



EMPLOYMENT TRIBUNALS

Claimant: Blanca Mingo

Respondent: The Royal Marsden NHS Foundation Trust

Heard at: London South

On: 23rd, 24th, 25th, 26th and 27th
June 2025 and 17th July 2025 (in
chambers)

Before: Employment Judge MJ Reed, Ms N Christofi, and Ms M Foster-Norman

Representation

Claimant: In person

Respondent: Ms Helena Ifeka, Counsel

JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
 - a. The respondent shall pay the claimant the following sums:
 - i. A basic award of £3,184.14.
 - ii. The compensatory award is reduced to zero, because the Tribunal concluded that there was a 100% chance that the claimant would have been fairly dismissed in any event.
2. The complaint of unauthorised deductions from wages is well-founded. The respondent made unauthorised deductions from the claimant's wages in the period 19th June 2023 to 30th June 2024.
 - a. The respondent shall pay the claimant £2,377.54, which is the gross sum deducted.
3. The complaint in respect of holiday pay is well-founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended.
 - a. The respondent shall pay the claimant £1,804.38.
4. The complaints of direct disability discrimination are not well-founded and are dismissed.
5. The complaints of harassment related to disability are not well-founded and are dismissed.

6. The complaints of unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.
7. The complaint of a failure to make reasonable adjustments for disability is not well founded and is dismissed.

REASONS

Claims and Issues

1. On 24th January 2024 Ms Mingo presented claims for unfair dismissal, direct disability discrimination, failure to make reasonable adjustments, discrimination arising from a disability, harassment related to disability, unauthorised deductions from wages and holiday pay.
2. The background to these claims is a long period of illness and time off work undergone by Ms Mingo from December 2021. She returned to work April 2023. Ultimately that return to work was unsuccessful. Ms Mingo had further substantial periods of absence and was ultimately dismissed by the Trust. The majority of the claims arise from the fact that the parties disagree about why the attempted return to work was ultimately unsuccessful. Ms Mingo argued that it was unsuccessful because she was not treated fairly and the Trust failed to make appropriate adjustments to her disability. The Trust argued that it did its best to assist Ms Mingo in her return to work, but ultimately her medical conditions had too significant an impact on her ability to work for it to be practical for her to continue in her role.
3. A preliminary draft list of issues had been set out by Employment Judge Michell in the record of the case management hearing. On the first day of the hearing the issues were discussed with the parties. The Trust had produced a refined list of issues, but this was not agreed between the parties. Ms Mingo also wished to amend some of the draft issues in order to clarify her claim. Following some further discussion, the parties were able to agree on the issues to be determined. The list of issues as agreed is included as an appendix to this judgment.
4. The Tribunal heard evidence from Ms Mingo and on her behalf from Jessica Hinds Mingo, her daughter. The Tribunal also read the statement of Mr Erick Hinds Mingo. On behalf of the Trust, the Tribunal heard evidence from Mr Patrick Ferguson, Steven Francis and Sofia Colas.
5. The Tribunal was provided with a hearing bundle running to 1800 pages. References to page numbers in these reasons are to this bundle, unless otherwise indicated. There was also a supplementary bundle of 84 pages and a small number of additional documents were provided in the course of the hearing.
6. Both parties made oral and written submissions. Their arguments are addressed as they arise in these reasons.

Findings of fact

7. The Tribunal considered the oral evidence and the documentary evidence to which it was referred. All findings of fact were made on the civil standard of proof. That means that they were reached on the basis that they are more likely to be true than not. It is

often easiest to understand the nature of the civil standard by contrasting it to the criminal standard of proof, which is to be satisfied so that you are sure (or, in more traditional language, to be sure beyond all reasonable doubt).

8. These written reasons are not intended to address every point of evidence or resolve every factual dispute between the parties. The Tribunal made the factual findings necessary to resolve the legal disputes before it. Where findings have not been made, or are made in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.
9. This is a case where there was very substantial email correspondence between Ms Mingo and her managers, in particular Mr Ferguson. No doubt this arose as a result of the nature of the workplace, the issues involved and because, for significant periods, Ms Mingo was off sick and therefore not in the office. These reasons do not set out all of this correspondence in a narrative fashion. A detailed account of that nature would have added substantially to the length of these reasons while making them much harder to read and understand. Rather, the key communications are dealt with in detail and other significant points are mentioned as they arise.
10. In the main the findings of fact proceed chronologically. Some points that are factually distinct from the main body of the claim, however, are dealt with separately in order to make these reasons easier to follow.

Background

11. Ms Mingo worked in the Cancer Data Team of the Trust. She was employed as a Cancer Data Officer from 14th September 2020. The Cancer Data Team is responsible for maintaining clinical data relating to the Trust's cancer patients. The primary part of its work was to extract relevant information from the clinical notes and similar documents produced by medical staff in order to enter that data into the Trust's IT systems. The role involves dealing with medical information that is both highly sensitive and vital to patient care.
12. It is important to emphasise that this work is therefore not a simple matter of clerical data entry. Rather it is a skilled administrative role. This is because of a combination of the need to be able to extract relevant data from clinical documents and the importance of the work being carried out with strict accuracy. Errors or omissions may have serious consequences for patients.
13. The Team is comprised of approximately 14 Data Officers, managed by Mr Patrick Ferguson. At all relevant times, Mr Ferguson was Ms Mingo's direct line manager.
14. A number of the Data Officers worked on a hybrid work pattern, in which they worked for 3 days in the office, two at home during a week. The 3/2 pattern was the broad rule – it would not be unusual for an Officer to work from home three days in a particular week.

Sickness absence

15. Ms Mingo had been signed off sick from 6th December 2021 to undergo elective surgery.
16. Unfortunately, during that period of absence, Ms Mingo contracted Covid. From 27th December 2021 she was absent because of that illness. She experienced significant symptoms of Long Covid which prolonged her absence. Ultimately, she was on sick leave between December 2021 and March 2023.

17. It is not necessary to deal with Ms Mingo's health during this period in great detail because there is no significant dispute between the parties and the allegations in this claim relate to later events. It is sufficient to record that Ms Mingo experienced substantial Long Covid symptoms and was unable to work during this period.
18. On 1st February 2022, as part of the Trust's absence management process, Mr Ferguson made an Occupational Health referral for Ms Mingo, page 188-190. Ms Mingo was seen by an Occupational Health Nurse Adviser. She wrote to Mr Ferguson and Ms Mingo with her report on 21st February 2022. She advised that Ms Mingo was not fit to return to work. She suggested that Ms Mingo might be able to return to work, on a part-time and remote basis, beginning on 7th March 2022. She suggested that Ms Mingo work remotely for 50% of her contractual hours for one week, followed by a further week of 75% hours. She suggested that, after three months of remote work, the situation should be reviewed with the intention that, at that point, Ms Mingo start a gradual return to non-remote work.
19. In March 2022 Ms Mingo explored with the Trust and Mr Ferguson the possibility of early retirement on health grounds. Ms Mingo emailed Mr Ferguson about this on the 29th March 2022, page 207, indicating that she wished to retire the next day, ie: 30th March 2022. On 30th March 2022, Mr Ferguson replied, clarifying that ill health retirement required a more involved process and that it would not be possible for this to be done so quickly.
20. As a result of her interest in ill health retirement, a further OH referral was made. On 31st March 2022 the OH report concluded that Ms Mingo was unfit for work and that consideration of ill health retirement would require further information from her GP and an appointment with an Occupational Health Physician for further assessment, page 208-209.
21. Mr Ferguson met with Ms Mingo about her ongoing absence on 23rd September 2022. Following that meeting he wrote to her, page 221-22. He explained that, given Ms Mingo had been off sick for nine months, the Trust would arrange a more formal sickness review hearing to assess her position and consider whether provision could be made to allow her to return to work. If this was not possible the Trust would consider redeployment, medical retirement or, if these options were not possible, ending Ms Mingo's contract with the Trust. As part of this process Mr Ferguson made a further referral to Occupational Health, which included a request that an opinion be given about her eligibility for ill-health retirement.
22. That referral resulted in an Occupational Health report, produced on 10th November 2022, page 231-233. It concluded that Ms Mingo was unfit for work and there were no recommended adjustments that would allow her to return to work at that time.
23. The report summarised Ms Mingo's medical condition at that time as follows. She had recently been diagnosed with Long Covid alongside an underlying respiratory condition. It noted that Ms Mingo reported ongoing symptoms of breathlessness, fatigue, reduced cognitive processing, poor memory recall, difficulty maintaining focus and a persistent cough. She said that any physically or cognitively demanding activity exhausted her. She was able to walk at a reduced pace for approximately 25 minutes but would feel exhausted afterwards.
24. The report also noted that Ms Mingo was receiving follow-up treatment by Long Covid specialists, and that onward referrals to other specialists were being coordinated. It recorded that Ms Mingo's specialists had said that her symptoms were expected to improve with time, although there was no clear timescale for this.
25. In relation to potential entitlement for ill-health retirement, the report noted that this

required incapacity that was expected to last until normal retirement age. Ms Mingo would reach normal retirement age in March 2030. The report concluded that further information from specialists was required to assess this.

Sickness absence review

26. On 23rd November 2022, Mr Ferguson wrote to Ms Mingo to invite her to a formal sickness review meeting to be held on 9th December 2022, page 247-248. That meeting was conducted by Stephen Francis, at the time Director of Performance and Information.
27. Prior to the meeting Ms Mingo wrote to Mr Ferguson, page 244-246. In that letter she expressed a desire to work from home for a number of reasons. These included that she experienced general tiredness, heart palpitations and got out of breath easily; that the office was sometimes too cold, which made her chest hurt; that travel made her stressed and left her with little energy and that she was experiencing difficulties with sleeping, concentration, stress and breathing. In the letter Ms Mingo also expressed the value she placed on her job, saying that she loved working at the Trust and that it gave her a sense of purpose. Mr Ferguson shared the letter with Mr Francis before the meeting
28. At the meeting Ms Mingo told Mr Francis that while she still felt unwell and had symptoms of Long Covid, she did not agree that she was not fit for work. Given Ms Mingo's view and the fact that the specialist advice that the OH report had requested had not yet been received, Mr Francis decided to put off the meeting until further information was available.
29. There was then a further OH assessment on 16th February 2023, page 271-274. That report concluded that Ms Mingo was likely to be fit to return to work in four weeks' time, provided there were long-term adjustments to her role. The recommended adjustments were:
 - a. A phased return to work beginning at 50% of her usual hours, gradually increasing over 6-8 weeks.
 - b. A reduction in Ms. Mingo's contractual hours so that she was working part-time, as a return to full-time working was unlikely possible with 'the short-term future'. The report recommended that Ms Mingo work no more than 80% of full-time work.
 - c. Remote working from home, exclusively in the short to medium term (six months), with a return to on-site work being dependent on an improvement in Ms Mingo's symptoms.
 - d. Close management support to check on her progress and well-being.
30. The report also concluded that Ms Mingo was unlikely to be a candidate for ill-health retirement, because her symptoms were likely to improve and she was therefore unlikely to be considered as permanently unfit for her position.

Epic System

31. To understand the events around Ms Mingo's return to work it is important to note here that, while she had been on sick leave, a new patient management software had been introduced at the Trust. The new system was known as 'Epic'. It replaced the previous system "HIS/ICW", which Ms Mingo had been trained on when she started her role and had used since then. The decision to purchase the Epic system was made in December 2021.

32. The other members of the Cancer Data Team had received introductory training on the Epic system. Mr Ferguson described a number of full day seminars in the period January to March 2023. An intense period of training then occurred in the four weeks running up to 17th March 2023, when the system went live. During that training all members of the team worked in the office. No formal assessment of their skills or capability was carried out either as part of that training or upon its conclusion. Mr Ferguson, however, who was the manager primarily responsible for the systems launch was satisfied at the end of that training that the attendees had all achieved a reasonable level of competence with the system. He was closely involved in the training process and in a position to make that assessment.
33. The launch of the Epic system was a major project for the Trust and for Mr Ferguson in particular. In the period running up to the launch and in the year after, the Cancer Data Team and Mr Ferguson would be under considerable pressure as they dealt with the implementation.

Credibility of evidence

34. Before dealing with the detail of the relevant events, it is helpful to say something at this point about the credibility of the evidence heard by the Tribunal.
35. The Tribunal found that Ms Mingo was an honest witness, who sought to tell the Tribunal the truth as she understood it. The Tribunal concluded, however, that her evidence was not always reliable. The Tribunal found that Ms Mingo's recollection was not always accurate. The Tribunal noted that both Ms Mingo's evidence and the medical documents such as Occupational Health reports refer to her experiencing symptoms of Long Covid, including difficult concentrating and memory problems. The Tribunal concluded that these symptoms, combined with the passage of time since the relevant events, meant that her account, although honest, were not always accurate.
36. The Tribunal also found that Ms Mingo's evidence had been influenced by the strong feelings of frustration and anger she has experienced both during these events and following her dismissal. It is plain that Ms Mingo was a dedicated employee of the Trust and gained considerable satisfaction from the important work she was doing. Through no fault of her own, she experienced a prolonged period of ill health beginning in December 2021. Her return to work in 2023 was challenging, because her health remained poor. Ultimately, it was unsuccessful and she was dismissed. It was only natural that she would have strong feelings of anger and frustration. The Tribunal concluded, however, that this has caused Ms Mingo to view some events, and in particular the actions of the Trust's managers, in a more negative light than was truly the case. She has sometimes attributed malice where it did not exist. In relation to a number of the incidents she related the Tribunal concluded that these either did not occur at all or that her recollection of them was substantially distorted from the truth.
37. The Tribunal found that the Trust's witnesses were also honest in their evidence to the Tribunal.
38. In general, however, the Tribunal placed most weight on the contemporaneous documents, where these were available.
39. These general remarks should be read alongside the following, where findings are made regarding the significant factual disagreements between the parties and the Tribunal's findings explained.

7th March 2023 Meetings

40. Ms Mingo attended two meetings on 7th March 2023. First, she attended a final sickness meeting with Mr Francis. Second, she attended a second, more informal meeting, with Mr Ferguson to discuss the practical details of her return to work.
41. The first meeting was attended by Ms Mingo, accompanied by a Trade Union Representative, Shereen Higginson. It was conducted by Mr Francis but also attended by an Employee Relations Manager and by Mr Ferguson.
42. Both Mr Francis and Mr Ferguson believed that it would be possible to make the adjustments that Occupational Health had recommended and that therefore it would be possible for Ms Mingo to return to work. They agreed that Miss Mingo would return to work on 20th March 2023, on the basis that she would begin working on 50% of her hours, with the aim of moving to 80% hours after six to eight weeks.
43. That plan, however, was a broad agreement as to the direction of travel in the future, rather than a specific contractual agreement. Nothing was put in writing at this stage. There was no specific agreement about precisely when Ms Mingo's hours would increase during the phased return. Nor was there any significant discussion about what, in the long term, would happen with Ms Mingo's hours or patterns of work. There was not, for example, any specific agreement that her contractual hours would be reduced to a part-time basis either at this time or at some point in the future. This relatively informal approach reflected the fact that all the participants in the meeting were focused on the immediate priority of facilitating Ms Mingo's return to work in a practical sense rather than on defining, in precise legal terms, the specifics of their agreement. It would, at that stage, have appeared unnecessary, since everyone at the meeting was operating on the hope and expectation that Ms Mingo would make a successful return to work. It was assumed that the fine detail of matters such as her precise hours could be resolved in the future.
44. Mr Francis and Mr Ferguson also noted that Ms Mingo would need to be trained on the new Epic system, which would go live on 17th March 2023. Mr Francis indicated that this training could only be completed through face-to-face training on site. This was something that had been discussed between Mr Francis and Mr Ferguson in advance of the meeting. Mr Ferguson's view was that bringing an employee up to speed on the Epic system required them to be present in the office, where they could receive face-to-face training and could be given immediate feedback on their work. Mr Francis accepted this view.
45. This position was explained to Ms Mingo. At this stage, she did not object. She was keen to return to work and did not anticipate that a short period of working in the office would be a substantial problem. At this stage all the participants in the meeting expected that Ms Mingo would be able to successfully complete her training within about four weeks and would then be able to move to hybrid work pattern.
46. They agreed that there would be a meeting between Mr Ferguson and Ms Mingo on 20th April to assess her progress at that point. The expectation was that at this stage Ms Mingo would have completed the Epic system training and would then be assessed as capable of working independently. It would then be possible to put a plan for hybrid work in place.
47. Ms Mingo, Mr Francis and Mr Ferguson also discussed her transport needs. That part of the conversation is dealt with in more detail below.
48. Mr Francis wrote to Ms Mingo setting out a summary of the meeting, page 510-512.
49. The second meeting was between Ms Mingo and Mr Ferguson. It took the form of a phone call. In broad summary, it was a more informal discussion between Ms Mingo and Mr Ferguson to deal with the practicalities of her return to work.

