EMPLOYMENT TRIBUNALS

Claimant: Ms. M October

Respondent: Royal Surrey NHS Foundation Trust

Heard at: London South, by hybrid

On: 23, 24, 25, 26 and 27 March 2026

Before: Employment Judge Cawthray
Ms. G Mitchell
Ms. S Chacko

Representation
Claimant: Mr J Nthini, representative
Respondent: Mr. B Jones, Counsel

RESERVED JUDGMENT

1. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

2. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

FULL REASONS

Background, evidence and procedure

1. The Claimant submitted her claim to the employment tribunal on 10 December 2023. This followed ACAS Early Conciliation between 2 October and 13 November 2023.

2. A case management preliminary hearing took place before Employment Judge Lumby on 3 December 2024.

3. A further case management preliminary hearing took place on 4 April 2025 by Employment Judge McClaren.

4. The hearing had been listed to take place in Croydon. Due to resource the hearing was converted to video, at short notice. Unfortunately, the Claimant did not receive notice in time and the Claimant and her representative attended the Tribunal building. The hearing took place by way of hybrid arrangements. The Claimant and her representative were in the Tribunal building each day and the Respondent's team and the Tribunal panel all attended by video.

5. At the start of the hearing the Employment Judge discussed any reasonable adjustments that were required. The Claimant had already written to the Tribunal in relation to adjustments sought in relation to dyslexia. Although the Respondent did not accept there was any evidence of dyslexia before the Tribunal it was agreed that all questions asked of the Claimant would be short and direct and she could have a pen and paper available. In relation to Stewart Walker it was considered an appropriate adjustment for cross-examination questions to be put to him and respondent to in writing. Regular breaks were taken throughout this five day video hearing.

6. The parties had provided a bundle of 807 pages. However, there was a separate section of small additional pages provided by email.

7. The Respondent had provided a chronology, but the Claimant did not agree the contents.

8. The Claimant had provided a 35-page witness statement.

9. The Respondent called, and provided witness statements, for the following witnesses:

Mr. John Tenny – Radiotherapy Satellite Centre Manager based at Redhill. Claimant's line manager.

Helen Burland – Professional Head of Radiography

Laura Turner – Acting Professional Head of Radiography

Praveen Gopi – Senior Radiographer – Band 6

Stewart Walker – Senior Therapeutic Radiographer – Band 6

Karun Palani – Team Leader Radiographer – Band 7

Nawda Fazel – Senior Radiographer – Band 7

10. The Tribunal considered the Respondent's witnesses to be clear and straightforward.

11. At the start of the hearing the Employment Judge discussed the issues with the parties. The issues had already been discussed at an early case management stage, and a copy of the agreed list of issues had been sent to the Tribunal in May 2025. A full discussion about the issues took place, and the Claimant confirmed the issues as set out below were the complaints she was seeking to bring.

12. The parties confirmed the position in relation to disability. The Claimant relies on lupus, recurrent depressive disorder (of which anxiety is a symptom); and hypothyroidism. The Respondent

accepts these were disabilities at the material times but does not accept the Respondent had knowledge of disability.

13. The Employment Judge explained that it was necessary to carefully timetable the hearing given the large number of witnesses and number of issues. Unfortunately, the evidence did not conclude until the last day. The parties, on agreement, provided written submissions. The Tribunal met on 18 and 19 June 2026 to deliberate. This was the first available date that the Tribunal could meet.

14. The written submissions have been considered in full.

Issues

15. The issues set out below use the same numbering as in the final list of issues for ease of reference. Given the concession on disability it was not necessary for the Tribunal to determine whether or not the Claimant was disabled.

Time Limits (section 123 Equality Act 2010 ('EqA')

1. The Claimant contacted ACAS on 2 October 2023 and was issued with an ACAS Early Conciliation certificate on 13 November 2023. She presented her ET1 on 10 December 2023. The Respondent contends that any act / omission complained of that took place on or before 2 July 2023 is prima facie out of time.

2. Did any of the acts / omissions complained of take place on or before 2 July 2023?

3. If so, do the acts / omissions complained of amount to conduct extending over a period, where the last act complained of is in time?

4. If not, in respect of the Claimant's claims under EqA, is it just and equitable to extend the time limit to consider any of the Claimant's claims?

Disability (section 6 and schedule 1 EqA)

5. The Claimant relies on the following disabilities:

a. Lupus;

b. Recurrent depressive disorder (of which anxiety is a symptom); and

c. Hypothyroidism.

6.The Respondent accepts that the Claimant was disabled for the purposes of EqA by virtue of these conditions at the relevant time (27 March 2023 to 18 August 2023).

7. Did the Respondent know, or ought it reasonably to have known, that the Claimant was disabled at the relevant times? The Respondent denies knowledge of the Claimant's conditions at paragraph 5 above.

Discrimination Arising from Disability (section 15 EqA)

8. Did the Respondent treat the Claimant unfavourably?

The Claimant relies on the following treatment:

a. The Claimant was falsely reported by Gabrielle Clark, Senior Radiographer on 2nd April 2023, which led to Mr Tenny reprimanding her on 3rd April 2023, at which time she was also reprimanded for calling another Senior Radiographer (Nashett Smith) in an emergency on 2nd April 2023;

b. The Claimant had unfair reports about her having done First Day Chats in or around June 2023, without competencies being signed off, which was escalated to the Service Head, despite having been asked to do it by a Senior and being told that there was no specific training;

c. Karun Pulani, Senior Radiotherapist, was overbearing in supervision and micro-managed the Claimant on the Unit. For example, on 9th June 2023, Mr Pulani stood less than 30cm away from her;

d. There was no one-to-one guidance on completing training competencies (before 19th June 2023);

e. The Claimant's completed tasks and progress were unacknowledged: Steward Walker and Praveen Gopi (both Senior Radiographers) often refused to sign completed competencies. Nawda Fazel, a Senior Radiographer, refused to sign an entry and reprimanded the Claimant for not being in the room doing set-ups;

f. At the meeting on 20th June 2023, Helen Burland, Head of Radiotherapy Services discussed reported concerns about the Claimant, about which the Claimant had had no previous warning (other than an email received on 15th June 2023 inviting the Claimant to the meeting);

g. The Claimant was reported by Ella Thunder, agency Senior Radiographer, by email on 26th June 2023, for allegedly not accepting feedback, being rude to staff and patients and lacking understanding, skills and knowledge;

h. The Claimant was criticised by John Tenny in the probationary meeting for allegedly not accepting feedback, being rude to staff and patients and lacking understanding, skills and knowledge;

i. The Claimant was removed from the Unit for two weeks for a no harm incident on 27th June 2023;

j. The Claimant was required to undergo a clinical assessment on 11th July 2023; and

k. The Respondent determined that the Claimant had failed the clinical assessment on 11th July 2023.

9. If so, did such treatment amount to unfavourable treatment?

10. If so, was that treatment because of something arising in consequence of the Claimant's disabilities?

The Claimant says the following things arise in consequence of her disabilities:

a. In respect of lupus: fatigue, difficulties with concentration, depressed mood, brain fog, forgetfulness, memory lapses, and slowed thinking.

b. In respect of hypothyroidism: fatigue, difficulties with concentration, depressed mood, brain fog, and anxiety; and

c. In respect of recurrent depressive disorder: harder to focus while conducting image reviews or under performance management.

11. Did the Respondent know, or could it reasonably have known, that the Claimant had the disabilities?

12. If so, can the Respondent show that the alleged treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the Respondent is to ensure that the needs, health, welfare and safety of patients and staff in the service are met, and to ensure the efficient operation of the Respondent's services.

<u>Failure to Make Reasonable Adjustments (sections 20-22 EqA)</u>

13. Did the Respondent have the following provision, criterion or practice ("PCPs"):

a. Requiring radiographers to pass a probationary period, during which permanent monitoring and feedback was encouraged [PCP1]?

b. Requiring staff to undertake a clinical assessment as a means to assess performance, where there are performance concerns [PCP2]?

[The Respondent accepted PCP1 and PCP2 were capable of being PCPs.]

14. If so, did the alleged PCP(s) put the Claimant at a substantial disadvantage in relation to that relevant matter in comparison with persons who are not disabled? The substantial disadvantage relied on by the Claimant is that:

a. The Claimant felt fatigue (physically and mentally), anxiety, brain fog and depression, which was detrimental to the Claimant's ability to concentrate and made doing daily things difficult.

15. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant:

a. Was disabled; and

b. Was likely to be placed at the disadvantage by the Respondent's PCP(s)?

16. If so, what steps could have been taken to avoid the disadvantage?

The Claimant suggests the following steps could have been taken:

a. Providing weekly one to one managerial support throughout the probationary period [PCP1]; and/or

b. Providing the Claimant with sufficient time to prepare ahead of the clinical assessment (more than one and a half days) [PCP2].

