EMPLOYMENT TRIBUNALS

Claimant: **Dr Rebecca Marsh**

Respondent: **NHS England**

Heard at: **Exeter** **On: 30 June – 04 July 2025**

Before: **Employment Judge Gray-Jones**

Representation:

Claimant: **Mr Michael Smith, Counsel**

Respondent: **Miss Amy Smith, Counsel**

JUDGMENT

1. The Claimant's complaint of discrimination arising from disability under s.15 Equality Act 2010 is well-founded and succeeds.

2. The Claimant's complaint of failure to make reasonable adjustments under ss.20 – 21 Equality Act 2010 is well-founded and succeeds.

REASONS

1. In a claim presented on 11 July 2022 the Claimant made complaints of disability discrimination against the Respondent. The complaints were of discrimination arising from disability under s.15 Equality Act 2010, failure to make reasonable adjustments under ss.20 - 21 Equality Act 2010 and indirect disability discrimination under s.19 Equality Act 2010.

2. The Claimant was a doctor in postgraduate training and the complaints against the Respondent are pursued under ss.53 - 55 Equality Act, on the basis that the Respondent is a qualifications body or an employment service-provider. The Respondent accepts that it is both and no jurisdictional issues are raised in relation to this.

3. The Claimant's complaints arise from the decision of an Annual Review of Competence Progression ("ARCP") panel arranged by the Respondent to issue an Outcome 4 in relation to the Claimant on 18 February 2022. An Outcome 4 indicates a sustained lack of progress in training despite additional support being provided and results in the doctor's release from the training programme.

4. The Claimant has been represented by Mr Smith and the Respondent by Miss Smith, both of Counsel. The Tribunal heard evidence from the Claimant and from Dr Mitesh Khakhar, Consultant Anaesthetist and Clinical Services Lead at Musgrove Park Hospital at the time of the events giving rise to the claim and Dr Geoff Smith, Regional Postgraduate Dean for NHS England South West on behalf of the Respondent. All witnesses gave evidence under oath and were cross-examined. There was an agreed bundle of documents.

5. The case was listed for 5 days. At the outset of the hearing it was agreed, following discussion with the parties, that the hearing would deal only with liability, due to the complexity of the issues relating to remedy if the claim was successful. This meant that it was unnecessary for the Tribunal to deal with applications made by the parties relating to the addition of further documents to the bundle, as these additional documents related solely to remedy.

6. A further application was made by the Respondent on the first day of the hearing seeking an order that parts of the Claimant's witness statement be deleted on the grounds that they contained evidence which was irrelevant and/or prejudicial. For the reasons given at the time the application was refused.

Procedural History and Issues

7. The proceedings have had a relatively complicated history. Further complaints were presented following the initial claim and there have been a number of preliminary hearings. In due course the subsequent claims were withdrawn and so the only complaints which the Tribunal has to deal with are those presented in the initial claim. Furthermore, the indirect disability discrimination complaint has been withdrawn.

8. The parties had agreed the issues which the Tribunal had to determine. These are set out in the Case Summary of the Preliminary Hearing conducted by Employment Judge Volkmer on 08 July 2024 and the final list of issues is at pp.153 - 156 of the hearing bundle. The issues, in relation to liability, are as follows:

    Time Limits

    1. The Claim Form was presented on 11 July 2022. The Claimant commenced the Early Conciliation process with ACAS on 02 May 2022 (Day A). The Early Conciliation Certificate was issued on 12 June 2022 (Day B). Accordingly, an act or omission which took place before 03 February 2022 (which allows for any extension under the Early

Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

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

1.2.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the act or omission 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 (plus Early Conciliation extension) of the end of that period?

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

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

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

2. Jurisdiction

2.1 The Claimant's claims are presented on the basis that the Respondent is:

2.1.1 A Qualifications Body under ss.53/54 of the Equality Act 2010, in relation to the Claimant's claim for a failure to make reasonable adjustments under section 20 and 21 Equality Act 2010 (as set out in paragraph 5 below) comprising allegations that the Respondent failed to make reasonable adjustments in its role as a Qualifications Body and in respect of the Claimant's CCT and/or

2.1.2 An Employment Services Provider under ss.55/56 of the Equality Act 2010; in relation to the Claimant's claim for discrimination arising from disability, under section 15 Equality Act 2010 (as set out in paragraph 4 below) comprising allegations that the Respondent discriminated against her in respect of the provision of vocational training (s.56(2)(a)) and making of arrangements for the provision of vocational training (s.56(2)(c)) by subjecting her to the d detriment of an Outcome 4 issued on 18 February 2022. The Claimant avers that the Respondent therefore discriminated against her in its role as an Employment Services Provider:-

2.1.2.1 Under s.55(1)(b) - as to the terms on which the Respondent offered to provide the services of the provision of vocational training and the making of arrangements for the provision of vocational training; and

2.1.2.2 Under ss.55(2)(a), (c) and (d) in respect of the Respondent's provision of vocational training and the making of arrangements for the provision of vocational training.

2.1.3 The Respondent accepts that it is a qualifications body and/or an employment services provider for the purposes set out above.

3. Disability

3.1 The Respondent has conceded that the Claimant was a disabled person by reason of Russell Silver Syndrome (RSS) and Moyamoya Syndrome (MSS) at all material times (from August 2017 to the present).

3.2 The Respondent concedes that it knew that the Claimant was a disabled person by reason of RSS and MMS at all material times (for the purposes of the current claims, from February 2022 to the present).

4. Discrimination Arising from Disability (s.15 Equality Act 2010)

4.1 Was the issuing of the Outcome 4 by the Respondent to the Claimant on 18 February 2022 unfavourable treatment?

4.2 Did the following things arise in consequence of the Claimant's disability, namely the Claimant's requirement to shield and/or her sickness absence?

4.3 Was the unfavourable treatment because of any of these things which are said to have arisen from the Claimant's disability?

4.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:-

4.4.1 ensuring that trainees have the skills, competencies and knowledge to work effectively and safely at the level to which they have been trained; and
4.4.2 ensuring the timeous completion of training; and
4.4.3 securing compliance with the Respondent's training programmes with the relevant GMC requirements; and
4.4.4 ensuring that the Respondent's resources are used efficiently; and
4.4.5 ensuring patient safety in the NHS.

4.5 The Tribunal will decide in particular:-

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

4.5.2 could something less discriminatory have been done instead; and

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

5. Reasonable Adjustments (ss.20 and 21 Equality Act 2010)

5.1 A "PCP" is a provision, criterion or practice. The Respondent accepts that it had and that it applied the following PCP, namely a requirement that the Claimant complete her training within a specified or reasonable timeframe, which was applied throughout the Claimant's training and in particular on the issuing of the Outcome 4 by an ARCP panel on 18 February 2022;

5.2 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant's disability required her to shield because of the COVID pandemic and to take sick leave as a result of her disability? The Respondent denies that this PCP placed the Claimant and persons who share the Claimant's disability at a particular disadvantage.

5.3 Did the Respondent know or could it reasonably be expected to know that the Claimant was likely to be placed at that substantial disadvantage? The Respondent denies any such knowledge.