50. Mr Ferguson reiterated that, although the Occupational Health advice had been that Ms Mingo should work from home, he did not believe that this was feasible in the short term. This was because he believed that she would need support and training given the move to the Epic system, particularly given her long absence from work. He said that she would need to complete that training and be assessed as competent on the Epic system, before she could work from home. He went on to say, however, that he expected that once that process was completed, Ms Mingo would be able to work at least part of the time from home, in common with other colleagues who were already doing so.
51. Ms Mingo and Mr Ferguson also discussed her annual leave position. At this point Ms Mingo had 23 days of annual leave remaining in the 2022/2023 leave year that ended on 31st March. There was obviously a practical issue about how that entitlement would be dealt with.
52. Ms Mingo initially asked to be paid in lieu of this entitlement. Mr Ferguson refused, because this was not an option permitted under the Trust's policy, see 'Policy for Managing Sickness Absence' page 148-157.
53. The Trust's policy states that:

If an employee is able to take their outstanding annual leave on their return to work before the holiday year expires, they should do so. If, after their return to work, there is insufficient time left in the leave year to enable them to take it, the employee may make a request to their manager to carry over the leave up to a maximum 20 days (the legal entitlement under the Working Time Directive) or pro-rata for part time staff. Any annual leave already taken during the annual leave year must be deducted from the 20 days (or pro rata equivalent for part-time staff).

54. There was therefore a discussion of Ms Mingo using her annual leave at the point that her sickness absence came to an end and, in effect, delaying her return to work. They discussed the possibility of Ms Mingo taking 20 days leave. Mr Ferguson, however, was reluctant to take this approach. This was because he was concerned that it would mean that Ms Mingo would return to work shortly before the check-in meeting that they were due to have on 20th April 2023. This would make it less likely that she would have successfully completed the training at that time. They therefore agreed that Ms Mingo would carry forward 20 days of annual leave, use 10 to extend her sickness absence, with the remaining 10 being saved for later use. This meant that she would return to work on 3rd April 2023. The other 10 days would be carried over into the 2023/24 holiday year.
55. As Ms Mingo pointed out during her evidence, this approach seems to have overlooked the facts that a) Ms Mingo had 23 days remaining in the current leave year and b) that much of the 10 days leave that she was ostensibly carrying forward to the following year would actually be used in the current leave year, i.e before 1st April 2023.
56. These points, however, were not raised at the time. The Tribunal concluded that Mr Ferguson was seeking to apply the policy. He and Ms Mingo genuinely overlooked these details at the time, primarily because both were focused on making arrangements for Ms Mingo's return to work, rather than discussing the details of her holiday entitlement.
57. It is clear from the contemporaneous documentation that Ms Mingo did not object to the approach proposed by Mr Ferguson. In an email of 17th February 2023 she said that she understood his reasoning and that it 'seemed to make a lot of sense', page 742.

58. After the phone call, Mr Ferguson sent Ms Mingo an email summarising the meeting, page 283-284.

Travel to & from work arrangements

59. The issue of transport to work was a significant one in relation to Ms Mingo's return to work. It arose because Ms Mingo was concerned that travel to work was likely to cause and / or exacerbate her fatigue – hence her desire to work from home. Since the Trust had concluded that working from home would not be possible while Ms Mingo was trained on the new Epic system, this remained a key issue.
60. The first substantial discussion of this issue was in the first meeting of the 7th March 2023, between Ms Mingo and Mr Francis. There was significant disagreement between Ms Mingo and Mr Francis (with whom Mr Ferguson agreed) about the content of the discussion and what was ultimately agreed.
61. Ms Mingo's evidence was that Mr Francis told her at this meeting that her transport to and from work would be arranged and paid for by the Trust. Mr Francis and Mr Ferguson deny that, saying that they suggested that there was likely to be support available through the government's Access to Work scheme. This is a government programme that provides grants to disabled employees to support their ability to work. These grants may cover the costs of transport to / from work. Both Mr Francis and Mr Ferguson say that they were clear that Access to Work was separate to the Trust and that Ms Mingo would need to make her own application.
62. The Tribunal accepted Mr Francis and Mr Ferguson's evidence on this point and concluded that there was no agreement, at this stage, that the Trust would arrange transport to or from work, cover Ms Mingo's transport costs or make an application to Access to Work on her behalf. Rather, Mr Francis suggested that support was likely to be available and proposed that Ms Mingo make an application.
63. In particular, in his email of 7th March, following their telephone meeting, Mr Ferguson sent Ms Mingo details of how to apply for an Access to Work grant. It is clear from that email that this was a step that Ms Mingo was expected to take, rather than something that would be arranged by the Trust. It is unlikely that Mr Ferguson would have written in these terms if he and Mr Francis had previously told Ms Mingo that the Trust would arrange transport.
64. On 17th March 2023 Ms Mingo emailing Mr Ferguson regarding her transport arrangements, page 285-286. In that email she raised a concern about the operation of the Access to Work programme and forwarded the email she had received from that programme. It is apparent from the email that she had made an Access to Work application. However, she had been told that Access to Work would contact her within the next 14 weeks. She was, naturally, therefore concerned about arrangements in the immediate future, given that at that point she was due to return to work in approximately three weeks. It is also clear from that email that Ms Mingo believed that the Trust had agreed to arrange transport to and from work for her and that Access to Work was the mechanism to arrange this.
65. In her email she said that she had contacted Access to Work and that they had told her that in the meantime, her manager should make arrangements. She suggested that the Trust paying for taxis would be appropriate, although it is unclear whether this was directly suggested by Access to Work or was Ms Mingo's view of the appropriate step.
66. Mr Ferguson forwarded that email to his line manager, Jo Champness, with his comments, page 285. That email records that he had also forwarded the email to Mr

Francis and HR. It is clear from that email that he did not believe that there had been an agreement to arrange transport.

67. Mr Ferguson then emailed Ms Mingo on 24th March 2023, page 287. In that email he set out his understanding that the Access to Work scheme was separate to the Trust's operations and was not a process that the Trust had any control or influence on. He noted that the issue that it would require time to reach a decision had not been something that had been anticipated during the 7th March discussion. He noted that it was the employee's responsibility to make arrangements to attend work. But he then went on to say that he had arranged funding to support Ms Mingo in her period of training and return to work by paying for taxis to work. This was for the four-week period beginning on 30th April 2023.
68. Overall, the Tribunal concluded that Ms Mingo had simply misunderstood the nature of the Access to Work scheme and its connection with the Trust. It is likely that this, to at least some extent, reflected the fact that both Mr Francis and Mr Ferguson on 7th March had been optimistic about the availability of assistance and had not anticipated the problems that might arise from the time needed for Access to Work to make a decision. Ms Mingo therefore left the meeting feeling that the issue had been resolved, only to later find that there were complications. The Tribunal accepted the Trust's account that, prior to 24th March 2023, the Trust had not agreed to cover the costs of transport, but rather directed Ms Mingo to Access to Work.

Return to work

69. Ms Mingo returned to work on 7th April 2023. This was a few days after the originally agreed return to work date, but Mr Ferguson and Ms Mingo had agreed to delay this to accommodate Ms Mingo's medical appointments. They agreed that she would take 3rd April 2023 as annual leave.
70. During the first four weeks Ms Mingo was provided with funding for taxis to and from work, as had been agreed. Mr Francis later extended that a further two weeks, meaning that Ms Francis was provided with transport to work until mid-May.
71. When she first returned to work Ms Mingo worked on Mondays, Wednesday and Friday (with a total of 20 hours split over these days). On 23rd April 2023 she asked for this to be changed to work Monday, Wednesday and Thursday, which Mr Ferguson agreed, see page 505.
72. When she returned to work Ms Mingo received the same training course that had been delivered to the rest of the team. After that course was completed she was sat next to Mr Ferguson (or when he was not available his deputy) so that they could provide support and monitor her work.
73. It is apparent that from quite an early stage, Ms Mingo found her return to work difficult and taxing. She continued to experience symptoms of fatigue. On 4th May 2023 (approximately four weeks after her return) in an email to Mr Ferguson and Mr Francis (among others) she said that 'I still suffer greatly from fatigue, and even the taxi ride to work makes me feel drained at the end of the day', page 736-737.

Computer / Work from home arrangements

74. A key area of dispute between Ms Mingo and the Trust was the possibility of her being provided with a laptop.
75. At the point of Ms Mingo's return, in early April 2023, both Ms Mingo and her managers

had a broadly shared expectation as to what would happen. Ms Mingo was expected to work in the office for approximately four weeks, at which point she would be able to do at least some work from home. With the benefit of hindsight, it is apparent that there probably was a difference of view in precisely what that would mean. Mr Ferguson and Mr Francis had in mind the normal arrangements for hybrid working (3 days in the office, 2 from home). Ms Mingo appears to have expected to be able to work from home at least the majority of time. That difference of view, however, had not yet become apparent.

76. Both Mr Ferguson and Mr Francis anticipated that, once Ms Mingo began to work from home, she would require a laptop, which the Trust would provide.
77. As early as 20th April 2023, however, Ms Mingo began to request that she be provided with a laptop, in advance of her starting to work from home. She initially did so in an email to Mr Ferguson, saying: 'I am wondering if I can have the laptop now so I can review, scrutinize and practice my learning; as Covid has affected my memory. I think it would be good to reinforce my learning.', page 713.
78. Shortly after this, in her email of 4th May 2023, Ms Mingo requested that she be provided with a laptop in order to allow her to work from home, page 714-715. The context of this request was that the period during which the Trust had initially agreed to pay for Ms Mingo's transport was coming to an end. Ms Mingo noted that she had also spoken to Mr Ferguson on 28th April making a similar request.
79. In brief, at this point Ms Mingo wanted to be provided with a laptop in order to work from home, rather than coming into the office. She explained that this was because her symptoms of fatigue meant that she would be unable to commute into the office.
80. Mr Ferguson's view, however, was that the Trust could only permit Ms Mingo to work from home once she had completed the Epic training and been assessed as competent to work independently. Until this had been achieved he was unwilling to have her work from home and therefore concluded that she did not require a laptop.
81. To some extent Ms Mingo also appears to have wanted a laptop in order that she could do some work in her own time, in an effort to improve her learning. Mr Ferguson did not believe that was appropriate. Firstly, because he did not believe that Ms Mingo should be attempting to work outside the agreed hours, particularly given her fatigue. And secondly, because, since there was no practice data available on the system, any access would have been to the live patient information. He did not believe it was appropriate for Ms Mingo to be accessing that outside the requirements of her role or in an unsupervised manner.
82. Mr Ferguson consistently articulated this view to Ms Mingo, both in person and via email correspondence throughout 2023.
83. Much of this communication became, to a substantial degree circular, with Ms Mingo making numerous requests to be provided with a laptop, while Mr Ferguson reiterated that this would only become possible once Ms Mingo had been assessed as able to work independently.

April / May 'Cursed' Incident

84. One of Ms Mingo's allegations is that at some point in April or May 2023, during her training, Mr Ferguson suggested that she was cursed.
85. Ms Mingo's evidence was that this did happen, while Mr Ferguson denies it. Mr Ferguson says that he does not recall any incident that might have been misconstrued or misunderstood. But he says that he would not have spoken in anything like that manner.

86. There is no documentary evidence relevant to this issue. The Tribunal did not draw any inference from that lack, since this was not the sort of incident that would necessary have been documented.
87. On balance, the Tribunal preferred Mr Ferguson's evidence on this point. He was a generally credible witness, while the Tribunal found on a number of occasions that Ms Mingo's evidence was unreliable.

Further sick leave

88. Ms Mingo was off sick between 11th and 25th May 2023. The sick note for this period records that this was because of 'post-covid 19 syndrome/symptoms', page 515.

Epic Assessment

89. On 8th June 2023 Ms Mingo took an Epic assessment designed by Mr Ferguson. This consisted of a worklist of 20 patients, broadly intended to replicate an average day's work.
90. Ms Mingo was able to work through 12 patients, rather than the full 20. When Mr Ferguson assessed her work he concluded that in relation to six of the completed patients there were material errors that required amendment.
91. Mr Ferguson described this as a 30% accuracy rate. While that terminology can be criticised, it is correct to say that only 30% of the expected work had been completed satisfactorily. Mr Ferguson's view was that an accuracy rate (applying his terminology) of 85% would be required for Ms Mingo to have passed the assessment. In his evidence, Mr Ferguson was asked how he had arrived at that passing grade. He said that he had discussed it with his line manager informally. He also made reference to a national target that 85% of patients are treated within 62 days, although he accepted that this target was very different one. In reality, the tribunal concluded that the 85% was arrived at on an ad hoc basis, broadly applying Mr Ferguson's experience of the system and his expectations of his staff. It was not arrived at following any careful statistical or other analysis.
92. Mr Ferguson's ultimately conclusion, however, that the assessment showed that Ms Mingo was not, at that stage, ready to work independently was a reasonable one – and indeed inevitable given the outcome. Ms Mingo made material errors in half of the patients that she completed. This was not an error rate that could have been accepted, given the nature of the work she was employed to undertake.
93. Mr Ferguson wrote to Ms Mingo on 8th June 2023 setting out that result. He indicated that, given the relatively poor result he did not think that Ms Mingo was ready to work from home and there would need to be further, focused, training on the areas that she had had difficulty with on the test.
94. In the same email Mr Ferguson noted that the agreement to pay for taxis to work was to come to an end the following week. He also noted that, following the original schedule of gradually increasing hours, Ms Mingo was expected to increase attendance to 66% the following week and they would need to discuss how these were to be structured.

Further sick leave

95. Almost immediately after the assessment Ms Mingo began a further period of sick

leave. From this point she would struggle to maintain attendance at work and there were repeated prolonged periods of sick leave.

96. Ms Mingo went on sick leave for the following periods:

- a. 12th June to 23rd August 2023
- b. 9th October to 19th December.

97. She produced sick notes for these periods, see pages 531, 539-540, 601, 629-630, 668. The sick notes referred to fatigue, post-Covid syndrome, adjustment disorder, Long Covid and dizziness / unwell. The Tribunal concluded that these were all references to Ms Mingo's Covid related symptoms. The 9th October 2023 sick note also refers to Ms Mingo having back pain, page 629. The 2nd November 2023 sick note refers to work relates stress and back pain and suggested that Ms Mingo required 'occ health input regarding working from home'.

98. When she was at work Ms Mingo continued with her training on the Epic system, assisted by Mr Ferguson and other colleagues.

25th August 2023 incident

99. One of Ms Mingo's allegations is that on 25th August 2023 Mr Ferguson made a hostile remark during a meeting, by saying something like 'Is everyone against Blanca?'.