17. Would the steps relied on by the Claimant have avoided the disadvantage?

18. Was it reasonable to expect the Respondent to take those steps in the circumstances?

<u>Remedy</u>

19. If the Claimant succeeds in any of her claims, what compensation would it be just and equitable to award?

a. Has the Claimant suffered injury to feelings?

b. Has the Claimant suffered any financial loss as a result of any discrimination found proven? If so, has the Claimant mitigated her losses?

c. Did the Respondent or the Claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, should the award be increased or reduced to reflect this?

d. Does the Tribunal consider it appropriate to make recommendations pursuant to s.12 EqA? If so, what is/are the Tribunal's recommendation(s)?

Findings of Fact

9. The findings of fact were made on the balance of probabilities, as far as necessary to determine the issues. Where a document is referenced, the complete document has been considered, but it is not always proportionate to repeat the contents in full or summarise it in detail. The findings of fact are set out in chronological order as far as practicable, but it has not been possible to adopt a strictly chronological account.

Background

10. The Claimant was employed by the Respondent as a Therapy Radiographer between 27 March and 18 August 2023.

11. The Claimant qualified as a radiographer in Cape Town in 1990. The Claimant first worked as a radiographer in the UK in 2001.

12. In the Claimant's witness statement, she states she has *"completed two MSc post graduate courses at Sheffield Hallam University"* in 2007 and 2009. In oral evidence the Claimant confirmed that she had not actually completed two master's degrees but had completed two modules.

13. The Claimant applied to the Respondent for a Band 5 Radiographer role on 20 July 2022. The post was advertised as a full-time role. There were several vacancies in the Radiography department at the time, and the team was short staffed.

14. The Claimant completed the application form. At the top of the application form it states:

"Disability adjustment requested: Dyslexia. Systemic Lupus with Sjogrens Allow sufficient time to articulate an answer. A glass of water to relieve dry throat."

15. The application form does not contain any reference to hypothyroidism or recurrent depressive disorder with anxiety. At the end of the application form there is a Monitoring Form and one of the questions sets out the definition of disability and asks:

"According to the definition of disability do you consider yourself to have a disability?".

16. The Claimant answered:

" I do not wish to disclose whether or not I have a disability." [page 273]

17. The application form shows that in recent years the Claimant had undertaken some short periods of radiography locum work and that she has undertaken a number of skills and development sessions, including a return to practice placement at the Respondent. However, her last substantive radiography role was around 2010.

18. The Claimant had engaged in refamiliarization (return to practice) sessions at the Respondent in 2021 and 2022 and was registered with the Health Care Professions Council.

Pre-employment OH assessments

19. The Occupational Health provider used by the Respondent is a third-party external provider. The Respondent made the Claimant an offer of employment that was subject to satisfactory references and occupational health assessment.

20. The Claimant was assessed by Dr. Khan of Occupational Health at some point on or before 4 November 2022. In a letter dated 4 November 2022 from Occupational Health to the Respondent's recruitment team Dr. Khan set out his views. The key elements are copied below: [*Page 261]*

"She has several health issues which can cause and do cause significant levels of fatigue. They can also affect specific joints however she has practiced this role before and does not feel it would impact her ability given that the role does not involve any manual handling / moving of any heavy equipment.

I am aware that the position will involve a significant commute for her and while this is not itself a medical issue, I suspect she will struggle to work 5 days a week given her fatigue and existing medical problems. If there was some way this could be considered on a part time basis particularly no more than 3 days a week then there is a much greater chance that she could cope and consistently be able to attend.

If there is no option, then there is still a possibility she could manage 5 days, but it is much less likely to be successful, though of course she will try.

Therefore, she is fit for the role and the main adjustment would be to significantly reduce the number of working hours that she has to work per week. On balance she is probably still fit for the role if it is a 5-day role but carries a greater risk of her struggling and of seeing further absence and difficulties.

Her health issues are likely to meet the Equality Act criteria for disabilities as they are long term and significant impairments."

21. The letter does not specify the health conditions.

22. However, at page 801 of the Bundle there is a note made by Occupational Health. The note records information the Claimant provided Occupational Health in a telephone consultation, it records that the Claimant informed Occupational Health that she had Systematic Lupus and Hypothyroidism and was on particular medications.

23. As noted above, this information was not reflected in the report provided to the Respondent's recruitment or radiography management teams.

24. Following receipt of the letter from Occupational Health the Respondent, via Mr. John Tenny and

the Claimant discussed the report. The Respondent's management team were concerned because the report referred to the role not involving any manual handing, but the role did involve manual and physical aspects.

25. The Respondent queried the contents of the report with Dr. Khan and Mr. Tenny discussed the matter with the Claimant. In an email reply, Dr Khan said:

"I cannot tell you her actual diagnoses, but I can say that there are several conditions, they are inflammatory in nature and they can cause widespread joint pain and cause fatigue."

26. It went on to say:

"If the role involved significant manual handling or at least involves her potentially having to manually handle equipment on her own, then she is going to struggle and I would say she is unfit for that." [270]

27. On 11 November 2022 Mr. Tenny emailed the Claimant and notified her that based on the Occupational Health report the Respondent could not offer her the job. [*269]* The Claimant replied with a detailed email on 15 November 2022 setting out her experience and physical abilities and requesting a further referral to Occupational Health. The Claimant referred to living with lupus and being fit enough to undertake middle to long distance running.

28. On 30 November 2022 Ms. Helen Burland, Professional Head of Radiotherapy, wrote to Occupational Health requesting clarification, raised a number of questions and provided a copy of the job description and the information provided by the Claimant in the above mentioned emails. *[271]*

29. On 2 December 2022, Dr. Khan of Occupational Health, physician emailed Ms. Burland setting out an updated opinion based on information provided about manual handling. *[275]*

"I have read MO's additional statement as well your list of job requirements. MO's list fails to mention that she spoke to me about having severe fatigue and as a result has to pace herself. It also does not mention the right wrist pain and finger pain that she has.

I take your point that working in a supernumerary capacity is not always the best indicator of work capability, though at least the role was similar.

The degree of manual handling of patients and equipment does concern me. An ideal solution would be a trial, where over the course of a week it would become clear to yourselves and to MO if she was capable for the role.

The part time suggestion is partly to do with her energy levels and partly to do with the long commute she will have from Kent. If you could accommodate part time working then long days will be difficult for her to sustain but she could possibly manage 2-3 consecutive days (to minimise the travel) of up to 8.

It is possible that she can manage the role, but it is also very possible that she will not. The fatigue and the wrist / finger pains will be a factor, there is no doubt about that. Had the role involved minimal manual handling then she would have been more likely than not to cope, as it stands, she is more likely than not to NOT cope with the role full time. Hence a trial would help her case and also working part-time would tip the balance towards her being able to cope."

30. Between 5 and 8 December 2022 Ms. Burland exchanged several emails with Occupational

Health in an attempt to try and understand the Claimant's position. *[274*]

31. The Respondent referred the Claimant for a further Occupational Health assessment. The Claimant attended a second assessment with Dr. Khan at Occupational Health on 16 December 2022*. [280]* Following the assessment Dr. Khan wrote to the Respondent as set out below:

"I undertook a second video consultation with Michelle October on December 16th 2022. Previously we discussed her different health issues and their impact on her, including her fatigue and various joint pains. Specifically, she had spoken about finger/wrist pain plus, neck pain and lower back pain. She tells me that she does not have any wrist or finger pain, and that the neck and lower back cause her no restrictions at all and therefore she feels completely able to complete the role. We discussed the job description and all the manual handling requirements, and she feels that she could handle all of the patient handling and the equipment handling etc without any problems.

Based on her currently reporting no symptoms and based on her telling me that the wrist, neck and back have improved significantly, I am happy to declare her fit for work, with some restrictions.

As noted in my most recent email, she is likely to struggle working five days a week, but if you can accommodate three days of eight hours each, then she should be fit to do that. The three days could be consecutive, or they could be split, please discuss this with her and of course it is dependent on your departmental needs.

She should require no actual adjustments to the role itself. Based on her current symptoms reporting and not based on the previous reports (of symptoms), I can declare her fit for work to start any time from now."

32. The clinical notes of the appointment are at page 804 of the Bundle, but the Respondent only had sight of these documents after the commencement of this Employment Tribunal claim.

33. As the Respondent considered the two reports from Dr. Khan were very different it asked for a third assessment to take place.

34. The Claimant attended a third assessment with Occupational Health on 21 February 2023. A Medical Certificate of Fitness to Work produced by Occupational Health stated the Claimant was fit to work and that no adjustments were likely to be required. *[283]*

35. Following this assessment, the Respondent management team considered the position in conjunction with Occupational Health. Ms. Burland emailed Occupational Health on 24 February 2023 and queried that the first two reports stated the Claimant would need workplace adjustments but the latter did not. *[286]*

36. On 27 February 2023 the Head of Clinical Performance at Occupational Health replied and said: *[286]*

"This employee has had three assessments, and it appears that her condition has improved

over time. I can see no reason why the most recent OHP report would not be accurate, as the OHP had all information available including the past reports and notes to discuss in the appointment."