5.4 What steps (the "adjustments") could have been taken to avoid the disadvantage? The Claimant suggests:

5.4.1 allowing an extension of the Claimant's training (Outcome 3) to account for the interruption to her training occasioned by the COVID pandemic and her sickness absence, and;

5.4.2 deferring the ARCP process until such time as the Claimant was able to be assessed over a longer period of time; and

5.4.3 allowing the Claimant to boost her confidence and self-esteem before assessing her for the purposes of the ARCP process.

5.5 Was it reasonable for the Respondent to have to take those steps and when?

5.6 Did the Respondent fail to take those steps?

Factual Background

9. It is necessary to state something briefly about the factual background to the case and in particular the arrangements for the training of doctors in England and Wales. This factual background was not in dispute between the parties.

10. The claim was initially presented against Health Education England (South West). Health Education England (HEE) was a non-departmental public body established under s.28(1) of the National Health Service Act 2006 and the Health Education England (Establishment and Constitution) Order 2012. As a consequence of the passing of the Health Care Act 2022 and the Health Education England (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023 HEE was abolished on 01 April 2023 and its functions and liabilities were transferred to NHS England, which is accordingly the correct Respondent in these proceedings.

11. The Respondent is responsible for implementing specialty training for postgraduate doctors in England. The arrangements for specialty training are set out in "A Reference Guide for Postgraduate Specialty Training in the UK", known as the 'Gold Guide'. This sets out the roles and responsibilities of the organisations involved in postgraduate medical training, including the processes and procedures which apply when assessing the progress of postgraduate doctors in specialty training towards the completion of that training.

12. The General Medical Council (GMC) also has roles and responsibilities set out in statute. It is the independent regulator for doctors, sets the standards for practice and maintains the register and specialist register of medical practitioners. It is responsible for approving the training and curricula applicable to postgraduate doctors in training.

13. The Royal Colleges also have a role in postgraduate specialty training. They develop curricula and assessment systems. The relevant Royal College in this case is the Royal College of Anaesthetists.

14. For anaesthetics there is a 7 year training programme. During this time the trainee undertakes placements at NHS trusts. The trainee is usually employed by the trusts at which they are undertaking a placement.

15. Once a specialty training programme is successfully completed, an ARCP panel recommends a trainee for completion to the relevant Royal College. The College makes a recommendation to the GMC which is responsible for awarding a certificate of completion of training ('CCT') and granting entry to the register. The doctor is then eligible to apply for consultant posts in their chosen specialty.

16. Each trainee has an educational supervisor who is responsible for overall supervision and management of their educational progress during the placement. The educational supervisor is responsible for producing an educational supervisor's report and declaration in collaboration with the trainee prior to an ARCP. The Claimant's educational supervisor in February 2022 was Dr Helen Hopwood.

17. Postgraduate deans are employed by the Respondent to oversee and manage the delivery of postgraduate education for the doctors within a particular region. Dr Smith was the Postgraduate Dean for the South West region at the time of the events which gave rise to this claim.

18. A Training Programme Director is a consultant employed by the Respondent who has overall responsibility for trainees on a particular training programme and oversees the ARCP process. Dr Khakhar was the Training Programme Director for the Respondent with shared responsibility for the anaesthtics training programme from January 2019 to 31 January 2023.

19. The ARCP panel is a process of assessment which takes place every 12 – 15 months for each trainee during the training programme. ARCPs are arranged by the Respondent and the ARCP panel consists of specialty consultants from the local education network. The panel considers the progress of a trainee based on the content of the trainee's electronic portfolio ("e-Portfolio") and recommends an outcome.

20. The possible outcomes of an ARCP relevant for the purposes of these proceedings are:
    Outcome 1: satisfactory progress
    Outcome 2: insufficient progress without additional training time
    Outcome 3: insufficient progress requiring additional training time
    Outcome 4: release from training.

21. An Outcome 4 can be awarded even if the trainee's training time/additional training time has not been exhausted. Additional training time may be awarded in accordance with the Gold Guide. For higher specialty trainees a maximum of one additional year may be awarded by an ARCP panel. Exceptionally a further additional year may be approved by the relevant postgraduate dean.

22. As a result of the COVID 19 pandemic an additional outcome was introduced: Outcome 10. This outcome recognized that progression in training may have been delayed because of the pandemic and enabled an ARPC panel to allow a trainee to continue if they were not at a critical progression point (Outcome 10.1) or to award additional training time where the trainee was at a critical progression point (Outcome 10.2).

23. Where an ARCP panel considers that there is insufficient evidence to make an assessment they can give an "N" outcome, identifying the reason for this. Where there is insufficient evidence available because a trainee has been on sickness absence then the ARCP panel can give an N1 outcome.

24. A trainee has the right to appeal an ARPC panel's decision to issue an Outcome 4.

Disability

25. The Claimant has a form of genetic dwarfism, known as Russell Silver Syndrome (RSS).

26. In 2014 the Claimant suffered a brain haemorrhage and it was discovered that she had abnormal cerebral arterial circulation on the right side of her

brain. This meant that the blood vessels were weaker than normal and more at risk of bursting, leading to brain haemorrhages and strokes. This abnormality is known as a Moyamoya type syndrome. This may arise as a result of the RSS or may be a separate condition.

27. The Respondent accepted that the Claimant was a disabled person by reason of Russell Silver Syndrome and Moyamoya syndrome during the period relevant to the claim and that it had knowledge of disability.

Findings of Fact

28. The Tribunal made the following findings of fact. Where there was a factual dispute the finding was made on the balance of probabilities.

29. The Tribunal found the Claimant and the witnesses for the Respondent to be honest witnesses. They did their best to give accurate and truthful evidence on the matters within their knowledge.

30. The Claimant commenced the anaesthetics specialty training programme on 01 August 2012. This consisted of a core anaesthetics training programme of 2 years and a higher specialty training programme of 5 years. Her title was Specialist Registrar in Anaesthetics.

31. The Claimant was absent from work due to an intracranial haemorrhage from October 2014. She then had a phased return to work in 2015. Thereafter she worked 0.8 FTE in order to assist with managing the risk of further haemorrhages.

32. The Claimant undertook a placement at Bristol Children's Hospital between August 2016 and August 2017. At her ARCP Panel assessment in January 2017 the panel recommended an Outcome 3.

33. On 23 June 2017 she met with Dr Khakkar and Dr Joe Silsby, who at the time was her Educational Supervisor, to discuss an ARCP scheduled for September 2017. There is a record of this meeting, in the form of a memo from Dr Khakhar to the Claimant at p.192 of the bundle. The memo records that that report prepared on the Claimant was generally good but communication was an area of weakness.

34. On 08 September 2017 the ARCP panel issued an Outcome 2 in relation to the Claimant. The Outcome 2 was issued because the Claimant had not met all the targets required. In particular, the Claimant had not completed the higher paediatric training module. The ARCP panel also noted that comments had been received concerning the Claimant's clinical skills, judgment and communication skills compared to other trainees at her level.

35. It was not possible for the Claimant to obtain a CCT in anaesthetics without passing the higher paediatric training module. In cross-examination the Claimant suggested that she had been told by the Royal College in "without prejudice" discussions that it might be possible for a disabled person to be exempted from this. No other evidence was put

forward to support this suggestion. Dr Smith in his evidence rejected it, his evidence being that it was not within the power of the Royal College to exempt a disabled person from the mandatory training requirements, including the higher paediatric training module. The Tribunal accepts it is not possible for the Claimant or any other disabled person to be exempted from the requirements of the curriculum, including the requirement to pass the higher paediatric training module.