100. Ms Mingo's evidence was that this occurred on her first day back at work following her sickness absence from 12th June to 23rd August 2023.

101. Mr Ferguson denied this allegation. He said that he did not have any specific recollection of a meeting on 25th August, but he would never have made a remark of this nature. He said that it would have been at odds both with his general behaviour and his attempts to support Ms Mingo back to work.

102. Mr Francis said in his evidence that he could not imagine Mr Ferguson acting in such a way, describing him as a 'self-deprecating, gentle and respectful person'.

103. The Tribunal accepted Mr Ferguson's evidence on this point and concluded that he did not make any hostile remark of this nature. The Tribunal concluded that this is an occasion on which Ms Mingo's strong feelings of frustration and anger about her situation led her to either misconstrue an innocuous remark or misremember what occurred.

104. It is clear, however, that at this stage Ms Mingo's relationship with the Trust and her managers was under very significant strain and had begun to break down. Ms Mingo was under a great deal of stress, both from her ongoing health difficulties and from the struggles she was experiencing returning to work. She quite genuinely felt that the Trust was not doing enough to help her.

28th August 2023 incident

105. One of Ms Mingo's allegations is that on 28th August 2023 when she refused to attend work on her day off, Mr Ferguson reacted with hostility. In the course of evidence it became clear that this was a reference to an incident on 25th August 2023 that was about whether Ms Mingo would be at work on Tuesday 29th August 2023.

106. Ms Mingo's evidence was that at the time Tuesday was one of her non-working days, but that Mr Ferguson wanted her to attend work on that day. She said that he

told her this on Friday 25th August 2023. She said that she had made family commitments on that day and so told him that she was unable to come into work. She said that Mr Ferguson responded in an intimidating fashion, leaning forward towards her in a way that made her apprehensive that he might strike her. Mr Ferguson denied this.

107. This allegation arose in the context of a planned increase in Ms Mingo's hours in accordance with the phased return to work. In his email of 8th June 2023, in which he had informed Ms Mingo of the assessment outcome, Mr Ferguson had also noted that Ms Mingo had been working 60% of her normal hours and that this was due to increase to 66% the following week, page 528. He noted that they had not finalised any agreement about how these hours would be worked and this would need to be discussed. Ms Mingo had then been absent from work until 23rd August 2023 and no such discussion had taken place.
108. Mr Ferguson's evidence was that in the week that Ms Mingo returned to work, there had been a meeting to discuss the increase in hours and, on that basis, he had anticipated that Ms Mingo would be at work on Tuesday 29th August 2023. Ms Mingo agreed that such a meeting took place but said that only the overall increase in hours had been discussed, not the specific days she would work. Mr Ferguson accepted that they had not been specific about the days.
109. The Tribunal concluded that this was simply an incident of miscommunication. Mr Ferguson had left the meeting with the impression that Ms Mingo had agreed that, given her increase in hours, she would be working on Tuesdays. In fact, that had not been specifically agreed and Ms Mingo had not had the same understanding of their discussion.
110. On 25th August 2023, Mr Ferguson, operating on his understanding of Ms Mingo's working pattern, attempted to arrange a meeting on 29th August 2023 with Ms Mingo. She told him that she was not working that day.
111. Mr Ferguson denied, however, responding in an intimidating or hostile manner. He said he did not have any specific recollection of the conversation, but would not have behaved in that way. He said that he could see from the documents that there had been some confusion but that he would not have been upset, because he 'didn't mind when people are in the office' unless there was a particular reason they were required and so this incident would not have been something he would be annoyed by.
112. Ms Mingo wrote an email to Mr Ferguson on Saturday 26th August 2023, page 589. Much of that email dealt with the intended upcoming assessment, which is dealt with below. She also, however, reiterated her understanding a) that they had already agreed that she could have Tuesdays off and b) that she would not be able to attend on Tuesday 29th.
113. Mr Ferguson forwarded that email to Jo Champness on 28th, saying that he had not agreed that Ms Mingo could have Tuesday off and expressing some frustration with the situation, page 589.
114. On 29th August 2023 Mr Ferguson emailed Ms Mingo, indicating that he would arrange a meeting when she returned to work to discuss matters, page 1595-6. He went on to say that all working patterns must be agreed by management and expressed his view that he had not agreed that Ms Mingo would not work on Tuesdays. He noted that the absence had been marked as unauthorised and that this might result in pay being withheld.
115. It is apparent from the emails that he sent that Mr Ferguson was annoyed by the incident. The Tribunal concluded that Mr Ferguson had been frustrated to find on 25th August that Ms Mingo was not intending to be in work when he had expected and

when he wanted to meet her. The Tribunal concluded, however, from his point of view this was a relatively minor incident. It is likely that it was apparent to Ms Mingo that he was annoyed, but he did not berate her or physically threaten her in any way. Ms Mingo's evidence did not suggest that he had said anything negative to her at the time, being focused solely on his body language. The tone of Mr Ferguson's emails was direct and relatively forceful, but not rude or unprofessional. The Tribunal accepted that during the conversation he might have leaned forwards, but not in way that might reasonably said to be hostile or to amount to intimidation.

116. It is notable that Ms Mingo did not make any contemporaneous complaint in respect of Mr Ferguson's behaviour and her emails at the time did not suggest any physical intimidation had occurred.
117. The Tribunal concluded that the reality was that Ms Mingo and Mr Ferguson had misunderstood each other in the previous discussion of her working hours and thereby ended up with different understandings of what had been agreed. When that became apparent both were somewhat annoyed and frustrated, which was only natural in those circumstances. But it was the sort of mutual misunderstanding and irritation that happens regularly in the workplace without either party being at any particular or serious fault. Once the misunderstanding had been identified, they were able to reach a clear agreement about Ms Mingo's working pattern in the future (see below).

Possible assessment and changes to supervision

118. It is clear from the contemporaneous documentation that during August there was an intention that Ms Mingo complete a further assessment, similar to the one she had taken in June. In particular, Ms Mingo in her email of 26th August 2023, Ms Mingo refers to 'the assessment planned for Friday' i.e. 1st September.
119. In context, this was a natural development. The expectation since March had been for Ms Mingo to complete an assessment following her training period. She had done so but been unsuccessful. It was natural that she would retake the assessment following a further period of training.
120. In that email, however, Ms Mingo wrote that she felt that the planned assessment had come at too short notice and that she had not yet had adequate training, in part because of Mr Ferguson's availability and in part because of her recent sickness absence. In truth, the primary factor at this stage must have been Ms Mingo's sickness absence, since she had not been in work between 12th June and 23rd August 2023.
121. Mr Ferguson's email of 29th August 2023 also made reference to the upcoming assessment, noting that he was willing to 'push it back a further week', page 1596.
122. On 30th August 2023 there was a meeting between Mr Ferguson and Ms Mingo. Following that meeting Mr Ferguson sent Ms Mingo an email, summarising the discussion, page 605.
123. At the meeting they had agreed Ms Mingo's work pattern as being 8am to 4pm on Monday, Wednesday, Thursday and Friday.
124. They also discussed Ms Mingo's ongoing training. Mr Ferguson agreed to meet with Ms Mingo for 30 minutes every morning. At that meeting they would plan out the work she would do that day and to cover any issues with the work she had done on the previous day. Ms Mingo would then work independently during the day, before sending her completed work to Mr Ferguson at the end of the day for him to review.
125. It is notable that this plan involved a significant amount of work on Mr Ferguson's

part. A half hour meeting four days a week was a substantial commitment for him to make. In addition to the time spent in the meeting, he would need to review Ms Mingo's work and prepare for the meeting. Overall, it was a significant commitment to make in relation to a single member of his team. The Tribunal concluded that it was a genuine attempt by Mr Ferguson to support Ms Mingo, while recognising that Mr Ferguson had many other duties and responsibilities to other members of his team. The Tribunal also concluded that, to a significant extent, Mr Ferguson made the proposal in order to seek to control the amount of time he was spending assisting Ms Mingo. That was a reasonable step to take given his other duties. It also illustrates that, prior to this point Mr Ferguson must have been devoting a substantial amount of time and effort to assisting and training Ms Mingo.

126. Mr Ferguson and Ms Mingo also discussed the assessment. Ms Mingo did not feel ready to retake an assessment at this stage and asked for it to be postponed. Mr Ferguson agreed. He said that Ms Mingo should tell him when she felt ready, but noted that she would not be able to work from home until she had successfully completed the assessment.
127. One of Ms Mingo's allegations was that between 29th and 31st August 2023, Mr Ferguson had made her attend an assessment, which was unduly challenging. She did not set out any detail of this in her witness statement, but was asked about it during her oral evidence.
128. In her evidence Ms Mingo accepted that, as set out above, Mr Ferguson had agreed to postpone her assessment at her request. Nonetheless, she said that a few days later she had been required to take an assessment. She described this as being an assessment on 5 patient files. She said that Mr Ferguson told her that a colleague, Lucy, would provide her with 5 patient files and that she would be assessed on these.
129. In his evidence Mr Ferguson was taken to a portion of a transcript that had been made of conversations Ms Mingo had had in the course of her training and employment, page 1196. Ms Mingo suggested to him that the conversation recorded between her and Mr Ferguson's deputy had occurred in August and showed that an assessment had taken place at that point.
130. In the transcript, the deputy refers to Mr Ferguson being 'ready to do the assessment today'. She then goes on to suggest that this will consist of 'going through a few [presumably client records] together and then you left alone to do few and Patrick check at the end'. If such a conversation had taken place in August, it would certainly suggest that a further assessment had taken place then.
131. That portion of the transcript, however, is dated 7th June, suggesting that the conversation between Lucy and Ms Mingo occurred then rather than in August, see page 1189. Discussion of an upcoming assessment on this date matched with the agreed fact that Ms Mingo took an assessment on 8th June.
132. Considering the evidence as a whole, the Tribunal concluded that Mr Ferguson did not require Ms Mingo to undergo an assessment in late August or early September. That would have been wholly inconsistent with the agreement with Ms Mingo recorded in the contemporaneous documentation. There was no apparent reason why Mr Ferguson would have agreed not to proceed – and recorded that in writing – only to immediately reverse himself. If anything like that had occurred, it is likely that Ms Mingo would have objected in writing at the time.
133. Ms Mingo's account on this point is also illustrative of the wider difficulties in her evidence. It was apparent in her evidence that she was convinced that Mr Ferguson had required her to undertake an assessment at this time, although the Tribunal concluded based on the contemporaneous documentation that this had simply not occurred. This was therefore a key example of an occasion in which Ms Mingo's

recollection was in error, causing the Tribunal to treat her evidence with some caution.

Supervision in September and October

134. After 30th August 2023, during the periods she was working, Ms Mingo was supervised in accordance with the agreement she and Mr Ferguson had reached on 30th August 2023. Supervision was generally carried out by Mr Ferguson, but he did sometimes delegate to one of the other Cancer Data Officers when he was unavailable.

135. The Tribunal did not accept Ms Mingo's account that Mr Ferguson only met with her on one occasion or that she was left unsupervised after 30th August 2023.

Referral to Occupational health

136. As a result of her further sickness absences Mr Ferguson made another referral to Occupational Health on 14th September 2023, page 607-612.

137. The report concluded that Ms Mingo was fit for work, with adjustments. It recorded that she was experiencing persistent symptoms of physical and cognitive fatigue and difficulties relating to concentration and memory. These symptoms were improving and were expected to continue to improve. It also noted that she was having recurrent chest infections.

138. The report noted that a number of adjustments had been made, including a gradual increase in working hours. It recommended that this continue. It also dealt with the transport to work and remote working. It noted that Ms Mingo was experiencing some difficulties with the Access to Work arrangements and recommended considering the possibility of remote work.

Air conditioning incident

139. One of Ms Mingo's allegation was that, in October 2023, Mr Ferguson caused or encouraged the air conditioning in the office to be set to an unduly cold temperature in order to discomfort Ms Mingo. Mr Ferguson denied this.

140. Ms Mingo made reference to the office temperature in an email she had sent to the Trust's employee relations email address. In that email she criticised the temperature in the office, saying despite the weather not being particularly hot, the air conditioning was set to a low temperature. She wrote that she had brought this to Mr Ferguson's attention, but it had not been addressed. She went on to say that she had 'overheard a conversation suggesting that the air condition settings were intentionally adjusted with my discomfort in mind'. There was no suggestion at this point that Mr Ferguson was responsible for maliciously setting the air conditioning at a level that was uncomfortable for Ms Mingo.

141. It is also significant that these points were made at a point that Ms Mingo was seeking to persuade the Trust to allow her to work from home. The Tribunal concluded that Ms Mingo's strong conviction that she should be permitted to work from home caused influenced her view that the conditions in the office were unsuitable for her.

142. Ms Mingo repeated her complaint about the air conditioning in her appeal, page 707. Again, at this stage, although she suggested that the temperature was set deliberately to 'put me at a disadvantage', she did not suggest that Mr Ferguson was responsible.

143. During cross-examination Ms Mingo accepted that, when she found the office too cold, she had gone to the air conditioner herself and turned it off. She did not suggest that Mr Ferguson or anyone else had objected to her doing this.
144. Mr Ferguson denied this allegation. He said that he did, on occasion, operate the air conditioning, but generally avoided doing so and would certainly not have done so in order to discomfort Ms Mingo.
145. The Tribunal accepted Mr Ferguson's account on this point. The Tribunal concluded that Ms Mingo's frustration and distress during this period, combined with the fact that she was genuinely discomforted by the office temperature, led her to conclude that Mr Ferguson was responsible for the setting of the office temperature and that he was doing so for reasons of malice towards her, when that was not the case.

Possible request for Occupational Health referral

146. One of Ms Mingo's allegations was that on or around 30th of October 2023, she had made a request to be referred to Occupational Health which was refused.
147. This was one of the allegations that the Tribunal and parties discussed at the beginning of the hearing, when clarifying the list of issues. At that stage, Miss Mingo said that she did not allege that Mr. Ferguson refused to make a referral to Occupational Health at this time, but rather that he had indicated that he would do so but did not.
148. At this point Ms Mingo was on sick leave, as set out above.
149. Ms Mingo's witness statement did not set out when she said that she made the request or in what circumstances. During cross-examination, Ms Mingo accepted that she had not made such a request to any of her managers. She said that she had made what she described as a 'self referral'. When pressed for more details she said that she had emailed one of the OH doctors who had assessed her previously, asking to speak to her.
150. The Tribunal noted that this evidence was quite different to what Ms Mingo had said when clarifying the list of issues.
151. The Tribunal concluded that this could not be regarded as making a request for an Occupational Health referral. At this stage, Miss Mingo had been referred to Occupational Health on numerous occasions and was familiar with the process.
152. There was nothing that had occurred up to this point or set out in the Trust's policies that would suggest it was possible for an employee to independently approach Occupational Health in the way Ms Mingo suggested she had done.
153. Ms Mingo did not produce the email that she suggested that she had sent. On the balance of probabilities, the Tribunal did not accept her evidence and concluded she did not approach Occupational Health independently at this time.
154. Since, in her oral evidence, Ms Mingo did not suggest she had made a request at this time to Mr Ferguson and Mr Ferguson said that she had not done so, there was no evidence before the Tribunal that any such request had been made at this time. The Tribunal concluded that no such request had been made.
155. This was another occasion on which the Tribunal found that Ms Mingo's evidence, although given honestly, was not reliable.