Start of employment

37. The Claimant started working at the Respondent's Redhill site on 27 March 2023. Mr. Tenny was the Claimant's line manager. On joining the Claimant she was assigned a mentor, Samantha Allison – Team Leader, and given an individual induction plan. *[295]* The induction pack also provides links and signposting to other documents that the Claimant was required to read and sets out the requirements that must be met in the probation period. The Claimant had a six month probation period.

38. Although the last Occupational Health report had stated that no adjustments were required, the Respondent permitted the Claimant to work 0.67 full-time equivalent, namely working 3 days per week 8.00am to 5.00pm.

39. The Claimant had an induction period, which was 40 days to reflect that she worked part time. During the induction period the aim is primarily to learn the role.

40. The Ionising Radiation Medical Exposure Regulations require that employees do not take part in exposure tasks until they have had competence confirmed and required in the relevant database, the Respondent uses Q-pulse. This means that staff in probation periods work is supervised. This is often referred to as working supernumerary.

41. In simple terms, the Claimant had booklets that set out the various competencies that she was required to meet. The booklets contains an imaging induction checklist. The Claimant was required to work through the booklet to demonstrate she had the necessary skills to be deemed competent. The process required two stages of signing. The Claimant was required to detail the patient and form of treatment ask supervisors to sign against that particular patient treatment. The Claimant must then obtain a signature against the overall competency, and there are a range of different competencies. Obtaining a signature for patient treatment is not the same as a competency being signed off.

42. On 2 April 2023 the Claimant sent Nashett Smith a text message at approximately 9.00pm in relation to her shift time the following day. The Claimant's oral evidence at she considered herself to be in an emergency as she was delayed getting home and needed sufficient rest before starting work the next morning.

43. The Radiography Team have an unwritten policy to not contact work colleagues outside of work hours and to use a team WhatsApp chat for work related matters. The Claimant was not aware of this as she had only recently joined the Respondent.

44. Mr. Tenny's evidence is that Ms. Clarke and Ms. Smith informed Mr. Tenny that the Claimant had contacted them the previous evening regarding her shift and asked him to remind the Claimant of the policy.

45. The Claimant's witness statement does not detail any contact or concern regarding Ms. Clarke reporting her on 2 April 2023. The Claimant, at paragraph 27 of her witness statement sets out in interaction with Ms. Clarke on 14 April 2023.

46. There is no documentary evidence that the Claimant contacted Ms. Clarke on 2 April 2023, save for paragraph 30 of Mr. Tenny's witness statement. Mr. Tenny's evidence it that both Ms. Clarke and Ms. Smith raised concern with him about out of ours contact. There is no evidence at all about any false reporting.

47. On balance, noting Mr. Tenny's very clear account, on this and in general, his evidence is accepted.

48. On 3 April 2023 Mr. Tenny spoke with the Claimant, in private, and explained the practice of the team not contacting colleagues outside of working hours was encouraged for health and well-being purposes. Mr. Tenny left the conversation feeling that the Claimant had understood the discussion.

49. On balance, taking all the evidence into account, including the contents of the email dated 11 April 2023 detailed below, the Tribunal found that Mr. Tenny did not reprimand the Claimant, but explained the policy.

50. On 11 April 2023 the Claimant met with Mr. Tenny on a one to one basis. Following the meeting Mr. Tenny emailed the Claimant with a summary of the discussions that they had. In relation to out of hours contact the email states: *[307]*

"We discussed the generic group WhatsApp, which you have requested not to join, it is optional but we discussed how the main aims of this are to not put work pressure on individuals outside of work hours to maintain a healthy work-life balance. We have a very strict policy about this as a good work life separation is essential for staff mental health. We also discussed how this group is also used to share shifts. It is the individuals responsibility to know their shifts and so if you do not join the group it will be up to you to have accurate shifts without breaking the policy about not contacting staff outside of work hours.

We discussed how there will be some emergency exceptions to the contact rule, but they should be emergency situations."

51. On 14 April 2023 the Claimant met Emma Morris, Practice Educator Lead, to discuss progress and objectives. Following the meeting Ms. Morris emailed Mr. Tenny with an update. [311]

52. Within the email Ms. Morris relayed some concerns:

"The concerns I have today when discussing Michelle's progress is her lack of appreciation of the impact having a career break will have on her current skill set. Michelle was quite defensive and a little non receptive to guidance today. Our practice has evolved greatly from when she was last in a relevant post in 2011. Our clinical skills have rapidly evolved. We have more autonomy to trouble shooting and soft tissue matching for example. Whilst she has expressed her treatment skills are progressing and she is "pressing buttons" she needs to still gain those key skills to be deemed competent as a second person. She doesn't seem to respond to feedback well. She deflects and blames colleagues. Guidance is part of any induction plan to ensure staff achieve the levels of competence required. At the moment the feedback received from colleagues reiterate

she does not yet have the trouble shooting skills required to be deemed competent. This should

come with support and time. By completing her prostate imaging workbook, she may start to appreciate these aspects further.

I also have concerns over Michelles approach to staff and her communication skills. She was slightly passive aggressive in her mannerisms towards me today. The effect caused me to feel naturally defensive of our processes. She was quick to blame the team working around her. This approach was evident when we discussed the areas to be addressed and the next steps in her development. To ensure she understood the reason for the induction package and processes I have thoroughly explained the reason for standardised processes. The gold standards are there to meet legislative guidelines and to ensure all staff understand OUR processes and to prevent incidences.

Her key issues from my point of view are her lack of self-awareness. She has repeatedly
expressed her previous experience at length. I think she feels she needs less input from staff due to this. I explained that the trouble with this approach is our rapid evolving technology and techniques over the last 12 years. There seems to be an element of ego in her approach. This isn't unmanageable but definitely present. She doesn't question she challenges in a way that makes the recipient feel quite defensive. I was happy to interact with her despite this, however I wonder how more junior staff might respond to this approach. I can envision some staff members may find it difficult guiding her during training. I think some of the reason for her approach is self-preservation as she has had a bad experience previously from another department. This will need to be monitored as she is likely to need additional support to enable her to gain skills and integrate within the team. She can be rather blunt which is partly cultural but may need to be monitored and addressed if it becomes problematic. Her body language was a little negative today as well. I worry that deep down she isn't coping too well with the transition to becoming a professional. I will definitely follow up and meet with her regularly to check in with her. I have prior experience of these issues with newly qualified staff members.

I have tried to make Michelle feel at ease with her progress and provide positive reinforcement. I have congratulated her on her progress and explained she has achieved most of what we expected. I will touch base with her again. I think if we can address her key issues early on, she will become a great radiographer, however her induction will need more support to ensure these traits cease. I think this should be an easy win with a team approach in a positive manner."

53. The Claimant also met with Mr. Tenny on 14 April 2023. The meeting lasted 75 minutes. Mr. Tenny sent a summary email to the Claimant on 17 April 2023. *[313]*

54. Within the email Mr. Tenny set out the discussions about potential miscommunication with other team members regarding the Claimant's experience and how she wished to move forward and that the discussion dealt with the Claimant's understanding her past performance and self-awareness.

55. On 17 April 2023 Mr. Pulani undertook an Aria training session with the Claimant.

56. On 19 April 2023 Ms. Smith emailed Mr. Tenny with feedback on the Claimant's performance. [*325 and 327*] The email is balanced, and suggests ways to achieve an improvement.

57. The Claimant met with Mr. Tenny on 21 April 2023. *[328]* Mr. Tenny emailed the Claimant after the meeting. The email records a more positive week, but with one incorrect patient set up. At the meeting Mr. Tenny spent some considerable time working through an image with the Claimant and said he would like to meet each Friday to give the Claimant additional imaging guidance.

58. On 25 April 2023 Ms. Burland emailed Mr. Tenny and relayed a discussion she had with the Claimant about a patient imaging matter earlier that day. The email records that during the discussion the Claimant told Ms. Burland that she had dyslexia, and that Ms. Burland observed this had not been disclosed in the Occupational Health reports and asked the Claimant to consider if it was impacting her learning in order to be able to discuss with Mr. Tenny. *[330]* Ms. Morris set out a number of clear tasks and actions required. *[332]*

59. On 5 May 2023 the Claimant emailed Samantha Allison in relation to her shifts in the weeks ending 19 and 26 May 2023 and requested to work 9.00am to 6.00pm on Mondays and 8.00am to 5.00pm on Fridays.

60. On 11 May 2023 the Claimant called Ms. Burland and explained she felt she was not having her competencies signed off. *[337]*

61. On 11 May 2023, following a request made by Mr. Tenny, Praveen Gopi emailed Mr. Tenny with feedback on the Claimant. *[334]*

- *I don't know what to say for her, my expectations was high for her, I am trying to help her but it is not working.*
- *I know I needs to be more patience when dealing with her but sometimes I get irritated,*
- *She does need more hands-on practice on machines especially she runs and making delay in ques.*
- *I am really sorry I feel seniors should have a meeting with her regularly*
- *Sorry John."*

62. Following the Claimant's email dated 5 May 2023 further emails were exchanged about arrangements, the first noting that they could manage the request for the Friday but not the Monday. The Claimant sent an email on 12 May 2023 and within it she referred to living with a long-term disability that causes chronic fatigue. The email also set out details about her commute to work and referred to making a reasonable adjustment of working a 9.00am to 6.00pm shift on Mondays. *[338]*

63. Ms. Allison forwarded the email to Mr. Tenny, who then raised the situation with Ms. Burland. Mr. Tenny considered this referred to lupus. The Claimant was moved to a 9.00am-6.00pm shift on Mondays as an adjustment.