36. The record of the September 2017 ARCP panel outcome (pp.210 - 211) of the bundle, which the Tribunal finds to be an accurate summary of the panel's conclusions, includes the following:

"Becki understands that the higher paediatric training could not be assessed in Taunton and will now be accessed during a higher paediatric module at Derriford Hospital commencing in October 2017 – with a set educational agreement...

"We will review progress and achievement of the new targets set (see below) at an ARCP in May 2018 (Becki is away on leave in January)...

"Becki understands that without higher paediatric training a CCT in anaesthetics is not possible ...

"Becki has been informed that failure to achieved [sic] *the targets set today in full could result in an outcome 4 at ARCP and removal from the training programme."*

37. The Claimant's next ARCP was on 02 July 2018. The ARCP panel issued an Outcome 4. The Claimant had not completed the higher paediatric training module by the time of this ARCP, despite additional training time, and this was essentially the reason for the Outcome 4 being issued, although other areas of concern were also identified. These included concerns about the Claimant's behaviours, including her communication, attitude, situational awareness, time management and prioritization. The higher intensive care module had also not been completed.

38. The Claimant appealed the Outcome 4, submitting detailed and lengthy grounds of appeal. In these she made clear that she felt that she had been subjected to bullying and harassment and a lack of support and described the training environment at Bristol Children's Hospital as "toxic". She detailed incidents involving a number of colleagues, including consultants [pp.220 - 231]. As a result of this she had presented at least one grievance.

39. As the Claimant had appealed the ARPC panel's decision she remained in training pending the outcome of the appeal. Between July 2018 and April 2019 she did not perform anaesthesia as a result of sick leave due to work related stress and, from November 2018, because she was not in a training placement.

40. From April 2019 until December 2019 she held a supernumerary post at Torbay Hospital carrying out mainly awake anaesthesia. She did not undertake on-call duties.

41. On 03 December 2019 Dr Khakhar, Dr Jeremy Langton, the Associate Dean and Dr Roger Langford, the Head of School, met to discuss the Claimant's ongoing training needs and how she was to be supported. Dr Khakhar gave an account of his meeting in his witness statement and there was also a written note of it [pp.235 - 236].

42. In the meeting it was noted that the Claimant had still not completed the higher paediatric or intensive care training modules and further placements out of region would be required to complete these. It was noted that the Claimant's current post at Torbay Hospital was only funded up to February 2020 and would expire at that point.

43. Although there were 5 potential sites for further placements for the Claimant, the only viable options were Taunton and Torbay. The sites at Exeter, Derriford and Truro were seen as not viable because of the Claimant's complaints against colleagues and her view that training at these sites would not be suitable as she would experience bias if she worked there, although the Claimant said in cross-examination that she would not have had a problem working at Truro.

44. It was decided that the most suitable placement was at Taunton and Somerset NHS Foundation Trust, at Musgrove Park Hospital. Funding for a 6-month supernumerary post for at least 6 months for the Claimant was confirmed.

45. On 04 December 2019 Dr Khakhar emailed the Claimant to notify her that there was a placement for her at Taunton from February 2020 until August 2020.

46. Dr Khakhar and the Claimant then met on 28 January 2020 to discuss and agree the placement. Also present were Dr Jason Louis, Director of Medical Education, Dr Nicola Campbell, Consultant Anaesthetist, Neil Squires, Senior Business and Education Manager, and Dr Joe Silsby, Consultant Anaesthetist and Karen Harding, the Claimant's BMA representative. A letter was sent by Neil Squires following the meeting to summarise the discussion [pp.245 - 246].

47. In her evidence the Claimant said that the placement was not suitable for her as it involved a 152 mile daily round trip and over 3 hours of travel and that the Respondent dismissed her concerns. However, there is no record of her raising this at the time and the Tribunal finds that she did not. The Claimant also said that she was forced to undertake an obstetrics refresher course when she started the placement, despite this not being a training priority. The letter records that the option of carrying out obstetric anaesthesia at the outset of the placement was put to the Claimant as a potential option to reduce the financial challenges that would arise from the placement. The Tribunal considers that this is the likeliest scenario, and does not accept that the Claimant was pressured into carrying out the

work by a threat to reduce her pay. The Tribunal considers it likely that the Claimant's strong feelings about the way she has been treated affect the accuracy of her recollection of this meeting.

48. The letter records that it was fully understood by all those present that the Claimant would be starting the placement after a significant period during which she had not carried out routine anaesthesia work.

49. An occupational health referral was made for the Claimant with a view to a report being obtained prior to the placement. The only reasonable adjustment requested was access to small gloves.

50. An Occupational Health report on the Claimant, dated 05 March 2020, and carried out by Dr Antony Webb, was submitted to Taunton and Somerset NHS Foundation Trust. This states,

"She has been in "less than full time training" since her return to work in 2015 after sustaining a brain haemorrhage in 2014, She was found to have an underlying condition in the brain that increases her risk of further haemorrhages and it was felt at the time that reducing this to an 0.8 commitment would be advisable as a way of managing this risk. She told me that there were no residual impairments following her brain haemorrhage and she had returned to her normal day-to-day activities without any restrictions.

"About a year ago she developed acute neurological symptoms which temporarily affected her capabilities. After extensive investigation by her specialist, it was thought that she had sustained a series of neurological events over the past few years. No underlying cause was discovered for these events and thankfully there appeared to have been no residual impairment to her functional capabilities. She is now on appropriate medication to reduce her risk of further events, as there is a potential for permanent impairment of function were she to have similar events in the future. She remains under specialist care and further investigations are planned to look at other potential causes. On further reflection she was able to associate these events with periods of extreme tiredness. I understand that her specialist has raised the possiblity of this being a trigger and, where possible, something to avoid in the future.

"She told me that she was well and there was no restriction on day to day activities. She is currently working as a trainee anaesthetic registrar."

51. The Claimant's commencement of her new placement coincided with the onset of the COVID 19 pandemic in the UK. As a result of this the training arrangements that had been made for the Claimant, as with many millions of other arrangements at the time, were seriously disrupted. As a result of her disabilities the Claimant was classed as vulnerable. The weaknesses in her circulation meant that she was identified as being at risk of serious illness if she was exposed to COVID 19. From early April 2020 until August 2020 she was required to shield and was unable to carry out her normal duties as a trainee anaesthetic registrar.

52. The Claimant returned to work in August 2020 carrying out indirect anaesthetic work, meaning that she did not carry out full anaesthetic duties in an operating theatre.

53. In September 2020 the Claimant's appeal against the ARCP panel Outcome 4 issued in July 2018 was concluded. The appeal panel met on 24 September 2020 and decided that the appeal should be upheld and the outcome changes to an Outcome 3 (inadequate progress – additional training time required). The outcome letter notes that, *"given that Dr Marsh has only received six months additional training time it was felt that she should be afforded a further opportunity to achieve the Higher Paediatric module."*

54. The appeal panel's outcome letter makes a number of recommendations including the following:

> *"1) Dr Marsh should repeat the Higher Paediatric Module outside of HEE South West to allow an independent assessment of her level of competence...*
> *5) It was noted that Dr Marsh's confidence had been affected and therefore before repeating the Higher Paediatrics module she should complete her placement in Taunton where she is doing Regional Anaesthesia along with some Obstetrics and General Anaesthesia. This will provide opportunity to boost her confidence and self-esteem before repeating the Higher Paediatrics module...*

55. The Claimant was then required to shield again from January 2021 until April 2021 as a result of the further COVID 19 related restrictions imposed by the government at that time.