Request for orthopaedic chair

156. One of Ms Mingo's allegations was that she had made a request for an orthopaedic chair, which was not provided. She argued that this amounted to a failure on the part of the Trust to make a reasonable adjustment to her disability.
157. On 7th July 2020, prior to joining the Cancer Data Team, Ms Mingo sent Mr Ferguson an email about the provision of an orthopaedic chair, page 1293-4. She said that she had needed time off with 'some health issues relating to back, neck and muscle spasms and sciatica'. She said that she had provided with the Trust Occupational health team, who had agreed she needed a 'special orthopaedic chair with neck support'. She followed up with an email on 9th July 2020 with a picture of the chair she had been using in her current role, page 1295-6.
158. On 16th March 2021, Ms Mingo had sent an email to Mr Ferguson making a request that an orthopaedic assessment of her workplace be carried out and that she be provided with 'an orthopaedic chair with back and neck support', page 176. In his evidence Mr Ferguson accepted that he had received this email and, at that time, had been aware that Ms Mingo said that she had problems with her back.
159. Ms Mingo referred again to her need for an orthopaedic chair in a letter to Mr Ferguson dated 27th November 2022, produced in the run up to the discussions of her capability for work in late 2002, which ultimately led to the phased return. In that document, she noted that one of the reasons she wished to work from home was that she had an orthopaedic chair at home, with a head rest.
160. On 16th October 2023, during her final period of sickness absence, Ms Mingo emailed Mr Ferguson, page 1224-5. This was part of an email chain about her health. In that email she referred to a conversation about her health and said that, as part of that conversation, had inquired about the possibility of acquiring a therapeutic chair to alleviate her back problems. She said that she had then followed up several times, but without result. Ms Mingo then went on to say that when she returned from Covid, her 'back discomfort persisted' and she had sought assistance with adjusting her chair. She said that Mr Ferguson had expressed uncertainty about how to address this concern. In context, this email suggests that Ms Mingo's had made requests for an orthopaedic chair in 2022, but one had not been provided.
161. Mr Ferguson replied on 16th October 2023, page 1324. His email suggests that he had understood Ms Mingo's references to back pain to be secondary to symptoms of dizziness and stress. He suggested that Ms Mingo had not suggested that any intervention was required. He goes on to say that back pain had not been mentioned by Ms Mingo since her return to work in April. However, he indicated that he would fill in an occupational assessment that day.
162. In his evidence Mr Ferguson said that he did not recall receiving the letter of 27th November 2022. He accepted, however, that Ms Mingo had made a request for an orthopaedic chair in 2022, which had not been actioned. He said that he did not recall what had happened but suggested that the request must have 'fallen through the cracks'.
163. Mr Ferguson said that he had not been conscious of Ms Mingo having any particular problem with back pain when she returned to work. He said that the first time anything like that had been mentioned was in August, when she had asked him for help adjusting her chair. He agreed that he had said something about not knowing how to do this. He accepted that this had 'maybe not been the best response', but said that he had simply not been conscious at that time that Ms Mingo was having any particular

back problem. When she had directly requested an orthopaedic chair in October, he had begun the normal process to deal with such requests. Matters did not, however, progress much further because Ms Mingo was off sick and ultimately was dismissed without returning to the office. He said that, had she returned, he would have expected to provide her with an appropriate chair and that this was the sort of adjustment made by the Trust routinely.

164. Ms Mingo's evidence was that after she returned to work she had told Mr Ferguson in one-to-one meetings that her back hurt. She said he had made efforts to adjust her chair at her request, but did not provide her with an orthopaedic chair. She said that she continued to experience back pain at work, which contributed to her fatigue. She suggested that it must have been obvious to anyone in the office that she was in pain and needed a chair. Therefore, she suggested, Mr Ferguson must have known that she was in pain and should have taken steps to provide her with a chair.

165. The Tribunal accepted that Ms Mingo experienced back pain throughout 2023. There was no dispute that she had such pain in the past and it is consistent with the available medical evidence. The Tribunal also accepted that this pain contributed to Ms Mingo's symptoms of fatigue. That was an entirely plausible consequence of such pain, given Ms Mingo's symptoms of Long Covid and fatigue. It would be almost inevitable that any significant pain experienced during the day would exacerbate those symptoms.

166. The Tribunal also accepted that a modified chair would be likely to improve Ms Mingo's pain symptoms and therefore result in less fatigue. Ms Mingo's evidence was that it had done so in the past and that she did better when sitting in an orthopaedic chair at home.

167. The Tribunal did not, however, accept that Mr Ferguson was aware of Ms Mingo's back pain when she returned to work. The Tribunal accepted his account that he noticed some respiratory symptoms and was very aware of her struggles with Long Covid, but did not become aware of her back pain until the October request for an orthopaedic chair.

168. The Tribunal also did not accept that Ms Mingo was experiencing severe or debilitating back pain at this time. If she had been, it is likely a) that Mr Ferguson would have become aware of this through his day-to-day contact with Ms Mingo and b) that Ms Mingo would have raised the problem with him much earlier (as she did in relation to other symptoms and difficulties). The Tribunal concluded that she was in some pain and that it did contribute to her fatigue, but that it was a relatively minor part of her overall health picture at that time.

169. The Tribunal also accepted that following Ms Mingo's return to work, Mr Ferguson was not conscious of the previous request, until Ms Mingo raised it again on 16th October 2023.

November Sickness absence meeting

170. On 9th November 2023 Ms Francis was invited to a formal sickness review meeting to take place on 28th November, page 673. At that stage she had been on sick leave since 9th October 2023.

171. That meeting was chaired by Mr Francis. Mr Ferguson attended in order to present a statement of case. Representatives from HR, Polly Searight (Head of Employee Relations) and Charity Muli (Senior Employee Relations Adviser), also attended. Ms Mingo was accompanied by Shereen Higginson, a Trade Union representative.

172. Prior to the meeting Mr Ferguson produced a 'Management Case for a Final

Sickness Absence Review Meeting, page 688-693. It contained 22 appendices, being the various relevant documents. In effect, it summarised the situation as of that date from Mr Ferguson's point of view.

173. A note of that meeting was produced, page 677-687. The Tribunal accepted that it was an accurate account of the meeting.
174. The meeting began with Mr Ferguson setting out the position from the management's point of view. He began by Ms Mingo's sickness absence from 6th December to 20th March 2023 and her return to work. He noted the history of adjustments that had been arranged, in particular the phased return to work. He also noted the decision that Ms Mingo would need to work in the office during the period that she was being trained on the Epic system and the arrangements for the assessment. He said that Ms Mingo had not been successful in the assessment and had therefore required further training.
175. Mr Ferguson then set out the history of sickness absence since Ms Mingo's return to work. He noted that, as of 28th November 2023 she had only been able to attend 36 days of work.
176. Ms Mingo then responded to Mr Ferguson's account. She said that it had been agreed that the Trust would provide transport for her upon her return to work. She said that this had not been done and instead she had had to make her own arrangements through Access to Work. There was significant discussion of the Access to Work arrangements, with Ms Mingo setting out her view that she had been told that transport would be arranged for her.
177. Ms Mingo also raised further issues with the arrangements in the workplace. First, she said that there was a problem in that the air conditioner caused her chest pain. Second, she said that she had asked Mr Ferguson to help her with her chair, which was causing her pain, but that he not been able to help.
178. Ms Mingo also said that she just wanted to work and that she would be able to work from home if she was provided with a computer.
179. Ms Higginson then made submissions on Ms Mingo's behalf. Essentially, she argued that Ms Mingo was an employee who was keen to return to work and that this should be possible with appropriate adjustments. She suggested that permanent flexible work should be considered, as should working from home.
180. Mr Francis then asked Ms Mingo to think back to the original plan (which he described as being a four-to-six-week training period to get Ms Mingo to the point that she could work unsupervised, at which point a hybrid work pattern could be arranged). He asked why, in Ms Mingo's view, this has been unsuccessful. Ms Mingo replied that she had felt 'extremely pressured' by Mr Ferguson to do an assessment after one or two weeks of having returned to the office. She suggested that Mr Ferguson had conducted training with other employees using screen sharing and did not understand why this could not be used in her case, to allow her to work from home.
181. Ms Higginson then intervened with a further submission. She suggested that the fundamental difficulty was that Ms Mingo was unable to travel to work in the office. She suggested that there had been difficulties in dealing with this, first in relation to the delay in Access to Work providing any support. This had been covered by the Trust for four weeks, but once this ended Ms Mingo was not, in practice, fit to attend work because she could not manage the journey. She suggested that, while she understood why Mr Ferguson believed that Ms Mingo needed to work on site for training, Ms Mingo was not a 'regular employee who can just come into work'. She suggested that this therefore needed to be figured out.

182. The meeting then closed on the basis that Mr Francis would consider the matter and provide a decision.
183. The meeting did not discuss in any detail the assessment that Ms Mingo had taken in June. It also did not revisit the decision that Ms Mingo could not work from home until she had completed such an assessment successfully.

Dismissal

184. On 5th December 2023, Mr Francis wrote to Ms Mingo, stating that he had decided to terminate her contract on notice, due to lack of capability arising from ill health, page 694-696.
185. He noted that there was a right to appeal.
186. In his evidence Mr Francis explained how he had reached this decision. His view was that the Trust had implemented the adjustments that had been recommended through the Occupation Health process, including a phased return to work and the provision of taxis. Nonetheless, Ms Mingo had not been able to maintain an acceptable level of attendance, despite some time having passed since her return in April. Fundamentally, therefore, Mr Francis concluded that there was no real likelihood that Ms Mingo would be able to return to consistent attendance within a reasonable period of time.
187. When, in his oral evidence, Mr Ferguson was asked about the possibility of Ms Mingo undergoing another assessment at this stage he said that he did not consider that as an option. He said that he had concluded that there had been an unsuccessful assessment in June and that Ms Mingo had asked for the planned August assessment to be deferred. Ms Mingo had then gone off on further sick leave and remained absent.
188. Mr Francis was also concerned that Ms Mingo's absence was having a significant negative impact on the Cancer Data Team. In part this was because, since she was not working consistently and remained in a period of training, the team was functionally reduced by one person. Other members of the Team therefore had an increased workload. This could not be covered by the Trust's bank staff, because they lacked the specialist skills required for the role. Second, Mr Francis was concerned that the task of managing Ms Mingo and seeking to advance her training was placing a significant additional weight on Mr Ferguson, who was already carrying out a demanding role and responsible for the implementation of the Epic system, which was a substantial project.
189. Mr Francis also considered whether Ms Mingo could be placed in any alternative role. But, following consultation with HR, he was told that there was no suitable role. In his oral evidence, he said that he was in any event doubtful that this was a real possibility. He noted that Ms Mingo had not been able to make a successful return to work, despite the Trust and Access to Work funding taxis. In those circumstances, he did not agree with Ms Mingo's arguments that the main obstacle to her returning was the need to attend the office.
190. Although in her witness statement Ms Mingo described the decision to dismiss her as being 'predetermined' in her oral evidence it was apparent that she did not mean that Mr Francis had reached a conclusion in advance of the meeting. In fact, she accepted that he had listened at the meeting and applied his mind honestly to the situation. What she meant by 'predetermined' in this context, was that he had made the wrong decision and the decision to dismiss her had been unfair.

Appeal

191. Ms Mingo appealed on 8th December 2023, page 701-708.
192. The appeal was deal with by Sofia Colas, at the Dime Divisional Director for Clinical Services. Ms Higginson attended with Ms Mingo.
193. Notes of the meeting were provided and the Tribunal accepted that these were a broadly accurate account, Supplemental Bundle page 58-76.
194. At the beginning of the meeting, Ms Higginson indicated that the basis of the appeal was that the possibility of redeployment had not been considered prior to dismissal. That was the lens through with Ms Colas considered the appeal. She did not engage in a substantial re-examination of Mr Francis' conclusions. Rather, she considered whether Mr Francis had conducted the meeting fairly and made a reasonable decision. She then went on to consider in greater detail whether it was possible to redeploy Ms Mingo effectively.
195. In the meeting Ms Mingo reiterated her dissatisfaction with the arrangements that had been made for her travel to work and the fact that she had not been provided with a laptop.
196. Ideally, Ms Mingo said, she would like to work exclusively from home, but that if she did need to go into the office one or two days a week, she would like to work at the Chelsea site, because that was an approximately 30 minutes journey by public transport.
197. Ms Colas wrote to Ms Mingo on 22nd January 2024, dismissing the appeal. In broad summary, she concluded that Ms Mingo's significant levels of absence, despite the efforts to make reasonable adjustments, meant that dismissal had been an appropriate decision by Mr Francis. In relation to the possibility of redeployment, she concluded that, even if this was possible, it was unlikely to allow Ms Mingo to attend work more reliably.
198. In her oral evidence Ms Colas said that she had considered two possible roles at Chelsea hospital. One was for a medical secretary, but this required a specific qualification that Ms Mingo did not possess. The second role was as a receptionist; a role that would not have allowed for any form of working from home. She concluded that neither of these roles were suitable for Ms Mingo.

Ms Mingo's pay

199. There was, both at the time and during the hearing, some confusion over the basis on which Miss Mingo had been paid and much of the hearing was spent in detailed consideration on the payslips.
200. The Tribunal accepted that the payslips produced by the Trust contained an accurate account of the sums that Ms Mingo had received:

Month	Gross Pay	Net Pay
Feb	£1503.05	£1264.91
March	£1169.03	£1058.29
April	£2866.03	£2107.79
May	£2338.08	£1781.44
June	£2688.84	£3771.65
July	£736.50	£962.25
August	£2692.58	£2000.50

September	£1309.36	£1145.18
October	£2127.26	£1670.65
November	£1523.36	£1277.42

201. It was not always easy to follow the parties respective accounts of Ms Mingo's pay. The Tribunal concluded, however, that in truth, the factual position was relatively straightforward. The primary cause of the difficulty in following events was that a number of things were happening in relation to Ms Mingo's pay at the same time.

- a. First, from 19th June 2023 Ms Mingo's entitlement to full sickness pay ended. From that point she was entitled to be paid half pay when on sick leave.
- b. Second, in the Trust's view, from 19th June 2023, Ms Mingo was entitled to be paid on an 80% full time equivalent basis, rather than as a full-time employee.

202. Further complicating the situation were two further facets of the way Ms Mingo's pay operated in practice.

- a. First, the fact that Ms Mingo was paid during the month (on the 23rd, 24th or 25th) for that month's work. This meant that she was paid, in respect of the remainder of the month, on a prospective basis.
- b. Second, the Trust did not implement the reduction to an 80% basis when it should have done, and subsequently sought to recover these sums by making deductions from her pay.

203. When she first returned to work in March 2023 on a phased return, Ms Mingo continued to be paid on the basis of her full contractual salary, although she was not working full time hours.

204. The Trust later shifted Ms Mingo's pay to an 80% full time equivalent basis with effect from 19th June 2023. This, however, was not implemented at that time, meaning that Ms Mingo continued to be paid on the basis of being a full time employee. It was not until October that the change was implemented, by which point Ms Mingo had, in the view of the Trust, been overpaid since 19th June 2023. The October payment therefore included deductions for pay arrears, seeking to recover the perceived overpayment.

205. Sickness absence is dealt with at clause 18 of Ms Mingo's contract, page 119-120. This provided for occupational sick pay, first at full pay and then at half pay. The periods of each level of pay increased based on an employee's length of service in the NHS. An employee in their first year of service was entitled to 1 month of full pay and 2 months of half pay. After 5 years of service this increased to 6 months of full pay and 6 months of half pay. This entitlement was based on a rolling twelve-month period, meaning that on any date of sickness absence entitlement would be based on the 12 months immediately prior to that date.

The law

206. In reaching its conclusions, the Tribunal applied the following legal analysis.

Unfair dismissal

207. The general approach to determining whether a dismissal is fair is set out in s 98 Employment Rights Act 1996. s98(1) requires the employer to establish the reason for the dismissal and that it is one of the potentially fair reasons set out in s 98(2). In this case the reason relied upon is capability. The reason for dismissal is the factor or

factors operating on the mind of the person who made the decision to dismiss.