64. On 15 May 2023 Miriam Rashid, Team Leader, emailed to Mr. Tenny. *[341]* Ms Rashid said, in short, that she had concerns about how the Claimant had been undertaking a procedure for a pelvis patient and had asked the second radiographer to take over and that when she gave the Claimant feedback, she was defensive and angry. Ms. Rashied set out that she had concerns about the Claimant's attitude and ability to take constructive feedback.

65. The allegation 8h itself does not set out which probation review meeting this relates to, but in cross examination the Claimant suggested it was about the review meeting on 15 May 2023.

66. On 15 May 2023 a two-month probation period review meeting took place. It was attended by the Claimant, Mr. Tenny and Luise Walter, Operational Manager Imaging Lead. A note of the meeting was produced. During the meeting a range of matters were discussed, including a detailed discussion about the role and competencies. During the meeting Mr. Tenny sought to ensure the Claimant understood that signatures against different tasks was different to completion of an area workbook. Mr. Tenny gave the Claimant feedback on his observation of the Claimant that day. Mr. Tenny explained he did not consider her to be competent and that he felt the Claimant needed to be more self-aware and accept feedback. The meeting lasted 2.5 hours but was not concluded. Mr. Tenny said the aim was to support the Claimant, and would like to meet with her weekly. Mr. Tenny explained the difference between induction and probation, and that the induction period was due to end on 3 July 2023 and the probation period on 27 August 2023. They discussed looking at the Claimant's shift pattern due to her fatigue levels.

67. The Tribunal considered the note of the meeting as whole. It considers Mr. Tenny was seeking to give the Claimant feedback on her performance generally, and her communication. The Tribunal did not consider that he

was criticising her. The Tribunal did not find that Mr. Tenny told the Claimant she was rude to staff or patients.

68. On 17 May 2023 there was a concern raised about the Claimant's alignment of a patient and her ability to accept feedback on the matter. *[346]*

69. On 19 May and 22 May 2023 and on 1 June 203 Ms. Morris emailed the Claimant following up on deadlines and progress. *[351]*

70. The Claimant was off work from 22 May to 30 May 2023 due to work-related stress and fatigue.

71. Towards the end of May/early June 2023 three clinical incidents involving the Claimant were reported to Ms. Burland, namely misidentifying a patient, practise in which an additional image may have acquired and undertaking a First Day chat for which the Claimant did not have competency.

72. The Claimant returned to work on 5 June 2023.

73. A return-to-work meeting took place on 5 June 2023 between the Claimant and Mr. Tenny. *[365]* It was agreed that the Claimant would split her break into two breaks of 10 minutes, and she could sit in a quiet room if needed.

74. On 7 June 2023 Mr. Tenney referred the Claimant to Occupational Health. *[368]* Within the referral Mr. Tenny wrote:

"Staff member has Lupus for which previous OH report recommended no adjustments (0.67 wte hour were given regardless to support). Has recently been signed off by GP for "work related stress and fatigue" from 22/5/23 and returned 5/6/23. Please re-assess fatigue and Lupus.
Has referred to "minor dyslexia" relating to difficulties in learning but from conversation has not had a UK based diagnosis. Has not interfered with previous work. Please assess if likely to impact work.
Staff member has requested to discuss anxiety."

75. On 9 June 2023 the Claimant worked with Karun Pulani. Mr. Pulani was based in Guildford, a different site to that which the Claimant worked at,

but he was covering someone's break when working with the Claimant on this day.

76. The Claimant, as set out in the list of issues, alleges that Mr. Pulani was *overbearing and micro managed her and that he stood less than 30*cm away from her.

77. In her witness statement the Claimant said that she was forced to ask Mr. Pulani for personal space when she was positioning a patient and that later she spoke to him about her health and that he later reported her for being rude. The Claimant does not set out how she says he was overbearing or micromanaged her other than by what she considered to have been an invasion of personal space.

78. In response to cross examination the Claimant did not give any clear response and simply referred to being discriminated.

79. Mr. Pulani, in his witness statement and oral evidence, explains that he asked the Claimant to go to the other side of the treatment bench to see if the lasers matched the Claimant's skin tattoos, and the Claimant did so and raised no concern. After they left the treatment room the Claimant told Mr. Pulani that he should have asked her in advance if he wanted her to move to the other side to set up and asked him whether he knew she had disabilities. He said he did not and had she told him she had a preference to work on a particular side he would have gone to the other side.

80. In order to supervise Mr. Pulani would need to stand close enough to observe the set up. This is standard practice. His evidence is that he did not stand as close as 30cm as had no reason to as the Claimant was on the other side.

81. Mr. Pulani was not aware the Claimant had any health condition or disability until the Claimant told him on 9 June 2023.

82. On balance, taking into account all the evidence, included that set out below, the Tribunal find that Mr. Pulani did not act in an overbearing way, did not micromanage and did not stand within 30cm of the Claimant.

83. Mr. Pulani informed Mr. Tenny about the discussion, as he considered the Claimant had been upset.

84. On 9 June 2023 the Claimant met with Mr. Tenny for the purpose of concluding the probation period review meeting. The meeting lasted 45

minutes but did not conclude in the time available. At the meeting a discussion about accepting feedback and interactions with team members took place. During the meeting the Claimant made comments about her view that Indian men spoke down to women, particularly black women as they assumed they knew nothing. The Claimant said she did not like working with Mr. Pulani and felt he was micromanaging her. Mr. Tenny highlighted additional training that he felt would assist the Claimant. *[373, 380]*

85. On 12 June 2023 the Claimant met with Mr. Tenny, and Ms. Allison, again for the purpose of completing the probation review meeting. The meeting lasted for an hour and at the meeting Mr. Tenny explained that the team were feeding back to him due to the way the Claimant responded to direct feedback. Mr. Tenny gave feedback on his observation of the Claimant's interaction with Vijith. Mr. Tenny explained that, specifically to support the Claimant, a second machine would be opened. The Claimant made reference to being on the spectrum and having dyslexia, but it is recorded as her saying neither were diagnosed and when asked if she wished to be referred to occupational health she declined. Objectives were set to secure improvement, namely: Claimant's attitude in team to improve, completion of e-learning and working directly with Mr. Tenny. Mr. Tenny raised the Claimant's comments made at the last meeting regarding Indian radiographers and explained the Claimant could raise a grievance if she wished. *[377]*

86. As Mr. Tenny did not consider the Claimant had met the standards to pass her probation and a further formal review meeting was arranged for 27 June 2023.

87. A First Day Chat is where a Radiographer speaks with a patient prior to treatment or appointment to explain what to expect and detail the preparation required. First Day Chats can only be undertaken by those with the required competencies. At this stage, the Claimant did not have those competencies.

88. The Claimant says that on 9 June 2023 Ms. Clark asked her to do a First Day Chat and that in response she asked Ms. Clark if there was any specific training and Ms. Clark told her there was no specific training and gave her a checklist. It is not clear if the Claimant undertook a First Day Chat on 9 June 2023.

89. The Claimant said that she was asked by Lorna Hunter, at Guildford, if she was okay to do a First Day Chat and reminded the Claimant to check the boxes.

90. On 13 June 2023 the Claimant undertook a First Day Chat with a patient.

91. The Return to Work Radiographer pack, page 641 of the Bundle, explains that that three observations of First Day Chats must be undertaken and then the probationer must by supervised whilst undertaking briefings, even if they feel comfortable to undertake them. The Claimant did not have this document at the start of employment, but accepted in evidence that she now understands the Respondent had rules regarding First Day Chats.

92. The Claimant has not, in her allegation, specified who she says unfairly reported her. As set out below, Ms. Burland did later discuss the arrangements for undertaking First Day Chats with the Claimant. Ms. Burland, in her witness statement, does not say who escalated this matter to her and in cross examination she said she could not recall but she was the duty manager on the day it was raised.

93. On 15 June 2023, at 16:44, Ms. Burland invited the Claimant to attend an informal meeting scheduled for 20 June 2023. In the email it said: [*Page 5 separate documents]*

    "The purpose of the meeting is to follow up in regards to the outcome of your decision in raising a grievance which John asked you to consider by this date.
    I would like to additionally discuss 3 clinical incident relating to your professional standard of practise."