56. In January 2021 the Claimant had an ARCP. This covered the period from 02 July 2018 until 25 January 2021 and recorded that the number of days out of training since the last ARCP was 483. The recommended outcome was Outcome 10.2 on the basis that the Claimant's progress had been delayed by COVID 19 and additional training time was required.

57. The ARCP outcome form [pp.271 - 280] records positive feedback about the Claimant but also some concerns, including reference to an "unresolved event relating to COVID exposure and testing" which was said to have raised concerns about the Claimant's judgment, communication and teamworking but which the Claimant refuted.

58. The form stated in the reasons for recommending the outcome,

> *"Multiple disruptions since March 2020 due to requirement to shield because CEV...*
>
> *"There is clearly a very long road ahead for Becki to complete her anaesthetic training and regain the confidence and skills she may have lost during the past two years disruption. I admire her tenacity and determination to get there.*

"Becki has been placed in Taunton since February 2020 – initially as a supernumerary trainee awaiting an ARCP outcome 4 appeal. She returned to training in October 2020 and we were guided by the recommendation of the ARCP review panel – the main one being to have a 6 month period working in Taunton to regain skills and confidence. This has not been possible as our OH department recommended Becki not to work in theatres."

59. The Claimant returned to work from shielding on 06 April 2021. At that point she had not performed any clinical anaesthetic work since December 2019 apart from two weeks in obstetrics prior to April 2020.

60. The Claimant took study leave from 4 to 9 May 2021 and was on sick leave due to exhaustion from 10 to 23 May 2021. She then went on long term sick leave from 13 July 2021 as a result of work-related stress.

61. The Claimant's witness statement states that tiredness can intensify the symptoms of her disability and the excess fatigue and stress she suffers from arises from her disabilities. The medical report she refers, which is quoted earlier in the judgment, suggests that extreme tiredness could be a trigger for the neurological events which the Claimant had experienced as a result of her disabilities, although the wording is somewhat equivocal, stating that her specialist had raised the possibility of extreme tiredness being a trigger. It does not state that the Claimant's excess fatigue and stress is caused by her disabilities.

62. Despite initially agreeing to the placement at Taunton it is clear that by the time of the ARCP panel the Claimant had experienced difficult relationships with some of her colleagues, including her Educational Supervisor, Dr Hopwood (in cross-examination the Claimant said that by the time of the ARCP panel the relationship had broken down).

63. The Claimant's fit note covering the period 06 September 2021 to 10 October 2021 states that she is absent by reason of "mental health".

64. The OH report on the Claimant dated 06 October 2021 states,

"She told me she returned to work in March but felt that training opportunities were not afforded to her because of ongoing restrictions on where she was allowed to work in the hospital. This, along with her perception of deteriorating relationships with her supervisors and fatigue from her commute made her feel overwhelmed by her work and she has been absent since July.

"Unfortunately, it appears that she has lost faith in her employer and this is the main obstacle to her return. She wants to complete her training so she can move into a role nearer her home base which she sees as more compatible with a healthier work life balance. With her current perception of the work situation as it is, it seems unlikely that she will return to her role for the foreseeable future."

65. On 01 December 2021 the Claimant emailed Dr Lam, stating in it,

"Many things need to be addressed /change before I would even consider coming back."

66. The Claimant's evidence, when asked about this email, was that she was well enough to return but would not be returning.

67. A letter sent to the Claimant by Nicola Campbell, College Tutor Anaesthesia, dated 02 December 2021 refers to the Claimant experiencing a flare up of Radiculopathy in her right arm and also states,

"You also stated you are experiencing Burnout. The most significant factor contributing to your burnout is the long commute ...

"During the meeting we discussed that in the Occupational Health report deteriorating relationships with supervisors were given as a barrier to a return to work. You disclosed that there are individuals within MPH that you find difficult to worth with, as you feel they undermine you..."

68. A letter was sent to the Claimant dated 13 December 2021 by Dr Lam following an education meeting on 08 December 2021 which includes the following,

"You shared with up that ongoing commutes from Plymouth to Taunton since March 2020 have negatively impacted on your wellbeing and you are no longer willing or able to continue this arrangement. Thank you for sharing the occupational health report following the meeting to support this ...

"Secondly, you indicated the professional relationships with trainers at Taunton have deteriorated significantly over the past months; you raised concerns on bullying and undermining behaviours towards you. We were concerned to learn this and have strongly encouraged you to escalate your concerns to your employing Trust. You informed us that you are planning to raise a grievance in the near future."

69. The Claimant's next ARCP took place on 18 February 2022. An Educational Supervisor's Report was prepared by Dr Hopwood [pp.351 - 358]. This covered the Claimant's work from January 2021 to January 2022. It recorded that from 15 April 2021 to 05 April 2021 the Claimant had been shielding; that from 06 April 2021 until 13 July 2021 she had carried out clinical theatre work based on 80% hours, including sick leave from 12 May 2021 to 24 May 2021 and 22 June 2021 to 22 June 2021 (there was also the period of study leave 4 to 9 May 2021); and then sick leave from 13 July 2021 until the report.

70. The report records that the Claimant completed 46 theatre sessions (21 full days and 4 half days) clinical work in a day surgery setting with direct supervision.

71. The report details various concerns raised about the Claimant's judgment, in particular in relation to the COVID incident in December 2020, her

situational awareness and her professional behaviour, including an unwillingness to accept feedback and her confidence.

72. In relation to clinical skills the report records as follows,

"Her practical skills have been a strong cause for concern and are felt to pose a risk to patients and staff. Whilst we were aware that Becki has had a significant period away from giving general anaesthetics her skill gap and lack of appreciable progress was a universal cause for concern"

73. The report then details a number of incidents which were said to have given rise to these concerns. These were supported by written feedback on the Claimant from various practitioners, including consultants, who had worked with her during the period covered by the report.

74. The ARCP outcome was issued on 22 February 2022 [pp.410 - 417]. The period covered was 26 January 2021 until 18 February 2022. The recommended outcome was Outcome 4: released from training programme with or without specified competencies.

75. The report states:

"Becki has not demonstrated any progress in general anaesthesia towards the targets set for her since her last ARCP in January 2021. Her clinical capabilities have regressed to that of a novice anaesthetist that would not be signed off for the initial assessment of competences (IAC) although her year of training is ST7.

"Her structured feedback highlights significant weaknesses and concerns in clinical skills, workplace behaviours and professional relationships. Even after making allowances for Becki's prolonged absence and the relatively short period of clinical exposure the consultant structured feedback contains an unprecedented amount of negative comments and weak and unacceptable scores...

"The decline in her clinical capabilities to the level of a novice anaesthetist and significant deficit between her year of training of ST7 brings into question the validity of her higher anaesthetic experience and capabilities gained in the past. In addition higher paediatrics, neuroanaesthesia and ICM higher competencies are outstanding.