208. If an employer succeeds in showing that the reason for the dismissal is potentially fair, the Tribunal must consider whether the dismissal was fair. S98(4) requires that, in doing so, it considers whether in all the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. The fairness of the dismissal must also be determined in accordance with the equity and substantial merits of the case. Neither the employer nor the employee bears the burden of proof on the issue of fairness, which is to be approached neutrally.
209. A fundamental element of considering fairness properly, in the context of a claim for unfair dismissal, is that a tribunal must not substitute its own view for that of the employer. Instead, the Tribunal's role is to consider the employer's actions and decide whether they were within the range of possible options open to a reasonable employer in the circumstances. This is often known as the 'range of reasonable responses'. See in particular *BHS Ltd v Burchell* [1980] ICR 303 and *Iceland Frozen Food v Jones* [1983] ICR 17.
210. This means that the tribunal must not 'stand in the shoes' of the employer and decide whether it would have reached the same decision. That would, inherently, involve the Tribunal replacing the employer's decision with their own. The Tribunal must focus on assessing the employer's decision, by reference to the range of reasonable responses. At the same time, that range is not infinitely wide and a finding that dismissal fell outside the range should not inevitably suggest that a Tribunal has substituted its own view for that of the employer, see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.
211. The basic question to be addressed in cases of ill-health capability is that set out by the Employment Appeal Tribunal in *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373: In all the circumstances, can the employer be expected to wait any longer for the employee to return to work and, if so, how much longer. That requires consideration of the nature of the underlying illness or condition; the likely length of the continuing absence and the impact of that absence on the employer's work.
212. Fairness also requires the employer to give proper consideration to the relevant available information. This will require both consultation with the employee and appropriate consideration of the available medical evidence.

Unfair dismissal compensation

213. The monetary awards for unfair dismissal are determined in accordance with s 118 to 126 of the Employment Rights Act 1996. These provide for a basic award and a compensatory award.
214. The basic award is calculated in accordance with ss 119-122. It is based on an arithmetic calculation on the basis of the employee's age, length of service and weekly pay. S 122(2) allows for a reduction to the basic award where the Tribunal considers that the conduct of the employee prior to the dismissal was such that it would be just and equitable to reduce the amount of the basic award.
215. In relation to the compensatory award, the Tribunal is required to award such amount as it considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal, in so far as that loss is attributable to action taken by the employer. In essence the purpose of the compensatory award is to place the employee in the financial position that they would have been, but for the unfairness of the dismissal.

216. In most cases this means that the compensatory award will be concerned with assessing the value of the wages that the employee would have been paid, had they not been dismissed. In many cases the Tribunal will also need to consider the pension benefits that the employee has lost as a result of dismissal. But there are many other potential financial losses, such as loss of potential bonuses, loss of access to a company car, shares etc.

Polkey Reduction

217. It is also open to a Tribunal to reduce any compensatory award to reflect the possibility that the employee might have been dismissed had the employer acted fairly. This is described as a Polkey reduction, following the case of *Polkey v AE Dayton Serviced Ltd* [1988] ICR 142.

218. As in relation to unfair dismissal, the Tribunal must not substitute its own view for that of the employer, the key questions are a) Whether the employee could have been fairly dismissed? and b) Would the actual employer have done so? See *Hill v Governing Body Great Tey Primary School* [2013] IRLR 274.

219. The assessment of a Polkey reduction is an inherently uncertain exercise, since it inevitably involves an element of speculation. Although there are cases in which the evidence related to any potential reduction is so riddled with uncertainty that no sensible assessment can be made, this is unusual. Tribunals should only proceed on the basis that employment would have continued indefinitely where the evidence that it would not have done so can properly be ignored, see *Software 2000 v Andrews* [2007] IRLR 568.

Direct disability discrimination

220. Following s13 and s39 of the Equality Act 2010, the Tribunal must determine whether the respondent, by subjecting the claimant to a detriment, discriminated against her by treating her less favourably than it treated or would have treated someone else, because of a protected characteristic.

221. In this case the claimant relies on the protected characteristic of disability.

222. A detriment is anything that a reasonable person in the claimant's place would or might consider to their disadvantage. It does not require that there be physical or economic consequences for the claimant – but an unjustified sense of grievance is not a detriment, see *Shammon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

223. Consideration of direct discrimination is an inherently comparative exercise. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator was or would be. The comparator may be an 'actual comparator'; that is someone in materially the same circumstances of the claimant. The tribunal may also need to consider how a 'hypothetical comparator' would have been treated. In some cases, identifying a suitable hypothetical comparator may be difficult and it may be appropriate to focus on considering why a claimant was treated in a particular way, using any evidence as to how other people are treated to inform that view, even if they are in materially different circumstances.

224. If there has been less favourable treatment, the Tribunal must go on to consider whether that was because of a protected characteristic.

225. In some circumstance, however, separating the question of whether there has been less favourable treatment from the issue of why that less favourable treatment occurred will be artificial or cumbersome. In such cases the Tribunal may consider both questions together – essentially asking whether an employee has been treated less favourably because of a protected characteristic, see *Shammon*.
226. One consequence of this comparative approach is that the fact that someone has been treated unreasonably does not mean that they have been discriminated against. For that matter, an employee who has been treated objectively reasonably may still have been discriminated against if they have nonetheless been treated less favourably than an appropriate comparator because of a protected characteristic. Similarly, an employee who has been treated objectively unreasonably will not have been discriminated against if their comparator was or would have been treated in the same way.
227. Direct discrimination is not necessarily conscious or deliberate. The tribunal must decide ‘what, consciously or unconsciously, was the reason for the treatment’, see *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48. For there to be direct discrimination it is sufficient that the protected characteristic be a material influence on the reason for the treatment. It does not need to be the only or main reason for the treatment.
228. In dealing with disability discrimination in the context of disability the tribunal must be careful to address the question of whether the claimant has been subjected to a detriment because of disability, rather than because of something that arises from that disability. The consequences of a disability (such as its impact on an employee’s ability to carry out the tasks required in the workplace) are not the same as the disability itself. See, for example, *Boesi v Asda Stores Ltd* [2023] IRLR 625. Where what is complained of is actions taken by an employer because of the consequences of a disability, any remedy is likely to arise from the duty to make reasonable adjustments or discrimination arising from disability, rather than direct discrimination.

Discrimination arising from disability

229. Following s15 of the Equality Act 2010 the Tribunal must determine:
- a. Whether the claimant has been treated unfavourably;
 - b. Whether the unfavourable treatment is because of something arising in consequence of the employee’s disability;
 - c. Whether the employer knew, or could reasonably have been expected to know, that the employee had the relevant disability; and
 - d. Whether the unfavourable treatment was a proportionate means of achieving a legitimate aim (often referred to as whether the treatment was justified).
230. This requires two separate decisions about causation. First, the Tribunal must identify what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator. Second, the Tribunal must determine whether that reason was something arising in consequence of the Claimant’s disability. That is an objective question, which does not involve examination of the alleged discriminator’s mental processes.
231. When considering the possibility of justification the Tribunal must make an objective balancing of the impact of the treatment and the reasonable needs of the party responsible for the treatment, see *Hampson v Department of Education and Science* [1989] ICR 179.

Harassment

232. Section 26 of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of:

- a. Violating B's dignity, or
- b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

233. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect. These are highly fact sensitive matters, where the particular circumstances of behaviour, the nature of the workplace, the nature of the relationships between the people involved and similar factors are likely to be relevant.

Reasonable adjustments

234. Pursuant to section 20 of the Equality Act 2010, read with Schedule 8, there is a duty on an employer to make reasonable adjustments in respect of disabled employees.

235. That duty arises where an employer applies a provision, criterion or practice to a disabled person that puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled.

236. The duty to make reasonable adjustments can also arise in respect of physical features that place a disabled person at a substantial disadvantage and where a disabled person is placed at a substantial disadvantage because of the lack of an auxiliary aid. These duties are not relevant to this claim.

237. When considering a reasonable adjustments claim, a tribunal must consider the provision, criteria or practice applied by or on behalf of an employer and determine whether it places a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with someone who is not disabled. This will involve careful consideration of the disadvantage that is said to be suffered by the claimant.

238. The tribunal will then need to consider what adjustment might be made in order to avoid the disadvantage.

239. It is in the nature of the duty to make reasonable adjustments that it may well involve treating a disabled employee more favourably than those employees who are not disabled.

240. When considering whether an adjustment was reasonable or not, the tribunal must reach its own objective assessment. In contrast to the approach to unfair dismissal, the tribunal is not considering whether the employer's decision was a reasonable one, but reaching its own conclusion.

Time limits

241. The time limit to present a claim about discrimination in the work place (other than a claim for equal pay) is set out in section 123 of the Equality Act 2010.

123 Time Limits

- (1) Subject to section 140B, proceedings on a complaint under section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
 - (2) [This subsection relates to claims brought by serving members of the armed forces and is not relevant to this case.]
 - (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
 - (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.
242. S123 therefore establishes a statutory time limit of three months, starting from the act complained of. If, however, there is conduct extending over a period, that three month time limit in relation to that conduct will only begin when that conduct ends. Conduct extending over a period is often referred to as a 'continuing act'.
243. Guidance on the correct approach to determining whether there has been conduct extending over a period has been provided by the Court of Appeal in *Hendricks v Metropolitan Police Commission* [2003] IRLR 96. This established that a conduct extending over a period requires that there a) be a series of incidents that are linked to each other and b) that these incidents reflect an 'ongoing situation or a continuing state of affairs'. This will often arise from the application of a discriminatory policy, rule or practice, but that is not required. Conduct extending over a period is to be contrasted with a succession of unconnected or isolated specific acts.
244. The time limit may also be extended where a claimant has entered into the ACAS Early Conciliation process before the statutory limit expired, see section 140B Equality Act 2010. If, however, the notification to ACAS is made after the statutory time limit, there is no extension of time.
245. Where a claim is presented late, time to present a discrimination claim may be extended where it is just and equitable to do so, see 123(1)(b). The question of whether it is just and equitable to extend time is a broad discretion, which should include consideration of all relevant circumstances, see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194. This will generally include consideration of the length and reasons for the delay and the extent to which delay has caused prejudice to the respondent.

Conclusions

246. Based on the findings of fact and the relevant law set out above, the Tribunal reached the following conclusions. They are organised by reference to the list of issues, although they do not follow precisely the same order.

Unfair dismissal

What was the reason or principal reason for dismissal?

247. Both parties agreed that Ms Mingo had been dismissed by the Trust.

248. The Tribunal concluded that Ms Mingo was dismissed because the Trust concluded that she was not able to perform her role, due to her ill health. This was a potentially fair reason for dismissal, in that it related to her capability to perform the work that she was employed to do. The Tribunal accepted the evidence of both Mr Francis and Ms Colas as to the reasons they concluded that Ms Mingo should be dismissed.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

249. This was an issue on which the members of the Tribunal did not reach a unanimous and the decision was therefore made by majority.

250. Two members of the Tribunal, including the Employment Judge, concluded that the dismissal was not fair. One member concluded that it was fair.

251. All members of the Tribunal concluded that Mr Ferguson, Mr Francis and Ms Colas had acted in good faith when considering the dismissal. Mr Ferguson and Mr Francis had genuinely sought to facilitate Ms Mingo's return to work, including attempting to make reasonable adjustments to her circumstances. They had also sought to act fairly in relation to the decision to dismiss. There was no malice in their actions towards Ms Mingo.

252. The procedure used to dismiss Ms Mingo was also fair. She was given notice of the various meetings and provided the documents that would be considered. She was given the opportunity to set out her position at the meetings, with the assistance of her Union representative. All of this was conducted in a fair manner by both Mr Francis and Ms Colas.

253. The reasons that the majority concluded that Ms Mingo's dismissal was nonetheless unfair were as follows. Mr Francis did not sufficiently address his mind to two connected questions that were vital to assessing Ms Mingo's capability to work. First, whether it was the requirement that she attend the physical workplace that was preventing her from maintaining a consistent record of attendance. Second, if this was the case, whether it was possible for her training to be completed in some form of remote manner. Third, if her training could be completed remotely, whether it would then be possible for her to work from home the majority of the time on an ongoing basis?

254. Because he did not turn his mind to these issues, when Mr Francis concluded that Ms Mingo was not capable, by reason of ill health, to continue in her work he did so primarily on the basis that she had not been able to maintain consistent attendance at work.

255. In most circumstances, such an analysis would not have been problematic. In almost all capability dismissals based on ill health, whether an employee can be expected to maintain a consistent attendance in the future, will be a relevant and important consideration. The recent history of attendance will often be an important factor in determining this, especially where a chronic health condition is concerned. But in Ms Mingo's circumstances proper consideration needed to be given to the fact that it was not expected that she would continue to work in the same way. Her ability to maintain attendance in the past therefore, was not as reliable a metric as it might otherwise have been and could not be used in the broad-brush manner that Mr Francis

did.

256. Without assessing these issues, it was not possible to fairly determine whether Ms Mingo was likely to continue to be unable to work consistently. This can most clearly be seen in the counterfactual that might have arisen had those questions been resolved in Ms Mingo's favour. If Mr Francis had concluded that it was the travel to work that led to Ms Mingo's attendance problems, that it would be possible for her to complete her training remotely and that she could then have worked from home, the rationale for her dismissal would have fundamentally changed. Mr Francis did not, however, turn his mind to these questions, which fatally undermined the fairness of his decision.
257. The majority bore in mind the fact that a Tribunal must not substitute its own view for that of the employer. It was therefore important not to judge Mr Francis' decision-making against either an idealised employer or what the Tribunal itself might have done in his shoes. The test must be whether a reasonable employer could have acted as he did. The majority concluded, however, that Mr Francis had not considered to any significant degree, whether Ms Mingo might be able to work from home for at least some of the time in the future; whether adjustments could be made to the training regime in order to get her to that point or whether, if all of this could be done, Ms Mingo would be able to work consistently. These issues were central to the fundamental question of whether Ms Mingo could be expected to return to work in the near future and maintain consistent attendance. Failing to give them consideration was therefore outside the range of reasonable responses, making his decision to dismiss unfair.
258. Ms Colas also did not turn her mind to these issues and therefore the disciplinary process, taken as a whole, was unfair.
259. The reasons that the minority concluded that Ms Mingo's dismissal was fair are as follows. Taking all of the circumstances into account, the decision to dismiss was within the range of reasonable responses. While another employer might have considered in more detail the questions that the majority concluded were necessary for a fair dismissal, it was not unfair to focus more on the overall level of the sickness absence.

Compensation for unfair dismissal

260. Given the Majority's finding that Ms Mingo had been unfairly dismissed, it is necessary to consider compensation for unfair dismissal.

Basic award

261. The Basic award is an arithmetic calculation. In Ms Mingo's case, it is as follows:
- a. Four years of continuous service, multiplied by
 - b. 1.5 age multiplier (Ms Mingo was over the age of 40 throughout her employment), multiplied by
 - c. A weekly gross salary of £530.69 (based on an annual salary of £27,596, see page 1283).
262. Ms Mingo was therefore entitled to a basic award of £3,184.14

Compensatory award

263. Given the Tribunal's findings of fact, it concluded that it was appropriate to consider whether a Polkey reduction should be applied. The Tribunal concluded that a reduction

of 100% was appropriate.