94. The Claimant replied to Ms. Burland's email on 19 June 2023 and asked for detail regarding the three incidents and said she was not available on 20 June 2023. Ms. Burland replied in relation to potential dates and times and said:

"The 3 clinical incidents, which I believe John has discussed with you and have now been escalated to me are:

1. *Mis-identification of a patient*
2. *Imaging that may have resulted in an additional image being acquired*
3. *Performing a first day chat where you didn't have signed off competency."*

95. The Claimant replied requesting a colleague support her at the meeting and that she had no recollection of Mr. Tenny discussing the matters with her. Emails were exchanged regarding the Claimant being accompanied and Ms. Burland explained it was an informal meeting. Although not

standard practice, Ms. Burland allowed the Claimant to be accompanied by Julie Barry, Chaplain.

96. As a matter of fact, the Tribunal found, as set out above, that she had been given guidance on completing her competencies by a number of staff, including but not limited to Mr. Tenny and Ms. Morris and the supervisors that she was working with who sought to provide feedback during treatment on numerous occasions. Further, the Claimant had access to a significant volume of written information from her induction plan and knew that she could contact people and raise questions.

97. The Claimant alleges that Mr. Walker and Mr Gopi often refused to sign completed competencies. The Claimant does not set out the occasions on which she alleges Mr. Walker and Mr. Gopi refused to sign competencies, but refers to page 719 of the Bundle, which is a Prostate Imaging Workbook where the Claimant appears to have added signature requested against four entries on 24 and 28 April 2023.

98. Mr. Walker does not recall refusing to sign the Claimant's competency workbook. Mr. Walker did sign the Claimant's workbook on 23 June 2023. Mr. Walker did find communication with the Claimant difficult, and felt she was often rude and defensive and that he felt the Claimant took longer on imaging than other probationers.

99. Mr. Gopi also considered the Claimant took a long time with imaging and sought to give the Claimant feedback and guidance. Mr. Gopi recalls a time when the Claimant asked him to sign of her rectum imaging workbook but he explained to her that he would not sign it as he was not comfortable confirming that she was capable of carrying out the necessary competencies safely independently. He recall this being only one occasion. The Tribunal note that Mr. Gopi signed a patient treatment for breast imaging on 24 April 2023, page 724, and on 23 June 2023, page 721, a prostate patient treatment.

100. The Claimant alleges that Ms. Fazel refused to sign an entry (in her workbook) and reprimanded the Claimant for not being in the room doing set ups. In oral evidence the Claimant said she asked Ms. Fazel to sign her workbook. The Claimant had not specified the date she says this took place, however Ms. Fazel only worked with the Claimant on one occasion. On balance, the Tribunal consider this date was 28 April 2023. Ms. Fazel was based at the Respondent's Redhill site. Although Ms. Fazel had worked with the Claimant whilst she was undertaking some return to practise sessions.

101. On the date she was working at Guildford Ms. Fazel was there to cover sickness absence. Ms. Fazel does not recall the Claimant asking her to sign her workbook for a patient treatment entry. After undertaking

patient treatments with the Claimant Ms. Fazel was engaged in interviews later that day. The Claimant did not contact Ms. Fazel, by any means, to ask her to sign against the patient entry, or a competency. Ms. Fazel's oral evidence, which is accepted, is that the usual process for trainees/probationers is for them to ask or follow up by email if a signature is needed. Ms. Fazel also explained, in response to cross examination, which is accepted, that she would not have signed the Claimant as being competent in any area after only working with her for half a day.

102. The Claimant's witness statement does not set out any detail on how she alleges Ms. Fazel reprimanded her. In cross examination the Claimant did not clearly explain how she said she was reprimanded but referred to Ms. Fazel's tone as not being supportive. Ms. Fazel's account, which is accepted, is that on the day they worked together there was a time when the Claimant was outside the treatment room and Ms. Fazel asked her if she was going to join her and the other radiographer in setting up and the Claimant replied saying it was not her turn and pointed to the timetable on the wall. Ms. Fazel was a little shocked by the Claimant's response as she considered it a good opportunity for the Claimant to observe and explained as there were only three staff in it would have been fine for the Claimant to observe as the room would not be crowded. Ms. Fazel did not reprimand the Claimant.

103. On 20 June 2023 Ms. Burland and Mr. Tenny met the Claimant, who was supported by and Ms. Barry, Chaplain*. [392]*

104. At the meeting Ms. Burland sought to clarify if the Claimant wished to raise a grievance against a member of staff. The Claimant made comments about her view regarding certain cultural behaviours towards women and Ms. Burland explained this was a serious matter and that the Claimant would be supported if she wished to raise a grievance. The Claimant said she did not wish to raise a grievance.

105. At the start of the meeting the Claimant commented on Mr. Pulani, and said:

"(Begins to discuss an incident) Asked Senior Rad for more personal space "last Friday". Felt uncomfortable when they were close during patient set-up. Example related to aligning of patient and how MO felt staff member deviated from standard processes without communicating. MO says they spoke to staff member about having lupus and the fatigue it causes and would prefer to keep it the same way. Denies saying that working with the staff member "makes them tired" and says staff member acknowledged and walked away while MO was talking."

106. Ms. Burland then sought to discuss the three clinical incidents.

107. In relation to misidentification of a patient, in summary, the matter related to an event on 21 April 2023 where a patient jokingly gave incorrect ID and other staff did not consider the Claimant to have noticed. The Claimant explained she did notice the joke. A discussion regarding expectations took place.

108. The discussion then moved to a second image almost being taken.

109. In relation to the First Day Chat, the Claimant said a member of staff told her there was no competency required to do a First Day Chat and that people had asked her if she could do chats, namely Ms. Clarke and Lorna Hunter. There was a discussion about the matter. Ms. Burland sought to explain the training and process for completing First Day Chats, and the Claimant said she was not aware. Ms. Burland considered that the Claimant's perception was that she had not done anything wrong.

110. In addition, Mr. Tenny sought to explain the adjustments he had put in place to try and help facilitate completion of her probation:

"Although the workbooks must be completed to work as a second person, as part of your probation goals I have made it easier by saying you only have to demonstrate that you are safe to treat patients as there is a risk you would not be able to finish the workbooks within the remaining induction time."

111. Towards the close of the meeting the Claimant said she did not feel she had been treated with dignity at work, including by Mr. Tenny.

112. On 20 June 2023 the Claimant attended a video OH assessment. The outcome report stated that adjustments were recommended: *"Modify work patterns or management systems and modify instructions or manuals."* Relevant extracts from the comments section state:

"Michelle advises she is able to manage her fatigue with the allocated breaks."

"In terms of the reported mild dyslexia, there are some highlighted issues that could be supported with some minor adjustments:

Michelle reports she takes more time to process information / instruction. I would recommend giving instructions one at a time, slowly and clearly without distractions, Give verbal as well as written

instructions where possible and allow extra time to process / complete tasks. Michelle advises she finds it helpful to take notes to support memory and this would be helpful to continue."

"There are no recommended adjustments to days or hours worked, however Michelle would like to discuss potentially reducing her hours."

"At the time of the consultation and writing this report, I do not have access to a medical report confirming medical history. However, based on the findings of the assessment there does appear to be a physical impairment lasting twelve months or more. The disability provisions of the EA may apply although ultimately, this is a decision for the courts."

"We have discussed the requirements of Michelle's role and she feels with the allocated breaks she is able to fulfil her duties. I would suggest regular microbreaks would be beneficial to aid focus and concentration." [386]

113. On 23 June 2023 Ms. Smith reported a patient safety incident involving the Claimant in which the Claimant had taken an additional exposure image and resulted in Ms. Smith took control over the console. *[400 and 398]* The Claimant has produced a document with her brief notes about the incident. In the note she references having information overload. *[399]*

114. The incident resulted in a DATIX report being submitted, and it was classified as a no harm incident. *[400]*

115. On 26 June 2023 Ella Thunder, a Senior Radiographer engaged via an agency, sent Mr. Tenny an email with feedback on the Claimant. The email was sent in response to a request made by Mr. Tenny, who was monitoring the Claimant's probationary performance.

116. In summary, Ms. Thunder said that the Claimant had not made an effort to integrate into the team, had a negative attitude towards the team and patients on occasions, was harsh or defensive when given feedback, that she sometimes interrupted patients and struggled to communicate with them empathetically. The email closes by stating: *"Michelle has the capacity to excel and learn in the environment as I try to make her feel as comfortable as possible. Taking in feedback without confrontation will allow this to happen." [405]*

117. On 26 June 2023 Ms. Burland sent the Claimant a letter summarising the meeting held on 20 June 2023. *[407]* The letter notes that the Claimant did not wish to pursue a complaint against her male Indian colleagues. It also notes that three clinical incidents were discussed and that Ms. Burland gave the Claimant information about her responsibilities

and requirements and that an improvement was needed in order to pass her probation. It is also notes that at the end of the meeting the Claimant had said she felt Mr. Tenny had not always respected her dignity at work and it was explained to her that she could raise a concern if she wished it to be investigated and was offered to move to the Redhill site support her achieving her competencies, but the Claimant declined the offer.