"It is the opinion of the panel that in the view of the skill gap and the lack of progress in training, a further extension to training would not be in Becki's best interest and it is not achievable to complete the competencies required for a CCT within a reasonable time frame."

76. The Claimant appealed the ARCP outcome, the appeal letter with appendices being submitted on 04 March 2022.

77. The Claimant returned to work on 18 July 2022. She then commenced a temporary placement at Royal Cornwall Hospital, Truro, where she continued to undertake training.

78. On 18 July 2023 her appeal against the ARCP outcome was concluded. The decision of the appeal panel, by a majority, was to uphold the appeal and issue an outcome under an N code (N1), on the basis that the Claimant had been on sickness absence at the time of the ARCP.

79. The Claimant remained at Royal Cornwall Hospital under her resignation on 01 May 2024.

The Relevant Law

80. The relevant legal principles were not really in dispute between the parties with the exception of one significant point, this being the effect of the Claimant's successful appeal on whether the Claimant was subjected to unfavourable treatment or a substantial disadvantage. The parties' positions on this and the Tribunal's conclusions are set out later in the judgment.

81. Counsel had helpfully prepared an Agreed Summary of the Relevant Law. It is as follows

Discrimination arising from disability

82. Section 15 of the EA states that:

> (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.

Unfavourable treatment

83. Unfavourable treatment, although not defined in the Act, is stated to be something that puts a claimant at a disadvantage (EHRC Employment Code, para. 5.7).

84. There is no need for a comparator to establish unfavourable treatment (the notable absence of s15 from s23(1) EQA).

85. It is not unfavourable treatment simply because the claimant thinks he should have been treated better. "Unfavourably" is to be measured against an objective sense of that whic*h is adverse as compared with that which is beneficial.* (**Trustees of Swansea University Pension & Assurance Scheme v Williams [2017] EWCA Civ 1008**).

86. The mental process of the alleged discriminator is not unfavourable treatment. It is the act or omission that is relevant (**T-Systems Ltd v Lewis EAT 0042/15**).

Something arising

87. The phrase "something arising in consequence of" the disability should be given its ordinary and natural meaning (**T-Systems Ltd v Lewis**).

88. It is a question of objective fact for the tribunal to decide after taking into account all the relevant evidence: **Sheikholeslami v University of Edinburgh 2018 IRLR 1090.**

89. The critical causative factor in a s.15 claim need not be the disability itself, as would found a s.13 direct discrimination claim. Section 15 is aimed at the protection from unjustified treatment because of the consequences of a disability such as the symptoms or effects of such disability (**Topps Tiles v Hardy [2023] IRLR 803 EAT**).

90. When assessing whether there is a connection between the disability and the something that arises, due regard should be had to existing medical evidence (**Connor v Chief Constable of South Yorkshire Police [2024] EAT 175*).***

Causation

91. When assessing causation first, the tribunal must identify whether the claimant was treated unfavourably and by whom and it then must determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant (**Pnaiser v NHS England and anor 2016 IRLR 170*).*** This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

92. The 'something' that causes the unfavourable treatment need not be the main or sole reason so long as it amounts to an effective reason or cause for it (**Urso v Department for Work and Pensions 2017 IRLR 304***).*

93. There cannot be causative link if a claimant's disability-related absence provides merely the space or circumstance in which the employer identifies a genuine (non-discriminatory) reason for dismissal:

    a. **Kelso v Department for Work and Pensions EATS 0009/15*:*** the claimant, who had Raynaud's disease, had been claiming DLA fraudulently. Her employer dismissed her for acting dishonestly/deceptively. She brought a s.15 claim relating to her dismissal. The claim was struck out on the basis that it had no reasonable prospects of success. The EAT upheld the Tribunal's decision. The disability was the background to the case, but not the cause of the dismissal.

    b. **Charlesworth v Dransfields Engineering Services Ltd EAT 0197/16**: the claimant was absent from work due to his disability. The respondent had been looking for ways to cut costs and it was considered that deleting the claimant's role would produce a cost saving. The tribunal concluded that there was some link between

the absence and dismissal, it was not an effective cause. The tribunal found that his absence allowed the respondent to identify the potential cost saving, but that the cause of dismissal was the decision that they could get by without him.

94. In **Wheatstone v Blakeney News Food and Wine Ltd and ors EAT 0287/19** the employment tribunal found that the claimant's absence was not because of her epilepsy, nor was there any basis for inferring that the matters comprising unfavourable treatment had exacerbated the epilepsy. The EAT noted that the GP had diagnosed 'work-related stress' on two occasions and there was no link drawn in the medical evidence between the claimant's stress and her disability.

Justification

95. The EAT summarised the main principles for tribunals in **City of Oxford Bus Services Ltd t/a Oxford Bus Company v Harvey EAT 0171/18:**

    c. the objective justification test requires at least a critical evaluation of whether the employer's reasons demonstrated a real need to take the action.

    d. the tribunal must assess not only the needs of the employer but also the discriminatory effect on those who share the relevant protected characteristic. Proportionality requires the importance of the legitimate aim to be weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

    e. the word 'reasonably' in the phrase 'reasonably necessary' allows that an employer is not required to prove there was no other way of achieving its objectives. However, the test is something more than the 'range of reasonable responses' test that applies in unfair dismissal claims.

    f. there is a distinction between justifying the application of the rule to a particular individual and justifying the rule in the particular circumstances of the business.

96. The test of justification under s.15(1)(b) is an objective one, according to which the tribunal must make its own assessment (**City of York Council v Grosset [2018] IRLR 746 CA**).

97. Section 15(1)(b) requires the employment tribunal to identify what the aims of that treatment were, to ask whether they were legitimate and, if so, then to decide whether that treatment was a proportionate means of achieving those aims. The test for proportionality will often turn on the third and/or fourth questions in the formulation by Lord Reed in **Bank Mellat v HM Treasury (No. 2)**: "It is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the

objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter." (**Knightley v Chelsea & Westminster Hospital NHS Foundation Trust [2022] IRLR 567 EAT**).

98. For an assessment of objective justification, the focus ought to be on balancing the needs of the employer against the discriminatory effect of the treatment. The process that led to the decision to dismiss is not the focus (**Department for Work and Pensions v Boyers EAT 0282/19**).

99. In **Kelly v Royal Mail Group Ltd EAT 0262/18** the EAT agreed with the employment tribunal that waiting to see whether the claimant's attendance would improve was not a viable option, since at the date of the final stage of the attendance management process the employer had already lost confidence that there would be any likelihood of improved reliability. Therefore, there were no real alternatives to dismissal such as to render the employer's actions disproportionate.

100. The issue for the tribunal is to determine where the balance lies between the discriminatory effect of choosing a particular age and its success in achieving the employer's legitimate aim. It will not necessarily show that a particular point can be identified as being any more or less appropriate than another point (**Seldon v Clarkson Wright and Jakes (No.2) 2014 ICR 1275***).*

101. In **NSL Ltd v Zaluski 2024 EAT 86** the EAT held that the employment tribunal erred when it found that there were 'more proportionate' means for the employer to achieve its legitimate aim without assessing whether they would meet the needs of the employer.