264. This was because the tribunal found that had the Trust considered the factors set out above that the tribunal concluded it needed to consider, it would nonetheless have chosen to dismiss Ms Mingo and that this decision would have been within the range of reasonable responses.
265. It is important to step back to consider the overall situation that Ms Mingo and the Trust found themselves in at the point that a dismissal was being considered. Ms Mingo had had a very lengthy period of ill health absence between 6th December 2021 and March 2023. She had returned to work on substantially reduced hours and with other reasonable adjustments in place. Nonetheless, her health had led to her taking further periods of sickness absence between 11th to 25th May 2023, 12th June to 23rd August and then from 9th October until 5th December 2023 when she was dismissed. Such a significant history of sickness absence would be bound to raise serious concerns in the mind of any employer.
266. That is the context in which the questions identified by the Employment Tribunal would need to have been considered by Mr Francis and Ms Colas.
267. It is also important to note that, at the point of dismissal, Mr Francis was seriously concerned about the impact on Mr Ferguson and the other members of his time of a) Ms Mingo's absence and b) the efforts that were being made to train and support her. This was not an unreasonable consideration and, if the decision had been approached in the way that the majority found fairness required, would have remained an important consideration.
268. Mr Francis would also have faced a situation in which Ms Mingo had, by a significant margin, failed the assessment that had been carried out in June and had not been able to attempt a further assessment since. At the point of his decision she had been off sick and therefore not engaged in any training for nearly three months.
269. Mr Francis would therefore have been contemplating a potential further period of training, for at least a month and quite possibly longer, before Ms Mingo could take any further assessment and, potentially, work independently. He would have inevitably had in mind that this process would require significant further work on the part of Mr Ferguson and other colleagues – particularly since there had not been any previous attempt to conduct training on a wholly remote basis.
270. Although Ms Mingo's view, both at the disciplinary stage and during the Tribunal hearing, was that it was her attendance at work that caused her particular difficulty and additional fatigue, that was not a view shared by Mr Francis. In his evidence to the Tribunal he said that he did not accept that traveling to and from work by taxi was substantially more fatiguing than working from home. None of the medical evidence available to either Mr Francis or the Tribunal clearly identifies the particular sources of Ms Mingo's fatigue or provides any clear guidance about whether working from home would have alleviated her symptoms. Given the nature of Ms Mingo's condition, it is unlikely that more detailed medical evidence focusing on that issue would have been able to provide a clear answer.
271. Overall, the Tribunal concluded that the Trust would have decided that it was unlikely that Miss Mingo could successfully return to work given the seriousness of her medical conditions, even if training could have been provided remotely and she could then have worked exclusively from home. The Trust would have borne in mind that making that attempt would have placed a considerable additional burden on Mr Ferguson and his colleagues. In all the circumstances, the Tribunal concluded that the Trust would have gone ahead with dismissal and that decision would have been within the range of reasonable responses and therefore fair.

Disability & knowledge

272. The Tribunal concluded that, at all relevant times, the Trust was aware of Ms Mingo's disabilities. The issues relating to Long Covid were well known to all of those dealing with Ms Mingo from 2022, during Ms Mingo's long period of sickness absence. Although Ms Mingo's diagnosis of fibromyalgia came much later, its symptoms were inextricably bound up with the concurrent symptoms of Long Covid, which the Trust was well aware of.
273. In his evidence, Mr Ferguson accepted that he became aware of Ms Mingo's back pain in August 2023, when she asked him to adjust her chair.

Direct disability discrimination

Did Mr Ferguson refuse the Claimant's requests to work from home?

Was that less favourable treatment?

274. As set out in the findings of fact, the Tribunal concluded that Ms Mingo did make requests to work from home and these were refused.
275. As set out above, direct disability discrimination is fundamentally a comparative claim. To succeed, a claimant must identify an actual or hypothetical comparator who was (or would have been) treated less favourably than the Claimant. That comparator must be in materially the same circumstances as the Claimant.
276. There were no other employees in the same circumstances as Ms Mingo who would be an appropriate actual comparator. None of the other members of the Cancer Data Team had had a similar period of sickness absence that meant that they had not participated in the training on the Epic system. None of the other members of the Cancer Data Team were subject to similar concerns about their competence on the new Epic system. These were important material differences between Ms Mingo and her colleagues.
277. The Tribunal therefore considered a hypothetical comparator. Both the parties and the Tribunal agreed that the appropriate hypothetical comparator in this case was:
- a. A woman
 - b. Who had been employed a similar period of time as Ms Mingo as a Cancer Data Officer
 - c. Who had been absence due to sickness for 15 months between December 2021 and April 2023.
 - d. Who had returned to work around April 2023, when the Epic system had gone live.
 - e. Was absent from work on ground of sickness between May and November 2023 in the same pattern as Ms Mingo.
 - f. Had not been assessed as competent to work independently on the new Epic system.
 - g. But did not have the same disability as Ms Mingo.
278. This was not a case in which it was necessary to consider a different hypothetical comparator in respect of different allegations. Where these reasons refer to the hypothetical comparator they therefore refer to this comparator.

279. The Tribunal was satisfied that the hypothetical comparator would have been treated in the same way as Ms Mingo. This was a case in which the Tribunal was able to make positive findings on the evidence and it was not necessary to move mechanistically through the burden of proof provisions.

280. It was clear from Mr Ferguson and Mr Francis' evidence that they had reached a view that it would be inappropriate for an employee to work from home until the employee had demonstrated that they were competent to work independently. That was their genuine and honestly held view. After Ms Mingo returned to work in April 2023 both expected that she would be able to take that step. Both wanted her to do so, so that she could return to being a fully effect member of the Cancer Data Team. The Tribunal concluded that the only reason that Ms Mingo was not permitted to work from home was that she had not passed the assessment conducted by Mr Ferguson. Anyone in the same or similar situation as Ms Mingo for a different reason, would have been treated the same way.

281. The refusal to allow Ms Mingo to work from home was therefore not less favourable treatment because of her disability. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

Did Mr Ferguson, during a meeting on 25th August 2023, treat the Claimant in a hostile manner by asking "Is everyone against the Claimant?"

282. As set out in the findings of fact, the Tribunal concluded that Mr Ferguson did not behave in this manner or otherwise treat the claimant in a hostile way on 25th August 2023.

283. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

On 28th August 2023, when Ms Mingo asked Mr Ferguson if she could have Tuesday off, her request was met with hostility

284. As dealt with in the findings of fact, the tribunal concluded that Mr Ferguson did not treat Ms Mingo with hostility on this date. The Tribunal found that there probably was an element of impatience and irritation in his response to the situation and the mutual confusion over when Ms Mingo was expected in the office. It did not, however, go beyond the sort of response that might occur from time to time in any office, when some confusion of this nature had occurred.

285. In any event, the tribunal concluded that Mr Ferguson's response was unrelated to Ms. Mingo's disability. There was no actual comparator in relation to this allegation. The tribunal therefore considered the hypothetical comparator as set out previously. The tribunal was satisfied that a hypothetical comparator in this situation would have been treated identically by Mr Ferguson. Ms Mingo did not establish primary facts that, in the absence of an explanation, might lead a Tribunal to conclude that Mr Ferguson had acted because of her disability. There was really nothing in the evidence that suggested that anything that Mr Ferguson had done related to Ms Mingo's disability, rather than the particular situation of confusion about when she was working.

286. If such facts had been established, the Tribunal would have accepted Mr Ferguson's account of his motives and actions.

287. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

Between 29th and 31st August 2023, Mr Ferguson made Ms Mingo take an assessment that was unduly challenging

288. The Tribunal concluded that Mr Ferguson had not designed an unduly challenging assessment for Ms Mingo.

289. It is certainly possible to criticise Mr Ferguson's approach to the assessment conducted on 8th June 2023. It was not the product of any careful pedagogical analysis. That reflected, however, the reality that this was a one-off assessment being applied to Miss Mingo because of her particular circumstances. It was not, therefore, unreasonable for Mr Ferguson to design an assessment himself on a fairly informal basis. Although the Tribunal reminded itself that the relevant question in respect to this claim is not whether Mr Ferguson acted reasonably, but rather whether he discriminated on the grounds of a protected characteristic. Nonetheless, it is relevant to consider here the reasonableness of his actions in order to determine whether a negative inference should be drawn. If, for example, the Tribunal had concluded that Mr Ferguson had acted unreasonably, for example by setting an unduly difficult test, the Tribunal might well have drawn a negative inference in relation to his evidence on this and other matters. In the circumstances, however, no such inference was drawn.

290. There was no actual comparator in relation to this allegation because no other employee was in a materially similar situation to Ms Mingo. Other Cancer Data Officers had not been required to undergo a similar assessment; indeed there had not been any formal assessment at all following their training.

291. The Tribunal therefore considered the hypothetical comparator. The tribunal concluded that Mr Ferguson would have applied the same approach and assessment to that comparator.

292. In relation to the specific allegation that Mr Ferguson had required Ms Mingo to take an assessment in August 2023 that was unduly challenging, as set out in the findings of fact, the Tribunal concluded that this did not occur. Mr Ferguson had intended that Ms Mingo take a further assessment, but this was postponed at her request. The Tribunal did not accept Ms Mingo's evidence that she was required to undertake a further an assessment.

293. For these reasons, the Tribunal dismissed this allegation of direct disability discrimination.

Between August – September 2023 Mr Ferguson made Ms Mingo work unsupervised

294. As set out in the findings of fact, the Tribunal concluded that Ms Mingo was not made to work unsupervised. The nature of her training / supervision did change, but that is not at all the same thing as being required to work unsupervised.

295. Further, the Tribunal concluded that this change was unrelated to her disability. The change was made in consultation with Miss Mingo and with her agreement. It was an attempt to assist and support her in the training on the Epic System, which she was finding difficult. This was not something that amounted a detriment.

296. The Tribunal also concluded that the hypothetical comparator would have been treated in the same way as Ms Mingo. Nothing in the evidence taken as a whole suggests that Mr Ferguson's decisions in respect of Ms Mingo's return to work and the training she received was in any way connected with her disability.

297. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

On a number of occasions between 30th November 2022 and 4th October 2023 Ms Mingo asked for a laptop to enable her to work from home. These requests were refused or ignored.

298. Ms Mingo did make numerous requests for a laptop in order to facilitate her working from home. These requests were refused.

299. As set out in the findings of fact, Ms Mingo's requests for a laptop were not ignored. They were, however, refused on the basis that Mr Ferguson was not satisfied that Ms Mingo was able to work independently and therefore had not authorised her to work from him. He therefore took the view that she did not require a laptop.

300. There was no actual comparator in relation to this allegation, since no other employee was in a similar situation to Ms Mingo. The Tribunal concluded that a hypothetical comparator would have been treated in the same way as Ms Mingo. Mr Ferguson's decision was unrelated to Ms Mingo's disability. It arose solely because of his view that someone working in the office did not require a laptop and that a laptop should only be issued if and when an employee was expected to work from home.

301. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

On or around 30th October 2023 Ms Mingo's request to have an Occupational Health referral was refused.

302. As set out in the findings of fact, the Tribunal concluded that no such request was made or refused. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

In October Mr Ferguson caused or encouraged the air conditioning in the office to be set unduly cold in order to discomfort Ms Mingo.

303. As set out in the findings of fact, the Tribunal concluded that Mr Ferguson did not do this. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

Mr Francis would not let Ms Mingo have backdated holiday pay from the holiday year ending 31st March 2023

304. Mr Francis did refuse to authorise any payment in lieu of Ms Mingo's holiday entitlement in March 2023. Instead, as set out above he agreed that Ms Mingo would use a ten day entitlement immediately after her sick leave ended (which then became eleven days when Mr Ferguson allowed her to take an additional day to accommodate medical appointments). The remaining nine days was then carried forward to the following holiday year.

305. There was no actual comparator in relation to this allegation. No other employee was identified as being in a similar situation to Ms Mingo in relation to accumulated holiday pay or having made a request to be paid in respect of accumulated holiday.

306. The Tribunal concluded that Mr Francis' decision was unconnected with Ms Mingo's disability. Any employee in a similar situation would have been treated in a similar way. The evidence did not suggest that there was any such connection and the decision was in accordance with the Trust's policy in relation to annual leave. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

In or around April / May 2023 Mr Ferguson told Ms Mingo that she was cursed during training.

307. As set out in the findings of fact, the Tribunal concluded that this incident did not occur. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

Decision to dismiss Ms Mingo

308. Both parties agreed that Ms Mingo had been dismissed by the Trust.
309. No actual comparator was identified in relation to the decision to dismiss Ms Mingo. The Tribunal therefore considered the hypothetical comparator.
310. The Tribunal concluded that Ms Mingo was not treated worse than the hypothetical comparator would have been treated by the Trust. Someone in a similar situation, with a similar level of sickness absence who had not been assessed as competent on the new Epic system, would also have been dismissed. There was no suggestion, in the evidence taken as whole, that any of the Trust managers were influenced by Ms Mingo's specific disability in any way. Rather it was their assessment of her ability to carry out her role that led to her dismissal.
311. For this reason, the Tribunal dismissed this allegation of direct disability discrimination.

Failure to make reasonable adjustments

Did the Trust know, or should it have known, that Ms Mingo had a disability, specifically long covid, fibromyalgia and back pain

312. As set out above, the Tribunal concluded that the Trust was aware of these disabilities.

Did the Trust operate a provision, criteria or practice of requiring its staff to use the office furniture that it provided?

313. The Tribunal concluded that it did. In common with almost all organisations, the Trust operated on the default expectation that employees would use the office furniture provided for their use.
314. The Trust has argued that the fact that Mr Ferguson was willing to provide an alternative chair for Ms Mingo's use means that this PCP could not have been in place. This is not a sustainable argument. The fact that the Trust was willing to make an exception to their normal practice does not mean that the practice did not exist.

Did that practice place Ms Mingo at a substantial disadvantage compared with other employees?

315. The Tribunal concluded that it did. It accepted Ms Mingo's evidence that the chair she had been provided with exacerbated her back pain. The increased levels of pain had a negative impact on her concentration and caused her to experience greater levels of fatigue.

Would it have been reasonable for the Trust to make an adjustment; specifically, to provide an orthopaedic office chair?

316. The Tribunal concluded that it would have been reasonable for the Trust to provide Ms Mingo an orthopaedic office chair. As Mr Ferguson accepted in his evidence, this was the sort of adjustment that the Trust made quite routinely. There was no evidence to suggest that there was any particular difficulty in providing such a chair or any reason not to do so.

Time limits

317. The Tribunal, concluded, however that the reasonable adjustments claim was out of time and that it was not just and equitable to extend to present the claim.

318. This is a claim about the Trust failing to make the appropriate adjustment. Therefore in accordance with section 123 the Tribunal must identify either a) the date on which the Trust did an act inconsistent with making the adjustment or b) if there was no such inconsistent act, the expiry of the period in which the respondent might reasonably have been expected to do it.

319. The Tribunal concluded that there was no inconsistent act in this case. The Trust never took action that was inconsistent with providing Ms Mingo with an orthopaedic chair. There was no decision taken that she would not be provided with such a chair and the Trust did not do anything inconsistent with such a chair being provided.

320. In the first instance it would have been reasonable for the Trust to provide such a chair shortly after the initial request on 16th March 2021. At that stage, however, the adjustment did not relate to the disabilities relied on as part of this case, in particular Ms Mingo's Long Covid. The occurrence of Long Covid was a new ground which Ms Mingo could seek a reasonable adjustment, which had not arisen in 2021.

321. In relation to that disability The Tribunal concluded that the Trust might reasonably have been expected to provide an orthopaedic chair no later than 19th May 2023, six weeks after Ms Mingo had returned to work. No specific evidence was produced by either side about how long would have been required for such an adjustment to be considered and made, had Mr Ferguson turned his mind to it when she returned to work. The Tribunal therefore drew on its general experience, taking into account the nature of the Respondent and the fact that this was a relatively straightforward step for the Trust to undertake.

322. This meant that the statutory deadline to present a claim in respect of this claim was 18th August 2023. Early conciliation did not commence until 10th November 2023 and the claim was not presented until 24th January 2024. It was therefore significantly out of time.