118. On 27 June 2023 there was a patient safety incident involving the Claimant. Mr. Tenny and Ms. Clark produced a written note of the incident. In short, the Claimant was operating the console and the machinery collided with the patient's arm. Mr. Tenny was present had to shout for the Claimant to stop and check the patient was not hurt. Mr. Tenny gave the Claimant chance to continue the treatment, but became concerned after asking her a number of questions that she could not identify the tolerance level and he took over that part of the process. A DATIX report was submitted and classified as a near miss. *[410]*

119. Following the incident Mr. Tenny sent the Claimant an email with some information regarding pitch roll.

120. Mr. Tenny and Ms. Burland decided that the Claimant should only work on non-patient facing tasks until safe practice had been demonstrated. The considered that there had been a number of incidents and they were concerned that the Claimant was unwilling to take feedback and there was a negative impact to the team, and patients.

121. A meeting took place with the Claimant, Mr. Tenny and Ms. Burland on 27 June 2023, after the near miss incident. At the meeting the Claimant was told she would not be undertaking patient facing duties and should focus on HWB plan, online training and imaging workbooks. Arrangements were made to facilitate and support this work.

122. Ms. Turner was appointed to investigate the concerns raised on 23 and 27 June 2023.

123. The Claimant was provided with a detailed supportive performance plan on 30 June 2023, the plan had been discussed with the Claimant. *[425 and 434]*

124. On 3 July 2023 the Claimant met with the Respondent's Wellbeing Lead and a health and wellbeing risk assessment was undertaken on 4 July 2023.

125. On 4 July 2023 the Claimant met, Mr. Tenny and Ms. Turner to discuss the performance plan and set goals. A proposal was put forward that the Claimant be assessed treating four patients to the standards

required. The Claimant was happy for such an assessment to take place, and reported she was positive she would be able to meet the goals. The Claimant suggested treating five patients, but management considered four patients would be better and did not wish to overwhelm the Claimant. The Claimant specifically said she was happy to work with any staff member during the assessment, including Mr. Tenny. *[442 and 444]*

126. The assessment was put in place because the Respondent's management team and significant concerns about the Claimant's ability to do the role adequately and safely. A clinical assessment is not the standard process for assessing competence and performance concerns at the Respondent and therefore and assessment was proposed, which the Claimant willingly agreed to.

127. Ms. Turner emailed the Claimant on 6 July 2023 summarising the discussion and basis of the agreed assessment*. [444]*

128. A further meeting between the Claimant Mr. Tenny and Ms. Turner took place on 7 July 2023 at which the clinical assessment was again discussed.

129. The Claimant emailed Ms. Turner at 22:24 on 7 July 2023 with comments in relation to the 7 July 2023 meeting notes and the format of the assessment. *[443]*

130. In an email to Ms. Turner on 10 July 2023 the Claimant said not wish to undertake any treatment with Mr. Tenny, and two other male colleagues. The Claimant had not said this on either 4 or 7 July 2023 meetings .*[447]*

131. The Claimant undertook a clinical assessment on 11 July 2023. The Claimant had been told which patients she would be treating the previous week so she could familiarise herself if she wished.

132. Ms. Clarke and Ms. Smith undertook the assessment with the Claimant, and a note of the assessment was produced by both of them. *[456 and 462]* The Respondent accommodated the Claimant's late request to not undertake the assessment treatments with certain colleagues.

133. In short, the assessors considered that the Claimant did not safely deliver the correct treatment to any of the patients in the requisite times. The assessor notes are summarised below.

134. In relation to patient 1 the set up was considered to be correct. The Claimant was not able to match the image and after some time realised

she should be doing a fid match and after 10 minutes Ms. Smith took over and completed the task.

135. In relation to patient 2 the set up was completed correctly. The Claimant became anxious and after discussion about the image Ms. Smith "*informed Michelle that I would need to take over the match since she was unable to do a manual match to ascertain the degree of pitch and a true long match. The match was completed and treatment commenced."*

136. In relation to patient 3 the set up was correct. The Claimant was unable to overlay the match and after a short period she asked Ms. Smith to complete the match. The Claimant was encouraged to complete but was not able to do so and Ms. Smith took over.

137. On 14 July 2023 a probation review meeting took place between the Claimant, Mr. Tenny, Ms. Turner and the Chaplain. Ms. Turner informed the Claimant she had not met the standards required for the role of a Band 5 Radiographer and was put on paid leave until a final probation review meeting. The Claimant was sent a letter summarising the discussion on 16 July 2023. *[467]*

138. On 18 August 2023 the Claimant attended final probation review meeting with Ms. Turner, Ms. Louise Sarnowski, Senior HR Business Partner, Mr. Semple and Ms. Marie Bullough, the Claimant's trade union representative. At the meeting the Claimant was told that she had not passed her probation period and her employment was ended with a payment in lieu of notice being made.

139. On 12 September 2023 the Respondent made referral to Health and Care Profession Council setting out concerns about the Claimant's fitness to practise.

140. The Claimant appealed the decision to dismiss her on 27 September 2023 and an appeal hearing took place on 1 December 2023. The decision to dismiss the Claimant was upheld and the Claimant was sent an outcome letter on 19 December 2023. *[560, 582 and 601]*

141. Although the decision to dismiss and the appeal process do not form part of any allegation in the list of issues the Tribunal considered it important to note the following matters.

142. At the appeal hearing the notes record that the Claimant considered she had been subjected to a witch hunt and *"put down as anything other than [unspecified colleagues] disliking me"* and *"the only black female, non UK trained radiographer." [591 – 592]*

Knowledge of disability

143. Given the nature of the allegations the Tribunal considered it helpful to set out its findings in relation to knowledge of disability here**.**

144. The Respondent has accepted that the Claimant's conditions of lupus, recurrent depressive disorder (of which anxiety is a symptom) and hypothyroidism amounted to disabilities at the time the claim is about.

145. The Tribunal sought to deal with the facts regarding knowledge, as far as it was able.

146. Mr. Tenny - At paragraph 16 of his witness statement Mr. Tenny states that he was aware that the Claimant had lupus and hypothyroidism prior to her joining the Respondent. This information that was known to him came from the Occupational Health reports and the Claimant's own disclosures, as set out above, which focuses on joint pain and fatigue. The evidence given in oral examination was not as clear, and he said he was not aware of the Claimant having anxiety or hypothyroidism at the start of employment but was not sure when he became aware.

147. Mr. Tenny became aware the Claimant suffered with anxiety during probation review meetings and following her sickness absence between 22 May 2023 and 5 June 2023. Anxiety is not relied upon as a standalone condition. The Tribunal do not consider that Mr. Tenny knew the Claimant and a recurrent depressive disorder at the time of the allegations.

148. Although Mr. Tenny was aware the Claimant suffered with fatigue and anxiety (from 22 May 2023) he was not aware of the symptoms, the things that Claimant says arose in consequence of her disabilities as set out at 10a, b and c of the list of issues.

149. Ms. Burland - At paragraph 6 of her witness statement Ms. Burland states she was aware that the Claimant had lupus from November 2022 when dealing with pre-employment matters and Occupational Health. She did not consider, on the information provided, that she met the threshold of disabled and understood fatigue to be the main symptoms. Ms. Burland was not aware the Claimant had hypothyroidism or recurrent depressive disorder.

150. Ms. Turner - At paragraph 6 of her witness statement Ms. Turner states she became aware the Claimant had lupus on 6 July 2023 when she read her job application for the purpose of checking what previous clinical experience the Claimant had. Ms. Turner became aware that the Claimant had hypothyroidism at the probationary review meeting on 18 August 2023 [*518].* Ms. Turner did not consider the Claimant met the

threshold of disabled but was aware she experienced fatigue due to the fit notes from May 2023 and later during probation reviews that she was feeling anxious.

151. Mr. Gopi - Mr. Gopi was not aware that the Claimant had lupus, hypothyroidism or recurrent depressive disorder until these legal proceedings. He was not aware the Claimant faced the difficulties she relies on something arising from.

152. Mr. Walker - At paragraph 6 of his witness statement Mr. Walker states he became aware the Claimant had lupus from a colleague in April 2023. He was only aware that the Claimant suffered from tiredness, as she informed him of this. He was not aware the Claimant faced the difficulties she relies on something arising from. Mr. Walker did not know the Claimant had hypothyroidism or recurrent depressive disorder.

153. Mr. Palani - On 10 June 2023 the Claimant told Mr. Palani that she had disabilities, but she did not provide any detail. Mr. Palani had no knowledge of any health issues prior to that date. Mr. Palani was not aware that the Claimant had lupus, hypothyroidism or recurrent depressive disorder until these legal proceedings. He was not aware the Claimant faced the difficulties she relies on something arising from.

154. Ms. Fazel - Ms. Fazel was not aware that the Claimant had lupus, hypothyroidism or recurrent depressive disorder until these legal proceedings. She was not aware the Claimant faced the difficulties she relies on something arising from.

155. Ms. Clarke, Ms. Smith and Ms. Thunder were not called as witnesses but there is no evidence to suggest that any of them knew about the Claimant's disabilities or that she faced the difficulties she relies on something arising from.