The timing of the proportionality assessment

102. There is conflicting authority on the point in time at which the proportionality assessment is to be made.

103. In **Health and Safety Executive v Cadman 2005 ICR 1546, CA** (an equal pay case), it was confirmed by the Court of Appeal that there is no rule of law that the material factor forming the basis of an employer's justification for unequal pay must have consciously and contemporaneously featured in its decision-making processes.

104. This case was applied by the EAT in **British Airways plc v Starmer 2005 IRLR 863***, EAT*. The EAT held that an employment tribunal had directed itself properly when looking at the objective justification defence by taking account of safety considerations that had not been in the employer's mind at the time when the PCP was applied to the employee.

105. However, in direct contradiction the EAT **Reid v Lewisham London Borough Council EAT 0249/17** held that, when considering the proportionality of a dismissal in the context of a s.15 claim, the employment tribunal had erred in law by taking into account matters that post-dated the dismissal and therefore were not in the mind of the employer at the relevant time.

106. In **Brightman v TIAA Ltd EAT 0318/19** the EAT remitted the case back to the tribunal as they found that the tribunal had failed to engage with the employee's criticisms of the employer's post decision rationale.

Failure to make reasonable adjustments

107. Sections 20 EqA imposes a duty to make reasonable adjustments as follows:

> "(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."

108. The initial burden rests upon the claimant as described by Mr Justice Elias in **Project Management Institute v Latif 2007 IRLR 579**:

> *"…the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."*

Disadvantage

109. It is a requirement that a tribunal considers the nature and extent of the disadvantage in order to ascertain whether the duty applies and what adjustments would be reasonable (**Environment Agency v Rowan 2008 ICR 218***).*

110. Tribunals must not make generalised assumptions about the nature of the disadvantage (**Chief Constable of West Midlands Police v Gardner EAT 0174/11***).*

111. Whether or not the claimant suffered a substantial disadvantage must be judged on the true facts, and not what either party believed to be the case at the time (**Copal Castings Ltd v Hinton EAT 0903/04**).

Reasonableness

112. Reasonableness is an objective test (**Smith v Churchills Stairlifts plc [2006] ICR 524***).*

113. The employer's thought processes are irrelevant regarding the alleged adjustments (**Royal Bank of Scotland v Ashton [2011] ICR 632).**

114. The EHRC Employment Code provides a list of factors that a Tribunal may wish to take into account when considering the reasonableness of an adjustment (para.6.28):

a. the effectiveness of the step,

b. how practicable it was for the employer to take the step,

c. financial and other costs, such as the extent to which taking the step would disrupt any of the employer's activities,

d. the employer's financial and other resources,

e. the availability to the employer of financial or other assistance,

f. the nature of the employer's activities and the size of its undertaking.

115. A Tribunal is required to assess how the step would have been effective as keeping the claimant in work (**Tameside Hospital NHS Foundation Trust v Mylott EAT 0352/09** and **North Lancashire Teaching Primary Care NHS Trust v Howorth EAT 0294/13***).*

116. When considering whether an adjustment is reasonable, it is sufficient for an employment tribunal to find that there would be a prospect of the adjustment removing the disabled person's disadvantage; it does not have to be satisfied that there is a "good" or "real" prospect of that occurring (**Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075 EAT**).

117. In **Parnell v Royal Mail Group Ltd 2024 EAT 130** the claimant had brought two reasonable adjustment claims, the earlier one of which had been successful. The tribunal dismissed the latter. This decision was upheld by the EAT who found that the tribunal had properly considered the earlier Judgment about a warning, but had considered those matters to be applicable to the earlier time period. The EAT agreed that the tribunal must make its own decision in relation to the same warning at a later stage taking into account the later evidence.

118. The question of whether an adjustment is or would be effective was one that had to be answered on the basis of the evidence available at the time the decision to implement it (or not implement it) was taken (**Brightman v TIAA Ltd EAT 0318/19**). Medical evidence obtained after the key event would only be relevant if it casts light on what the likelihood was of the adjustment being effective.

119. An assessment of whether the step could or would have removed the disadvantage is a key aspect of the decision (**Romec Ltd v Rudham EAT 0069/07***).*

120. A failure to consider the practicability of the step would be an error of law (**Secretary of State for Work and Pensions (Jobcentre Plus) and ors v Wilson EAT 0289/09**). A consideration of practicability must include an assessment as to whether it is within the power of the employer to take the step (**County Durham and Darlington NHS Foundation Trust v Jackson EAT 0068/17**).

Matters on which the parties are not agreed

121. As stated above, the directions on the relevant law set out above were agreed by both counsel. However, there was a dispute as to the relevant law in relation to the effect the Claimant's successful appeal against the ARCP panel's decision and in particular whether this negated any unfavourable treatment which the Claimant may have been subjected to by the decision.

122. The Respondent wished to argue, in relation to the s.15 claim, that if an appeal forms part and parcel of the respondent's decision-making process following the key decision and the key decision is overturned on appeal, the claimant can be said to have suffered no disadvantage or detriment as the PCP has not been applied (**Little v Richmond Pharmacology Ltd UKEAT/0490/12**). Also see **Glover v Lacoste UK Ltd and Mr R Harmon [2023 EAT 4**.

123. The Claimant did not agree that these authorities are relevant to the claims before the Tribunal on the basis that they relate solely to section 19 claims of indirect discrimination. As such the parties made further submissions in relation to this issue.

124. In addition to what is set out in the Agreed Summary the Tribunal had particular regard, in relation to the s.15 claim, to the case of **Pnaiser v NHS England and Another [2016] IRLR 170** and in particular the guidance set out by Mrs Justice Simler DBE at para 31:

a) The Tribunal must first identify whether there was unfavourable treatment and by whom; in other words it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause of it.
c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant (see **Nagarajan v London Regional Transport [1999] IRLR 572***).*
d) The Tribunal must determine whether the reason/cause (or, if more than one) a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act, the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
e) For example, in **Land Registry v Houghton UKEAT/0149/14** a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
g) Miss Jeram argued that a 'subjective approach infects the whole of s.15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 – 34 of *Weerasinghe* as supporting this approach, but in my judgment those

paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

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

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

125. The Tribunal has also reminded itself of the provisions under s.136 Equality Act 2010 relating to the burden of proof, which apply to all the complaints pursued in the claim.

Submissions

126. Both counsel made submissions based on the agreed relevant legal principles and on the matter which was not agreed.

127. The Respondent confirmed that it was no longer raising any limitation defence to the complaints which were being pursued.

128. It was accepted by the Claimant that her performance prior to the ARCP panel's decision had not been good, but that the deterioration in her skills arose from her enforced shielding. She was shielding because she was particularly at risk of suffering harm if she contracted COVID 19. As such it was submitted that the Claimant had clearly been subjected to unfavourable treatment by the ARCP panel's decision to issue an Outcome 4 because this arose as a consequence of the deterioration of her skills caused by her shielding.

129. It was accepted that the Respondent had shown that it had a legitimate aim but the Outcome 4 was not proportionate means of achieving that aim because there were other reasonable decisions the panel could have reached which would have avoided the discriminatory effect of its decision, such as an Outcome 10.1 or N1.