323. The Tribunal concluded that it was not just and equitable to extend time in the circumstances of this claim.

324. Ms Mingo did not put forward a positive case in relation to why she had not brought a claim earlier. In general terms, the Tribunal concluded that occurred for a number of reasons. First, and most importantly, the issue of the chair was a relatively minor

matter in the context of the overall employment situation and Ms Mingo's concerns at the time. Prior to her dismissal she was much more concerned with the arrangements for her travel to the office and the hope that she might be permitted to work from home. Quite reasonably, she focused on those matters. Secondly, during this time Ms Mingo was suffering from fatigue and brain fog, which made it harder for her to deal with this issue. This, however, was a relatively minor part of the picture. It is clear from the history of these events and the correspondence that Ms Mingo was able to raise matters with Mr Ferguson. She regularly raised issues such as her travel arrangements; her desire to be provided with a laptop; her wish to work from home and so forth. Third, at this stage, again quite reasonably, Ms Mingo was focused on her efforts to return to work, rather than the prospect of possible litigation.

325. In considering whether time should be extended the Tribunal also considered that it was relevant that, although Mr Ferguson, acting for the Trust, had erred in losing track of the original request for an adjustment and not returning to it when Ms Mingo came back into the office following her sickness absence, it was not a matter that Miss Mingo had raised during discussion of her returning to work or at any time after that until October 2023. The reference in November 2002 to her benefiting from such a chair at home was extremely oblique and it was reasonable that it did not alter Mr Ferguson to his previous oversight. The Tribunal concluded that Mr Ferguson was not aware of Ms Mingo's discomfort upon her return to work. In these circumstances there would have been very substantial prejudice to the Trust in extending time to allow Ms Mingo to pursue a claim, which in practice was over a matter that she not made any real effort to advance for some years.

326. If the Trust had ignored Ms Mingo's renewed request in October 2023 for a chair or refused to provide one at a point where she had returned to the office, this analysis might have been very different. But that is not what occurred. When that renewed request was made Mr Ferguson expressed his willingness to provide an orthopaedic chair and the Tribunal concluded that he would have done so, had Ms Mingo returned from her sickness absence.

Discrimination arising from a disability

Did Ms Mingo's sickness absence arise from her disability?

327. The Tribunal concluded that it did. Both Ms Mingo's own evidence and the available medical evidence show that Ms Mingo's sickness absence arose directly from her disabilities of Long Covid and fibromyalgia.

Did the Trust treat Ms Mingo unfavourably by refusing her requests to work from home?

Was that treatment because of Ms Mingo's sickness absence?

328. Mr Ferguson did not permit Ms Mingo to work from home. This was, however, for reasons unrelated to her sickness absence. The Tribunal accepted Mr Ferguson and Mr Francis' evidence that an employee in the Cancer Data Team would only be able to work from home if Mr Ferguson was satisfied that they were ready to work independently and without direct supervision. Mr Ferguson was not so satisfied in relation to Ms Mingo, since she had not successfully passed her assessment.

329. Ms Mingo would have been treated in exactly the same way, whatsoever the background to her not being found ready to work independently (for example, if she had been a new starter).

Did Mr Ferguson, during a meeting on 25th August 2023, treat the Claimant in a hostile manner by asking "Is everyone against the Claimant?"

330. As set out in the findings of fact, the Tribunal concluded that this incident did not occur as alleged by Ms Mingo.

331. The Tribunal therefore dismissed this claim of discrimination arising from a disability.

On 28th August 2023, when Ms Mingo asked Mr Ferguson if she could have Tuesday off, was her request met with hostility?

Was that treatment because of Ms Mingo's sickness absence?

332. As set out above, the Tribunal concluded that this incident did not occur in the manner alleged by Ms Mingo.

333. The Tribunal did find that Mr Ferguson displayed some annoyance and irritation when there was confusion about when Ms Mingo would be in the office. This did not, however, reach the level of unfavourable treatment. There will inevitably be occasions in working life where things go awry. On such occasions both employees and managers may be annoyed or frustrated and, sometimes, those emotions will be apparent. It is not necessary, in order to avoid treating an employee unfavourably, for a manager to be a paragon of stoic virtue. Where, as in this case, there is an isolated occasion of minor irritation it will not amount to unfavourable treatment.

334. In any event, there was insufficient connection between Mr Ferguson's irritation and Ms Mingo's sickness absence for this allegation to succeed. Mr Ferguson's annoyance arose from the confusion about when Ms Mingo would be in the office, rather than from Ms Mingo's absence. Although there was some factual connection between the previous sick leave, because it was the phased return to work that created that uncertainty, that was simply part of the background to the situation, rather than Mr Ferguson being annoyed by the sickness absence itself.

335. The Tribunal therefore dismissed this claim of discrimination arising from a disability.

Between August – September 2023 Mr Ferguson made Ms Mingo take an assessment that was unduly challenging

336. As set out above, the Tribunal concluded that this did not occur as alleged by Ms Mingo.

337. The assessment as originally devised and administered by Mr Ferguson did not amount to unfavourable treatment. There was an element of informality and a lack of rigour in the way that the assessment was designed. But that was reasonable in all the circumstances. An assessment was applied to Ms Mingo in a way that was not done with her colleagues, but that was reasonable because her circumstances differed from theirs. Through no fault of her own, she had been absent during the run up to the Epic launch and the intensive training that had proceeded it. It was reasonable for Mr Ferguson and Mr Francis to take steps to ensure that Ms Mingo's skills had developed to the point that she was ready to work independently. An informal assessment, designed by Mr Ferguson, on a relatively ad hoc and informal basis, was an appropriate way of doing this. Applying a reasonable and appropriate assessment to Ms Mingo in these circumstances was not unfavourable treatment.

338. In relation to the specific allegation Mr Ferguson did not make Ms Mingo take an assessment in August or September 2023. As set out in the findings of fact, following discussion with Ms Mingo he agreed to postpone any assessment until she felt ready.

339. The Tribunal therefore dismissed this claim of discrimination arising from a disability.

Between August – September 2023 Mr Ferguson made Ms Mingo work unsupervised

340. As set out above, the Tribunal concluded that this did not occur in the manner alleged by Ms Mingo.

341. In addition, the changes that Mr Ferguson made to the way that Ms Mingo was supervised did not occur because of her sickness absence. Rather, as set out above, they were made following discussion with her in an attempt to better support her, in circumstances where she was having difficulties returning to work and developing her skills using the Epic system. Ms Mingo would have been treated in the same way had her absence been for some other reason unconnected with disability, such as having taken a sabbatical or been on a period of parental leave.

342. The Tribunal therefore dismissed this claim of discrimination arising from a disability.

On a number of occasions between 30th November 2022 and 4th October 2023 Ms Mingo asked for a laptop to enable her to work from home. These requests were refused or ignored

343. As set out above, Ms Mingo did make numerous requests for a laptop to be provided to her, which were refused.

344. The Tribunal concluded that these refusals did not amount to unfavourable treatment. There was no decision in principle to refuse Ms Mingo a laptop. Rather the situation was that the Trust was unwilling to authorise Ms Mingo to work from home, in those circumstances there was no reason to provide her laptop, because she had no need for one. It was clear, both from Mr Ferguson's evidence and the contemporaneous documents that, the Trust intended, if and when Ms Mingo was able to work from home to provide her a laptop to facilitate this.

345. In any event, neither the decision to refuse to the requests for a laptop or to continue to require Ms Mingo to attend the office, rather than working from home, were made because of her sickness absence. It is clear that an employee in an analogous position, but without the history of absence would have been treated the same way. For example, a new employee who had also not successfully completed the training and been assessed as sufficiently capable to work independently, would have been in a broadly similar position as Ms Mingo, but with no similar sickness absence. It is clear, taking the evidence as a whole that someone in that position would also have been required to keep attending the office and the Trust would have refused any similar request for a laptop to be provided. The Trust's treatment of Ms Mingo was not because of her sickness absence, but because she was not working from home.

346. The Tribunal therefore dismissed this claim of discrimination arising from a disability.

On or around 30th October 2023 Ms Mingo's request to have an Occupational Health

referral was refused.

347. As set out above, the Tribunal concluded that this incident did not occur as alleged by Ms Mingo. There was therefore no unfavourable treatment and the Tribunal therefore dismissed this claim of discrimination arising from a disability.

In October Mr Ferguson caused or encouraged the air conditioning in the the office to be set unduly cold in order to discomfort Ms Mingo.

348. As set out in the findings of fact, the Tribunal concluded that Mr Ferguson did not do this. There was therefore no unfavourable treatment and the Tribunal therefore dismissed this claim of discrimination arising from a disability.

In or around April / May 2023 Mr Ferguson told Ms Mingo that she was cursed during training.

349. As set out above, the Tribunal concluded that Mr Ferguson did not do this. There was therefore no unfavourable treatment and the Tribunal therefore dismissed this claim of discrimination arising from a disability.

Mr Francis would not let Ms Mingo have backdated holiday pay from the holiday year ending 31st March 2023

350. As set out above, the Tribunal accepted that Mr Francis did refuse Ms Mingo's request for a payment in lieu of her untaken holiday.

351. The Tribunal concluded that this was not unfavourable treatment. In general, employees are not entitled to receive pay in lieu of untaken holiday, unless the employment has come to an end.

352. Further, the decision to refuse such a payment in lieu was not made because of Ms Mingo's sickness absence. Rather it was the application of the Trust's policy in relation to holiday pay. An employee who had accrued significant untaken holiday entitlement would have been treated the same way. The decision was unconnected with Ms Mingo's sickness. The Tribunal therefore dismissed this claim of discrimination arising from a disability.

The decision to dismiss Ms Mingo

353. The Tribunal concluded that the decision to dismiss Ms Mingo was taken because of her sickness absence. Although Mr Francis' focus at the point of dismissal was on the future prospect of Ms Mingo returning to work and being able to maintain a satisfactory record of attendance in the future, this was inextricably linked to her previous attendance record and the very substantial periods of sickness absence. These were crucial factors in his decision.

354. The Tribunal accepted that the Respondent's dismissal of the Claimant pursued legitimate aims. In particular, the Trust sought to ensure that there was an effective and adequately resourced Cancer Data team in order to maintain the proper standard of care for its patients.

355. Despite very substantial adjustments, including a prolonged phased return, reduced hours, repeated Occupational Health input, funded transport to the workplace, extensive one-to-one support, and further training opportunities, Ms Mingo had been unable to sustain regular attendance or demonstrate the ability to work independently

within a reasonable timeframe.

356. The Respondent reasonably concluded that the Ms Mingo's continued absence and ongoing training needs were placing a substantial strain on managerial time and the wider team, particularly in the context of the concurrent implementation of the Epic system. Less intrusive measures were considered and attempted over a lengthy period. It was not possible to redeploy Ms Mingo to an alternative role, because there was no available role that would address the underlying difficulty of her poor state of health. In those circumstances, the Tribunal concluded that the decision to dismiss Ms Mingo was a proportionate means of achieving the Respondent's legitimate aims.
357. Stepping back and considering the evidence as a whole, the Tribunal concluded that despite the genuine hopes and expectation of both Ms Mingo and her managers, she simply remained too unwell to make a successful return to work in 2023.

Harassment related to disability

Did the Trust subject Ms Mingo to the following treatment?

Was it unwanted conduct, related to her disabilities, which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Refusal of Ms Mingo's requests to work from home

358. As set out in the findings of fact, the Tribunal accepted that Ms Mingo's requests to work from home were refused by Mr Ferguson.
359. This was unwanted conduct by Mr Ferguson, since Ms Mingo wished to work from home. It was also related to her disabilities, since the motive for the requests was that Ms Mingo found travel to the office difficult because of her disabilities.
360. It was not, however, conduct that violated Ms Mingo's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. Mr Ferguson's decision was a principled one, based on his genuine belief about the needs of the Cancer Data Team. It was made following discussion with Ms Mingo. There was no hidden or expressed malice in his decision. It was communicated to Ms Mingo in a reasonable and professional manner. His behaviour did not approach the necessary threshold to amount to harassment.

Did Mr Ferguson, during a meeting on 25th August 2023, treat the Claimant in a hostile manner by asking "Is everyone against the Claimant?"

On 28th August 2023, when Ms Mingo asked Mr Ferguson if she could have Tuesday off, was her request met with hostility?

Did Mr Ferguson made Ms Mingo take an assessment that was unduly challenging?

Did, between August – September 2023 Mr Ferguson make Ms Mingo work unsupervised?

In October Mr Ferguson caused or encouraged the air conditioning in the office to be set unduly cold in order to discomfort Ms Mingo.

In or around April / May 2023 Mr Ferguson told Ms Mingo that she was cursed during training.

361. For the reasons set out above, the Tribunal concluded that these incidents did not occur as alleged by Ms Mingo. The Tribunal concluded that at no stage did Mr Ferguson's behaviour violate Ms Mingo's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

On a number of occasions between 30th November 2022 and 4th October 2023 Ms Mingo asked for a laptop to enable her to work from home. These requests were refused or ignored.

362. As set out above, Ms Mingo did make a number of requests for a laptop in order to allow her to work from home. These were refused by Mr Ferguson. This was unwanted conduct, in that Ms Mingo wished the requests to be granted. It did not, however, relate to her disability, because the refusals arose purely from the fact that Ms Mingo was not, during this time, permitted to work from home. She therefore did not require a laptop for this purpose.

363. In any event, nothing in Mr Ferguson's conduct had the purpose or effect of violating Ms Mingo's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Although Ms Mingo disagreed with Mr Ferguson's decision about her working from home, it was one reached in good faith and on a reasoned basis. It was not capricious or malicious. It was communicated in a courteous, professional manner and his reasoning was explained.

Mr Francis would not let Ms Mingo have backdated holiday pay from the holiday year ending 31st March 2023

364. As set out above, the Tribunal accepted that Mr Francis did refuse Ms Mingo's request for a payment in lieu of her untaken holiday. This was unwanted conduct, since Ms Mingo had wished for such a payment. It did not, however, relate to her disability. Mr Francis was simply applying the Trust's policy in relation to untaken holiday. He would have refused any similar request, regardless of why a period of untaken holiday had accumulated.

365. Further, Mr Francis' actions in applying the policy (and agreeing to allow Ms Mingo to carry over her holiday entitlement into a new leave year) did not have the purpose or effect of violating Ms Mingo's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It was a reasonable management decision, made in line with the Trust's policy. It did not approach the necessary threshold to amount to harassment.

Unauthorised deductions from wages

366. As set out above, the Trust paid Ms Mingo on the basis that, from 19th June 2023, she was entitled to be paid half pay when on sick leave and on a 80% full time equivalent basis.

367. In relation to the sick leave aspect of her pay this was correct. It accurately reflected Ms Mingo's contractual entitlement to pay while off sick contained her contract.

368. In respect of the 80% full time equivalency, the Tribunal concluded that the Trust was not correct. Although there had been a broad expectation by both the Trust and Ms Mingo that she would not return to a full-time job, there was no binding contractual agreement about this reached. Such an agreement would need to involve both parties agreeing to a clear set of terms about both the precise nature of Ms Mingo's new hours (including when they would be worked) and the date on which any change would take

effect from. In the absence of such detail there was no sufficiently specific agreement reached to amount to a contractually enforceable change of terms.