Time limits

156. In relation to time limits, the Claimant engaged in ACAS early conciliation between 2 October and 13 November 2023 and submitted her claim to the Employment Tribunal on 10 December 2023.

The Law

157. Set out below is a summary of the law. The case law principles that were referenced in the closing written submissions have been considered.

Time Limits

158. Section 123 of the Equality Act 2010 sets out the time limit for bringing discrimination claims in the Tribunal. It provides that complaints of discrimination should be presented within three months of the act complained of.

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a)t he 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) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(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.

159. Section 123(1)(b) provides that where a discrimination claim is prima facie out of time it may still be brought *"within such other period as the Tribunal thinks is just and equitable*". This provides a broader discretion than the reasonably practicable test for other claims.

160. The time for presenting a claim is extended for the duration of ACAS Early Conciliation.

161. However, where the ACAS EC process was started after the primary time limit had already expired the ACAS " freezing" of the time limits does not operate to assist a Claimant (Pearce v Bank of America EAT 0067/19).

162. Time limits should be adhered to strictly (relevant case being Robertson v Bexley Community Centre 2003 EWCA CIV 576.)

163. The burden of proof is on the Claimant.

164. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble:-

"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

- *the length of and reasons for the delay;*
  the extent to which the cogency of the evidence is likely to be affected by the delay;
- *the extent to which the party sued had cooperated with any request for information;*
- *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
- *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

165. However, this list of factors is a guide, not a legal requirement. The relevance of the factors depends on the particular case.

166. In *Aberttawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194* the Court of Appeal noted that the tribunal has a wide discretion and the Tribunal was not restricted to a specified list of factors.

167. The most important part of the exercise is to consider the length and reasons for the delay and balance the respective prejudice to the parties.

168. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]* the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the application convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

169. Subsequently in *Chief Constable of Lincolnshire -v- Caston [2010] IRLR 327* the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

170. In *Department of Constitutional Affairs -v- Jones [2008] IRLR 128* the Court emphasised that the guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. Other factors may be relevant too. At paragraph 50 Hill LJ said:-

"The factors which have to be taken into account depend on the facts, and the self directions which need to be given must be tailored to the facts of the case as found".

171. We considered the principles derived from case law in relation to the merits of a claim.

Discrimination arising from disability

172. The legislation regarding complaints of discrimination arising from disability is set out at section 15 of the Equality Act 2010, set out below.

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

173. The approach to determining Section 15 claims was summarised by the Employment Appeal Tribunal in *Pnaiser v NHS England and Another [2016] IRLR 170. This* includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;

- The “something” that causes the unfavorable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavorable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;
- The tribunal must determine whether the reason or the cause is “something arising in consequence of B’s disability”;
- The expression “arising in consequence of” can describe a range of causal links. The causal link between the something that causes unfavorable treatment and the disability may include more than one link;
- Knowledge is only required of the disability. Knowledge is not required that the “something” leading to the unfavorable treatment is a consequence of the disability.

Shamoon v Chief Constable of the Royal Ulister Constabulary [2003] ICR 337, HR set out, at paragraph 35:

“35. But once this requirement is sataisfied, the only other limitation that can be read into the word is that indicated by Lord Brightman. As he put it in Ministry of Defence v Jeremiah [1980] QB 87, 104B, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur and others (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in Lord Chancellor v Coker and Osamor [2001] IRLR 116 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. As Lord Hoffmann pointed out in Khan's case, at p 1959, para 52, the employment tribunal has jurisdiction to award compensation for injury to feelings whether or not compensation is to be awarded under any other head: Race Relations Act 1976, section 57(4); 1976 Order, article 66(4). Compensation for an injury to her feelings was the relief which the appellant was seeking in this case when she lodged her claim with the tribunal. Her complaint was that her role and position had been substantially undermined and that it was becoming increasingly marginalized.

36. The question then is whether there was a basis in the evidence which was before the tribunal for a finding that the treatment of which the appellant complained was to her detriment.”

174. “Unfavourably” is not defined in the Equality Act 2010 but the Code assists and states: *“must have been put at a disadvantage.”*

175. The Code notes that *“Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.”*

176. The Code gives examples of unfavourable treatment, including:

- Refusal of a job;
- Dismissal;
- A shift to night working;
- A team move to an open-plan office.

177. The respondent will successfully defend the claim if it can prove that the unfavorable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavorable treatment. Considering the justification defence requires an objective assessment which the tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer's actions fell within the band of reasonable responses.

178. The Equality and Human Rights Commission Code of Practice suggests the question should be approached in two stages:

- Is the aim legal and non-discriminatory and one that represents a real, objective consideration?

- If so, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances?

179. The Code goes on to say that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. "Necessary" here does not mean that the treatment is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means (see *Hampson v Department of Education and Science [1989 ICR 179 and Hardys & Hansons plc v Lax [2005] ICR 1565.)*

180. Justification therefore requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (*Hensman v Ministry of Defence UKEAT/0067/14*). The Tribunal has to take into account the reasonable needs of the employer, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the treatment is reasonably necessary.

181. The Equality and Human Rights Commission Code of Practice in paragraph 5.2.1 suggests that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of a claimant is justified.

182. A section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability. This is also part of the knowledge defence applicable to complaints of failure to make reasonable adjustments.

183. The Code, at paragraph 5.14, suggests that *"Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"2.* At paragraph 6.19, the Code goes on the say:

"The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

184. *Gallop v Newport City Council [2014] IRLR 211* established that when considering the extent of an employer's enquiries into whether an employee is disabled, an unquestioning reliance on Occupational Health advice may not be sufficient to enable an employer to rely on the knowledge defence.

185. Knowledge on the part of a person employed by the respondent is likely to be imputed to the respondent. It will either be actual knowledge, or knowledge which ought reasonably to have been transmitted to the appropriate person.

Duty to make reasonable adjustments

186. The legislation regarding complaints of a failure to make reasonable adjustments is contained within sections 20 and 21 of the Equality Act 2010.

187. Section 20 of the Equality Act 2010 states:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule

apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty

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

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

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

188. The duty to make reasonable adjustments appears in section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) – *"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."*

189. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

190. In *Environment Agency v Rowan [2008] ICR 218* it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

191. The words "provision, criterion or practice" ("PCP") are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In *Ishola v Transport for London [2020] EWCA Civ 112* it was said: *"all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."* It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

192. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

193. Substantial disadvantage is such disadvantage as is more than minor or trivial.

194. In *County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the* Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;

- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s);
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:

  The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
  The extent to which it is practicable to take the step;
  The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities; -The extent of its financial and other resources;
  The availability to it of financial or other assistance with respect to taking the step;
  -The nature of its activities and size of its undertaking;
  - If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

195. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.*

196. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

197. An important consideration is the extent to which the step will prevent the disadvantage. Although the Equality Act 2010 uses the term "avoid", this is not an absolute test. (The position is different in auxiliary aid cases where the employer has to take such steps as it is reasonable to take to have to provide the auxiliary aid).

198. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law: *Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT*. The Court of Appeal put the matter this way in *Griffiths v Secretary of State for Work and Pensions [2017] ICR 160:*

"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

Broadly speaking, and all other things being equal, the more effective the adjustment is likely to be the more likely it is to be a reasonable adjustment; the less effective it is likely to be, the less likely it is to be reasonable. Effectiveness must be assessed in the light of information available at the time, not subsequently: *Brightman v TIAA Ltd UKEAT/0318/19 2 July 2021* (paragraph 42).

Conclusions

199. In reaching its conclusions the Tribunal applied the law to the findings of fact and made conclusions as far as necessary to deal with the allegations as pleaded in the list of issues.

200. Full regard was had to the closing written submissions made by the parties, but submissions are only repeated where the Tribunal considered it necessary. The Tribunal noted that within the Claimant's written submissions, at various points, there was reference to incorrect legal tests and there appeared to be some confusion and attempts to depart from the pleaded case and list of issues.

201. The Tribunal's conclusions are unanimous.

202. Given the nature of the complaints brought, the Tribunal considered it logical to deal with knowledge of disability first. This did not prevent the Tribunal working through the correct phases of all the individual complaints.

Knowledge of disability

203. A section 15 discrimination arising from disability claim will not succeed where a respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability. This is also part of the knowledge defence applicable to complaints of failure to make reasonable adjustments.

204. The Code suggests that "Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"" (para 5.14). The Code gives an example, at paragraph 5.15, of where a sudden deterioration in an employee's time-keeping and performance and change in behaviour at

work should alert an employer to the possibility that these were connected to a disability and lead the employer to explore with the worker the reason for the changes and whether difficulties are because of something arising in consequence of a disability, in this example, depression.

205. Further, paragraph 6.19 of the Code says:

"The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

206. The Respondent now accepts that the Claimant was disabled at the times the claim was about, 27 March 2023 to 18 August 2023, in relation to three conditions relied on.

207. The Tribunal had to determine whether the Respondent had actual or constructive knowledge of the Claimant's disability, and if so, from when.