130. In relation to the reasonable adjustment complaint it was accepted by the Respondent that the relevant PCPs were applied. The PCPs clearly put the Claimant at a substantial disadvantage. This was acknowledged in the Respondent's own policies, which made provision for decisions where it was found that a trainee doctor's training had been disrupted by the effects of the COVID 19 pandemic. The Respondent was clearly aware of the substantial disadvantage. A reasonable adjustment would have been to issue a different outcome, either an N or a 10 Outcome or to adjourn the panel to allow the Claimant to gain more confidence.

131. In relation to the s..15 claim the Respondent accepted that the Claimant's shielding arose from her disability but Miss Smith argued that the majority of the period being considered was covered by the Claimant's sickness absence, and this did not arise as a consequence of disability. Furthermore, the successful appeal of the panel's original decision meant that there was no unfavourable treatment.

132. In the event that it was found that the ARCP panel's decision was unfavourable treatment there was no dispute as to the Respondent's legitimate aim and the panel's decision was a proportionate means of achieving that. It was not permissible to take into account the fact that a majority of the appeal panel decided that a different outcome should be issued.

133. It was also submitted that it would not have been a reasonable adjustment for the ARCP panel to issue a different outcome. The Claimant had not shown she had been placed at a substantial disadvantage as a disabled person. Furthermore, even if she had been, a different decision by the ARCP panel would not have been reasonable in the circumstances.

Conclusions

Discrimination arising from disability

134. The first question to address is whether the issuing of the Outcome 4 to the Claimant by the ARCP panel on 18 February 2022 was unfavourable treatment.

135. The Respondent argued that it was not, because the Claimant successfully appealed the outcome. The Respondent relied on the judgment of the EAT in **Little v Richmond Pharmacology Ltd UKEAT/0490/12**. This was a case involving an indirect sex discrimination claim. The claimant's request for flexible working prior to a return to work from maternity leave was refused. The claimant then appealed and the employer upheld the appeal. The EAT agreed with the ET that the employer's decision to refuse the request for flexible working was expressed to be subject to a right of appeal and to that extent was conditional. The claimant, had exercised that right and succeeded and so the requirement that she work full-time was not to be applied to her when she returned to work. Accordingly, she suffered neither personal disadvantage nor detriment.

136. Miss Smith for the Respondent argued that this principle applied directly to the Claimant's circumstances. The Claimant appealed after the Outcome 4 was issued, she continued her training on her return to work from July 2022 and in due course the appeal was successful on 18 July 2023 the Outcome 4 was replaced with an N coded outcome. The Claimant therefore never experienced the application of the Outcome 4 to her.

137. Mr Smith for the Claimant argued that the successful appeal did not negate the Outcome 4 amounting to unfavourable treatment. He argued that **Little v Richmond Pharmacology Ltd** was limited to cases of indirect discrimination. He referred to the decision of the EAT in **Glover v Lacoste UK Ltd and Harmon [2023] EAT 4**, in which the EAT considered **Little**, expressed some doubt about whether it was correct but held that it was not necessary to determine this as it was based very much on the particular facts of that case and in particular on the final decision to apply a PCP not having been taken until the appeal was determined.

138. The Tribunal also had regard to the case of **Jakkhu v Network Rail Infrastructure Ltd UKEAT/0276/18** (HHJ Eady QC, as she then was) in which the EAT held that the concept of the "disappearing dismissal", which occurs in unfair dismissal claims when there is a successful appeal against dismissal did not apply to claims of direct discrimination under the Equality Act 2010, although its analysis of this is fairly brief and it does not appear to have considered **Little**.

139. The Tribunal's conclusion on this is that it is clear from **Little** that the question of whether an appeal negates the application of a discriminatory PCP is highly fact sensitive. The EAT held on the facts in that case that it did. However, in this case the evidence does not indicate that the Outcome 4 issued by the ARCP was expressly conditional or contingent on the completion of the appeal process. Moreover, there was no question of the Outcome 4 only taking effect once the Claimant returned to work. It was issued even though she was on sickness absence and she was subject to it until it was successfully appealed. The fact that it took almost a year and a half for the appeal to be completed in my view further supports my view that the circumstances in this case are very different from those in **Little**.

140. I also accept the Claimant's submission that if **Little** establishes a principle that a successful appeal can cure a discriminatory act this is limited to cases of indirect discrimination. It is clear that the judgment is limited to the application of a PCP and there is nothing in the judgment of the EAT to suggest that it has a wider application to other types of discrimination.

141. In light of this I have no hesitation in concluding that the Outcome 4 issued by the ARCP panel on 18 February 2022 was unfavourable treatment. Unless successfully appealed it had the effect of, if not ending then significantly limiting, the Claimant's career as a doctor. Whist the Outcome 4 remained in place the Claimant could continue training but would not be in a position to complete it.

142. The next question to consider is whether the unfavourable treatment was because of something arising in consequence of the Claimant's disability, namely her requirement to shield during the COVID-19 pandemic or her sickness absence?

143. The Tribunal's conclusion is that the Claimant's sickness absence did not amount to something arising as a consequence of her disabilities. It is clear from the evidence, which includes the medical evidence and the Claimant's own evidence, that the periods or sickness absence arose from the Claimant's perception that relationships at work had broken down and she was in a hostile training environment and also, potentially, from fatigue. The Tribunal does not find that any fatigue which the Claimant was experiencing arose from her disabilities.

144. As far as the breakdown in relationships at work is concerned, it was not part of the Claimant's case that this was something arising in consequence of disability and even if it had been the Tribunal considers that there is insufficient evidence to show that it was. Accordingly, the Tribunal does not find that the Claimant was treated unfavourably because of sickness absence arising from disability.

145. However, the Respondent accepted that the Claimant's shielding was something arising in consequence of her disability.

146. The Tribunal then has to consider whether the unfavourable treatment arose from the Claimant's shielding. This involves considering the reason or reasons for the panel's decision to issue an Outcome 4.

147. Dr Khakhar's evidence was that the panel were aware of the time she had spent shielding but that this did not in their view justify or explain what they viewed as a significant regression in her progress as an anaesthetist, so that rather than performing at the level of an ST7 she was performing at the level of a novice anaesthetist. That he held his view was not challenged in cross-examination. It was accepted that the Claimant had not performed well during the time she had been at work when she returned from shielding.

148. However, as is clear from the authorities, in particular the guidance in **Pnaiser,** that whether there is unfavourable treatment because of something arising in consequence of disability is an objective question rather than an examination of the thought processes of the alleged discriminator.

149. The Tribunal considers the following matters to be relevant to this question:

1) It had been clear to both the Claimant and the Respondent, at the time of the Claimant's assignment to Taunton in March 2020, that she had not worked in routine anaesthesia for a considerable period and would need a period of supervised practice before she was able to undertake general duties and on-calls: see the email of 04 December 2019 and

letter of 11 February 2020. As such the Claimant's situation, even before the pandemic, was one where the Respondent recognised that there was a risk of de-skilling due to the time she had spent away from work.