369. This meant that although the Trust was acting in good faith when it took the view that Ms Mingo's pay should be reduced to 80% of a full time role, this did not reflect the true nature of the contract. Ms Mingo remained entitled to be paid on the basis of a full-time role. Paying her below that rate was therefore a deduction from her wage.
370. This deduction occurred in relation the period 19th June 2022 to 30th January 2024 (when Ms Mingo's notice period ended). This was a period of 32 weeks and 2 days. For 20 weeks of that period Ms Mingo was on sick leave (19th June to 23rd August 2022 and 9th October to 19th December 2023). During those 20 weeks she was entitled to be paid at 50% of her normal salary.
371. The deduction was therefore 20% of Ms Mingo's salary for 12 weeks and 2 days, which was £106.14 multiplied by 12.4 weeks or £1,316.14; plus 10% of Ms Mingo's salary for 20 weeks, which was £53.07 multiplied by 20 weeks or £1,061.40.
372. The total deduction from wages was therefore £2,377.54.
373. This was a series of deductions. All of the deductions were of the same nature and arose from the same error in respect of Ms Mingo's contractual entitlement.

Holiday Pay

374. The Tribunal accepted that at the end of her sickness absence in March 2023, Ms Mingo had 23 days of annual leave remaining in the 1st April 2022 to 31st March 2023 leave year. She was on sick leave until 20th March 2023. Upon her return to work, the Trust had agreed that she would have a phased return, working Monday, Wednesday and Friday.
375. To remain absent from work, she therefore used six days of annual leave entitlement during that leave year (Monday 20th, Wednesday 22nd, Friday 24th, Monday 27th, Wednesday 29th and Friday 31st March 2023). This mean that, at the end of that leave year, 17 days leave remained.
376. This leave entitlement was carried forward to the 1st April 2023 to 31st March 2024 leave year, in accordance with the principles set out in *NHS Leeds v Lerner* [2012] IRLR 825. Ms Mingo had been unable to take her annual leave during the year in which it had accrued, as a result of her ill health.
377. Ms Mingo was therefore entitled, in accordance with the approach set out in *NHS Leeds v Lerner* to a payment in lieu equal to the sum due for that period of leave, i.e. 17 days.
378. Given the gross weekly pay of £530.69 (£106.14 per day) that amounts to £1,804.38.

Approved by:

Employment Judge MJ Reed

12th May 2026

Judgment sent to parties on
21st May 2026
For the Tribunal Office

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

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

IN THE EMPLOYMENT TRIBUNAL

WEST CROYDON

B E T W E E N:

MISS BLANCA MINGO

Claimant

and

THE ROYAL MARSDEN NHS FOUNDATION TRUST

Respondent

FINAL LIST OF ISSUES

1. Time limits

- 1.1. Given the date the claim form was presented (namely 24 January 2024) and the dates of early conciliation (10 November 2023/ 22 December 2023), any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.

The Respondent submits that the relevant date is **11 August 2023**.

- 1.2. Were the unlawful deduction of wages complaints made within the relevant time limit pursuant to sections 23(b) of Employment Rights Act 1996 ("**ERA**") and Article 7(a) Extension of Jurisdiction Order 1994? The Tribunal will decide:
- 1.2.1. was the claim made to the Tribunal within three months (plus the early conciliation extension pursuant to s23(3A) ERA) of the date of payment;
 - 1.2.2. if not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one;

- 1.2.3. if not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit; and
 - 1.2.4. if it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?
- 1.3. Were the discrimination complaints made within the time limit in s.123 of the Equality Act 2010 ("**EqA**")? The Tribunal will decide:
 - 1.3.1. was the claim made to the Tribunal within three months (plus the early conciliation extension pursuant to s.111(2A) ERA) of the act or omission to which the complaint relates;
 - 1.3.2. if not, was there conduct extending over a period;
 - 1.3.3. if so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period;
 - 1.3.4. if not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.3.4.1. why the complaints were not made to the Tribunal in time; and
 - 1.3.4.2. in any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

- 2.1. If the Claimant was dismissed, what was the reason or principal reason for dismissal pursuant to s.98 ERA?

The Respondent says the reason for dismissal was as a result of the Claimant's capability for performing work of the kind she was employed to do. The Tribunal will need to decide whether the Respondent genuinely believed that the Claimant was not capable of performing her role and therefore that her employment could not continue.

- 2.2. If the reason was ill-health capability, did the Respondent act reasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

- 2.2.1. the Respondent took reasonable steps to ascertain the medical position;
- 2.2.2. the Respondent consulted with the Claimant;
- 2.2.3. dismissal was within the range of reasonable responses; and
- 2.2.4. the Respondent otherwise acted in a procedurally fair manner.

3. Disability & Knowledge

- 3.1. The Respondent accepts that the Claimant is a disabled person within the meaning of s.6 of the EqA, by reason of long Covid, fibromyalgia and back pain.
- 3.2. The Respondent does not admit that it was aware of the extent of the symptoms the Claimant asserts she was suffering from at the material times.

4. Direct disability discrimination - s13 EqA

- 4.1. Did the Respondent know, or ought it to have known, that the Claimant suffered from a disability namely long Covid, fibromyalgia and back pain?
- 4.2. Did the Respondent do the following things:
 - 4.2.1. On three occasions between 7 – 23 April 2023, the Claimant asked Patrick Ferguson ("**Mr Ferguson**") if she could work from home however these requests were refused "in circumstances where other people made similar requests which were allowed".
 - 4.2.2. During a meeting on 25 August 2023, Mr Ferguson treated the Claimant in a hostile way making remarks along the lines of "is everyone against the Claimant?"
 - 4.2.3. On 28 August 2023, when the Claimant refused to attend work on her day off, Mr Ferguson reacted with hostility
 - 4.2.4. Between 29 – 31 August 2023, Mr Ferguson made the Claimant attend an assessment which was unduly challenging.
 - 4.2.5. Between August – September 2023, Mr Ferguson made the Claimant work unsupervised.
 - 4.2.6. Between 30 November 2022 – 4 October 2023 in various emails, the Claimant asked for a laptop to enable her to work and followed up this request in person on 30 October 2023 but her requests

were refused or ignored.

4.2.7. On or around 30 October 2023, the Claimant's request to have an Occupational Health referral was refused.

4.2.8. Mr Ferguson caused or encouraged the air conditioning in the office to be turned onto an unduly cold setting in October 2023 in order to discomfort the Claimant.

4.2.9. Mr Francis would not let the Claimant have backdated holiday pay from the holiday year ending 31 March 2023.

4.2.10. In or around April/ May 2023, Mr Ferguson told the Claimant that she was cursed during training.

4.2.11. The Claimant's dismissal.

4.3. Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else who did not share the Claimant's protected characteristic (disability) was treated. There must be no material differences between that other person's circumstances and the Claimant's, except for the existence of the protected characteristic. If there was nobody in materially the same circumstances as the Claimant, the Tribunal will decide whether the Claimant was treated worse than someone else who did not share their protected characteristic but was otherwise in materially the same circumstances would have been treated.

4.4. The Claimant's hypothetical comparator is:

4.4.1. a woman

4.4.2. who had been employed by the Respondent since 14 Sep 2020 as a Cancer Data Officer

4.4.3. who had been absent due to sickness for 15 months from Dec 2021 to April 23

4.4.4. who returned to work in or around April 2023 after the new Epic system had gone live

4.4.5. who when she returned to work in April 23 had not been assessed as competent on the new Epic system

4.4.6. who was then absent due to sickness again between May and November 2023 (in accordance with the sick notes numbered 11-19 in the Chronology) so that she only worked 36 days in those nine months (i.e.

with about a 14% attendance rate)

4.4.7. albeit with a different disability to C, such as, for example, (i) cancer (ii) depression or (iii) Chronic Fatigue Syndrome.

4.5. If there was less favourable treatment, was the less favourable treatment because of the Claimant's disabilities?

5. Failure to make reasonable adjustments – s20 and s21 EqA

5.1. Did the Respondent know, or should it ought to have known, that the Claimant suffered from a disability, namely long Covid, fibromyalgia and back pain?

5.2. Did the Respondent operate the following provisions, criteria or practices:

5.2.1. Require its staff, including the Claimant, to use the office furniture which had already been provided.

5.3. Did the PCP put the Claimant to a substantial disadvantage when compared to non-disabled employees as follows: it worsened the Claimant's backpain and effected her concentration

5.4. Was the Claimant placed at a substantial disadvantage when compared to non-disabled employees as follows: it worsened the Claimant's backpain and effected her concentration

5.5. If so, would it have been reasonable for the Respondent to make an adjustment, namely to provide her with a specialised office chair? The Claimant alleges that such a chair was requested from Mr Ferguson on 9 November 2020, 16 March 2021, 11 February 022, and (from Jo Chapness) on 10 October 2023.

5.6. The tribunal may take the following into account:

5.6.1. the extent to which the adjustment would have ameliorated the disadvantage;

5.6.2. the extent to which the adjustment was practicable;

5.6.3. the financial and other costs of making the adjustment, and the extent to which the step would have disrupted the Respondent's activities;

5.6.4. the financial and other resources available to the employer; and

5.6.5. the nature of the employer's activities and the size of the undertaking.

5.7. If the adjustments were reasonable, did the Respondent fail to make them?

6. Discrimination arising from a disability – s15 EqA

6.1. Did the Respondent know, or should it ought to have known, that the Claimant suffered from a disability, namely long Covid, fibromyalgia and back pain?

6.2. Did the Respondent treat the Claimant unfavourably by:

6.2.1. On three occasions between 7 – 23 April 2023, the Claimant asked Mr Ferguson if she could work from home however these requests were refused "in circumstances where other people made similar requests which were allowed".

6.2.2. During a meeting on 25 August 2023, Mr Ferguson treated the Claimant in a hostile way making remarks along the lines of "is everyone against the Claimant?"

6.2.3. On 28 August 2023, when the Claimant refused to attend work on her day off, Mr Ferguson reacted with hostility.

6.2.4. Between 29 – 31 August 2023, Mr Ferguson made the Claimant attend an assessment which was unduly challenging.

6.2.5. Between August – September 2023, Mr Ferguson made the Claimant work unsupervised.

6.2.6. Between 30 November 2022 – 4 October 2023 in various emails, the Claimant asked for a laptop to enable her to work and followed up this request in person on 30 October 2023 but her requests were refused or ignored.

6.2.7. On or around 30 October 2023, the Claimant's request to have an Occupational Health referral was refused.

6.2.8. Mr Ferguson caused or encouraged the air conditioning in the office to be turned onto an unduly cold setting in October 2023 in order to discomfort the Claimant.

6.2.9. Mr Francis would not let the Claimant have backdated holiday pay from the holiday year ending 31 March 2023.

6.2.10. In or around April/ May 2023, Mr Ferguson told the Claimant that

she was cursed during training.

6.2.11. The Claimant's dismissal.

6.3. Did the following things arise in consequence of the Claimant's disability:

6.3.1. The Claimant's sickness absence;

6.4. Was the unfavourable treatment because of any of those things?

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

6.5.1. That it needed to ensure the Claimant had the necessary training to deal with patient data she was required to organise as part of her role and this was not able to be done without her working from the office to receive this training.

6.6. The Tribunal will decide in particular:

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

6.6.2. could something less discriminatory have been done instead; and

6.6.3. how should the needs of the Claimant and the Respondent be balanced?

7. Harassment related to disability – s26 EqA

7.1. Did the Respondent subject the Claimant to the following treatment:

7.1.1. On three occasions between 7 – 23 April 2023, the Claimant asked Mr Ferguson if she could work from home however these requests were refused "in circumstances where other people made similar requests which were allowed".

7.1.2. During a meeting on 25 August 2023, Mr Ferguson treated the Claimant in a hostile way making remarks along the lines of "is everyone against the Claimant?"

7.1.3. On 28 August 2023, when the Claimant refused to attend work on her day off, Mr Ferguson reacted with hostility.

7.1.4. Between 29 – 31 August 2023, Mr Ferguson made the Claimant

attend an assessment which was unduly challenging.

- 7.1.5. Between August – September 2023, Mr Ferguson made the Claimant work unsupervised.
- 7.1.6. Between 30 November 2022 – 4 October 2023 in various emails, the Claimant asked for a laptop to enable her to work and followed up this request in person on 30 October 2023 but her requests were refused or ignored.
- 7.1.7. On or around 30 October 2023, the Claimant's request to have an Occupational Health referral was refused.
- 7.1.8. Mr Ferguson caused or encouraged the air conditioning in the office to be turned onto an unduly cold setting in October 2023 in order to discomfort the Claimant.
- 7.1.9. Mr Francis would not let the Claimant have backdated holiday pay from the holiday year ending 31 March 2023.
- 7.1.10. In or around April/ May 2023, Mr Ferguson told the Claimant that she was cursed during training.
- 7.1.11. The Claimant's dismissal.

7.2. If so, did the treatment amount to unwanted conduct?

7.3. Was the unwanted conduct related to the Claimant's disabilities, namely long Covid, fibromyalgia and back pain?

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

The Tribunal will take into account: (1) the Claimant's perception, (2) the other circumstances of the case, and (3) whether it was reasonable for the conduct to have that effect on the Claimant.

8. Remedy for unfair dismissal

8.1. The Claimant seeks re-engagement by the Respondent:

- 8.1.1. is it practicable for the Respondent to comply with an order for re-engagement; and/or
- 8.1.2. did the Claimant cause, or contribute to, their dismissal and, if so, would it be just to order re-engagement?

- 8.2. What basic award is payable to the Claimant, if any?
- 8.3. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
- 8.4. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 8.4.1. what financial losses has the dismissal caused the Claimant;
 - 8.4.2. has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job;
 - 8.4.3. if not, for what period of loss should the Claimant be compensated;
 - 8.4.4. is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason;
 - 8.4.5. if so, should the Claimant's compensation be reduced? By how much;
 - 8.4.6. did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply;
 - 8.4.7. did the ACAS Code of Practice on Dismissal and Re-engagement apply;
 - 8.4.8. did the Respondent or the Claimant unreasonably fail to comply with it;
 - 8.4.9. if so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%;
 - 8.4.10. if the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct;
 - 8.4.11. if so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion; and
 - 8.4.12. does the statutory cap of fifty-two weeks' pay or £105,707.00 apply?

9. Remedy for discrimination

- 9.1. What financial losses has the discrimination and harassment caused the Claimant?

- 9.2. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 9.3. If not, for what period of loss should the Claimant be compensated?
- 9.4. What injury to feelings has the discrimination or harassment caused the Claimant and how much compensation should be awarded for that?
- 9.5. If the Claimant's employment was terminated as a result of discrimination/harassment, is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 9.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 9.7. Did the Respondent or the Claimant unreasonably fail to comply with it?
- 9.8. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
- 9.9. Should interest be awarded? How much?
- 9.10. What recommendation does the Tribunal make in relation to the discrimination? In particular, what are the specified steps the Respondent must take to obviate or reduce the adverse effect on the Claimant? What is the specified period for taking those steps?

10. Unauthorised deductions from wages – s13 ERA

- 10.1. Did the Respondent make the following deductions from the Claimant's wages:
 - 10.1.1. Deductions each month between February 2023 – January 2024 in that the Claimant submits she was paid incorrectly for that period.
- 10.2. Were the deductions made without authorisation? The Tribunal will determine whether:
 - 10.2.1. any deduction was required or authorised by statute;
 - 10.2.2. any deduction was required or authorised by a written term of the Claimant's contract;
 - 10.2.3. the Claimant had a copy of the contract or written notice of the contract term before the deduction was made;

10.2.4. the Claimant agreed in writing to the deduction before it was made;
and

10.2.5. how much is the Claimant owed?

10.3. Did the Respondent's payment of the Claimant's salary between February 2023 – January 2024, if incorrect, amount to a breach of contract?

11. Holiday Pay

11.1. What was the Claimant's accrued but untaken holiday entitlement as of 31 March 2023?

11.2. What was done with this accrued but untaken holiday pay? The Respondent asserts that the Claimant was permitted to use 10 days to extend her period of absence and permitted to carry over the remaining 10 days to the 2023/2024 annual leave year.

11.3. Was the Claimant entitled to carry this over or receive payment in lieu of this?