2) The recommendations of the ARCP appeal panel in the letter of 25 September 2020 noted that her confidence had been affected and she should complete the placement at Taunton (which was a 6 month placement) in order to boost her confidence and self-esteem before taking the higher paediatrics module.
3) The Claimant shielded from March to August 2020, then was on restricted duties from August to December 2020 and then shielded again from January to April 2021. As such, on her return to full duties in April 2020, I consider that the Claimant has shown that the likelihood of her being deskilled had increased significantly as a result of this further lengthy period of absence and restricted duties. I find that in considering causation it is illogical to limit the amount of time shielding to the period between January and April 2021 when in fact the period of her return to work, which is what the 2022 ARCP considered, took place after a much lengthier period of shielding.
4) The Tribunal accepts that the concerns identified in the ARCP panel outcome of 18 February 2022 to an extent "mirrored", to use Dr Khakkar's wording [W/S para 23] those in the earlier ARCP decisions in July 2018 and February 2017. However, it is clear from any fair reading of the ARCP reports that although similar concerns are identified in them the situation had worsened significantly by the time of the 2022 ARCP. This worsening occurred immediately after a lengthy period of shielding.
5) The Tribunal notes that in his witness statement Dr Khakhar deals with the panel's expectations of doctors returning from a career break, maternity leave or other sickness and says that the panel would expect people to regain confidence within a couple of weeks or <u>at most months</u> (emphasis added). The Claimant's period of working after returning from shielding was 23 days, spread over a period of under three months, which included some sickness absence and study leave. As such, the fact that the Claimant had not regained confidence within the period of time she had spent at work should not have been viewed by the panel as unusual.

150. In conclusion, I find that the Claimant has shown that her performance at work deteriorated, that is, her clinical skills, her confidence and, it is likely to some extent as a result of this, her behaviour, and that this was a consequence of the lengthy period she spent shielding, which in my view encompasses the time spent on restricted duties, which was a form of shielding.

151. I also consider that she has shown that this was a reason for the issuing of the Outcome 4. It was not the sole reason, as the there were other reasons for the decline in her performance, including her perception of relationships and other conditions at work and non-disability related absences (prior to shielding) and non-disability related fatigue, but I am satisfied that the Claimant has shown that the shielding was a material factor in the decision to issue Outcome 4.

Proportionality

152. It was not disputed that the Respondent had shown that it had a legitimate aim. The issue therefore is whether it has shown that the Outcome 4 was a proportionate means of achieving it.

153. My conclusion is that it was not. In reaching this conclusion I consider the following factors mean that the panel's decision to issue Outcome 4 was not a proportionate means of achieving a legitimate aim.

154. Firstly, I take account of the effect of the discriminatory decision on the Claimant. It was not simply a question of her losing a job, as it is in many employment cases, but of losing, or having significantly limited, her chosen career, that she had already spent many years training for. As such cogent justification would need to be shown to make the decision lawful.

155. Secondly, I think it is of some significance that the discriminatory treatment arose as a result of the COVID pandemic. This was the fault of neither the Claimant nor the Respondent. It was an unexpected catastrophic event that disrupted the lives and plans of millions of people both disabled and non-disabled. However, in those circumstances I consider that there was a particular obligation on the Respondent to take reasonable steps to ensure that a doctor in training in the Claimant's position, who had her training disrupted in a way that a non-disabled doctor, who did not have to shield, did not, was not further disadvantaged by the way the Respondent operated its ARCP process. In fact, this was clearly something that the Respondent had appreciated, as it had introduced the Outcome 10 option, and at the previous ARCP the Claimant had been awarded this. However, it was not suggested by the Respondent that the Outcome 10 option was time limited or that it could only be used once. I consider that in early 2022, which was a time when COVID restrictions were finally starting to ease, that the ARCP panel should have been particularly mindful of the possibility of the continuing effects of the pandemic, such as shielding, and given it more weight than they did.

156. Thirdly, there is of course the fact that other, reasonable options which would not have had a discriminatory effect were available, in particular a 10.2 outcome or an N coded outcome. I do not base this conclusion on the fact that the appeal was successful and that an N option was awarded but on Dr Khakhar's very honest acceptance during cross-examination that both were potential outcomes that his panel could have issued. There was no evidence and no cogent argument presented that either outcome would have impaired the legitimate aims which the Respondent sought to pursue.

157. I also take the view that in the circumstances it was not proportionate for the panel to base the assessment on such a short period at work when it should have been clear that the Claimant's performance

was impaired, at least in part, by the lengthy time she had spent out of full practice as a result of COVID shielding.

158. Finally. I don't consider that the panel reached a proportionate decision, in the circumstances, by taking the view that there was insufficient time for the Claimant to complete her training within the time available, taking into account the additional time allowed within the Gold Guide. It was not a reasonable or proportionate decision to reach after such a relatively short period of assessment, when viewed against the recommendations made by the ARCP panel which heard the Claimant's successful appeal against the previous Outcome 4. Furthermore, given that COVID was an exceptional event, the panel should have been mindful of the possibility of an exceptional extension of time to deal with the effect of the pandemic on a doctor's progression through training.

The Reasonable Adjustments Claim

159. I deal firstly with the effect of the appeal on the reasonable adjustments claim. I don't consider that the decision of **Little v Richmond Pharmacology Ltd** applies in these circumstances. The conclusion in **Little** was based on the ET's conclusion that the discriminatory PCP had never been applied to the claimant, because she had never returned to work. The admitted PCPs in this case had always applied to the Claimant. I consider that **Little** was based on its own particular facts and does not apply to the very different circumstances of this case.

160. I find that Claimant was subjected to a substantial disadvantage. She was issued with an Outcome 4 because the panel took the view that there was insufficient time for her to complete her training within a reasonable period and issued an Outcome 4. For the reasons set out above that put the Claimant at a disadvantage. The panel reached that conclusion, at least in part, because the Claimant's performance was impaired by disability-related COVID shielding.

161. As far as knowledge is concerned I consider that the Respondent knew or could reasonably be expected to know that the Claimant was placed at the substantial disadvantage. I would go so far as to say that it is virtually self-evident, and I don't consider that the Respondent has put forward sufficient evidence to show that it did not know and could not reasonably be expected to know that a doctor in training's performance was likely to be impaired if they had undergone a lengthy period of shielding. The fact that the Respondent itself had drawn up Outcome 10 to deal with this eventuality in itself undermines its case on this point.

162. As far as steps to avoid the disadvantage are concerned, I have already outlined that option 10.2 or an N outcome would have been potential options and there was a failure to make a reasonable adjustment by not issuing those outcomes. The other reasonable option argued for was allowing the Claimant to boost her confidence and self-esteem before assessing her. I have some hesitation as that, as Mr Smith accepted, is nebulous. However, I consider that the Respondent should have tried to ensure that the recommendations of the ARCP panel in September 2020

were carried out and on that basis the Respondent did not make a reasonable adjustment by issuing an Outcome 4 before the Claimant had spent a period of at least 6 months in full practice.

163. I should make clear that I am not finding that any of these reasonable adjustments were guaranteed to succeed in avoiding the substantial disadvantage. That is not the test. The test is whether there is a chance, or some prospect, that the adjustment will succeed. See **Hindmarch v North-East Ambulance NHS Foundation Trust [2025] EAT 87** at [61] - [63].

164. As such the conclusion is that both complaints are upheld.

165. The case will now be listed for a hearing to determine remedy.

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Employment Judge D Gray-Jones
Date: 1 August 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON 19 August 2025

Jade Lobb
FOR THE TRIBUNAL OFFICE

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