208. The burden is on the employer to establish if there was no actual or constructive knowledge.

209. At this stage the Tribunal was only considering knowledge of disability, between 27 March 2023 and 18 August 2023, and took into account the legal principles set out above.

210. The Tribunal considered this to be a finely balanced matter, and took all the evidence available into account. The matter was complicated by the fact that there are three disabilities being relied on, and there was different knowledge of differing persons at differing times.

211. As a general conclusion, the Tribunal considered that it was reasonable to rely on the information provided by Occupational Health. The Respondent sensibly sought to obtain further information and clarification. As the Occupational Health provider was a third party no knowledge it had could be imputed to the Respondent.

212. The Tribunal dealt with each disability separately.

213. Lupus – In relation to lupus the Tribunal concluded that it had constructive knowledge, from the start of the employment, that lupus would amount to a disability. Although there was a lack of clarity and some

confusion caused by the early Occupational Health reports the Tribunal considered that the combination of information about knowing the Claimant had lupus and that the struggled with fatigue and joint pain, a recommendation to work part time and an indication that Occupational Health considered that the was likely to meet the definition of disabled, gave the Respondent constructive knowledge that lupus was a disability.

214. Hypothyroidism – The Tribunal had some difficulty with this consideration, in particular in view of Mr. Tenny's witness statement. The Tribunal noted that none of the Occupational Health reports provided to the Respondent referred to hypothyroidism and the Claimant did not disclose this until 18 August 2023.

215. However, as noted above, Mr. Tenny, at paragraph 16 of his witness statement made an express and clear statement*: "… I was aware that Ms October had lupus and hypothyroidism prior to commencement of her employment, from her return to work placement that she did back with us in 2021 or 2022."* The Tribunal noted that oral evidence was less clear, but in view of the express statement considered it was bound to find that the Respondent, through Mr. Tenny knew the Claimant had hypothyroidism from before she started employment.

216. The Tribunal noted that an employer may be aware that someone has a health condition, but not have any detail about the symptoms and how they may impact an employee. However, in consideration of the overlap in symptoms, the main being fatigue, and the information from Occupational Health and Mr. Tenny's statement, the Tribunal found the Respondent had knowledge of hypothyroidism being a disability.

217. Recurrent depressive disorder – On the evidence, the Tribunal concluded that the Respondent had no actual knowledge, and no constructive knowledge that the Claimant had recurrent depressive disorder or it symptoms. It is noted some of the Respondent's staff were aware the Claimant was experiencing anxiety. However, this was in context of performance concerns and stress related absence, and there was no clear information giving any actual, or implied knowledge, of a recurrent depressive disorder until sometime after the clinical assessment on 11 July 2023, which is the last allegation of discrimination.

Failure to Make Reasonable Adjustments (sections 20-22 EqA)

218. As set out above, the Tribunal's general conclusion was that the Respondent had constructive knowledge of lupus, knowledge of hypothyroidism and no knowledge, actual or constructive, of a recurrent depressive disorder.

219. The importance of a methodical approach to considering a failure to make reasonable adjustments complaints has been emphasised in case law.

220. In dealing with a reasonable adjustment complaint the Tribunal reminded itself of the need to consider and address the requirement for knowledge of the substantial disadvantage as well.

221. The Claimant relies on the two PCPs as set out below.

a. Requiring radiographers to pass a probationary period, during which permanent monitoring and feedback was encouraged [PCP1].

b. Requiring staff to undertake a clinical assessment as a means to assess performance, where there are performance concerns [PCP2].

222. The Respondent accepts they are both a PCP, and therefore the Tribunal did not have to make a determination in this respect. However, it is important to note that in relation to the word “requiring” is not accepted by the Respondent that it has a coercive character. On the facts as found, the Tribunal agreed that the word “requiring” as set out in the PCP could not be considered to have been a coercive mandatory requirement in a negative sense.

223. The next matter was for the Tribunal to determine if the PCPs put the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

224. The substantial disadvantage relied on by the Claimant is that:

<u>The Claimant felt fatigue (physically and mentally), anxiety, brain fog and depression, which was detrimental to the Claimant’s ability to concentrate and made doing daily things difficult.</u>

225. The Claimant has not linked any part of the pleaded disadvantage to any particular health condition.

226. Further, in written submissions, the Claimant now appears to be seeking to rely on a different disadvantage to that set out in the list of issues. The issues were agreed, and checked at the start of the hearing. No application to amend was made, and the Tribunal considered the pleaded disadvantage.

227. Keeping in mind the specific disadvantage pleaded, the Tribunal reminded itself that substantial means more than minor or trivial. This needs to be assessed on an objective basis. The disadvantage must be linked to the disability.

228. On the evidence presented, when assessed on an objective basis, the Tribunal did not consider the Claimant has satisfied the Tribunal that either PCP put the Claimant at the disadvantage of feeling fatigue (physically and mentally), anxiety, brain fog and depression, which was detrimental to the Claimant's ability to concentrate and made doing daily things difficult.

229. The Claimant has a number of disabilities that result in the symptoms she relies on as the disadvantage caused to her. In short, the Tribunal agree with the Respondent's submission that these are things, on the Claimant's own case, that she has and would experience regardless of either PCP.

230. There is no evidence to conclude that the alleged disadvantage, the symptoms, would be made worse as a result of having to pass a probation period in which monitoring and feedback was required or undertaking a clinical assessment. Indeed, Occupational Health, in June 2023 noted the Claimant was managing her fatigue and on 4 July 2023 it was agreed if the Claimant felt unwell she could sit out.

231. In relation to PCP1 the Tribunal did not consider that in comparison to non-disabled persons the Claimant was put at the substantial disadvantage by the PCP1. She already had these symptoms. They were not caused or made worse by PCP1.

232. In relation to PCP2, the Claimant willingly agreed to participate in the clinical assessment as she was confident in her ability. Indeed, she raised no concerns about the structure and requested to treat more patients when discussing the arrangements.

233. There is no evidence the Claimant experienced any symptom, other than anxiety, on 11 July 2023. The Tribunal consider that any non-disabled probationer would experience some level of anxiety when their competence was being assessed.

234. The Tribunal concluded that neither PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

235. However, should the Tribunal be wrong, it went on to consider if the Respondent knew, knew or could it reasonably have been expected to know that the Claimant was likely to be placed at the pleaded disadvantage. The conclusions on knowledge of disability are not repeated here.

236. The Tribunal concluded the Respondent did not have actual or constructive knowledge that PCP1 and/or PCP2 would put her at the pleaded disadvantage.

237. As indicated above, the Tribunal was not directed to any contemporaneous evidence demonstrating that any concerns were raised by the Claimant, or indeed Occupational Health, about the probation period. In relation to PCP2, the Claimant did not raise any concerns save for not wishing Mr. Tenny and two other colleagues to be present, noting she had raised concerns about such colleagues previously. This does not appear to have any association with the pleaded disadvantage.

238. The Tribunal then, again continuing on an alternative basis in case it was wrong, went on to consider what steps could have been taken to avoid the disadvantage and considered whether it was reasonable for the Respondent to have taken those steps and when, and whether the Respondent failed to take those steps. We kept in mind the extent to which the step would have prevented the disadvantage experienced by the Claimant.

239. The Tribunal assessed whether the proposed adjustments were reasonable.

240. The Tribunal considered whether (if the complaint had not failed because of there being no substantial disadvantage caused by the PCPs and/or no knowledge of substantial disadvantage) if it would have been reasonable for the Respondent to take the proposed steps, and when. The Tribunal kept in mind the extent to which the step would have prevented the pleaded disadvantage experienced by the Claimant.

241. The Equality Act 2010 uses the term avoid, but this is not an absolute test. The more effective an adjustment is likely to be, the more likely it is to be reasonable. The assessment of whether an adjustment was reasonable is an objective one. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law.

242. In relation to PCP1 the Claimant suggests the following step could have been taken: Providing weekly one to one managerial support throughout the probationary period.

243. The Tribunal consider providing regular support and feedback during a probationary period for any employee is a sensile and reasonable thing to do. It does not necessarily agree that weekly one to one support is reasonable.

244. However, in this case it was found that the Claimant had been provided with managerial support on a weekly basis throughout the probationary period. The findings of fact set out numerous regular meetings with Mr. Tenny, and others including Ms. Burland and Ms. Morris. Further, the witness evidence demonstrates that the various senior

radiographers sought to support the Claimant in the delivery of her work. The Claimant knew she could contact a number of people for support and guidance.

245. In effect, the suggested step had been undertaken. The Claimant was provided with regular feedback and support.

246. In relation to PCP2 the Claimant suggests the following step could have been taken: Providing the Claimant with sufficient time to prepare ahead of the clinical assessment (more than one and a half days).

247. The arrangements for the clinical assessment were discussed at meetings on 4 and 7 July 2023 and over email correspondence up until 10 July 2023. The Claimant had more than one and a half days to prepare. Further, it was noted that the Claimant was adamant throughout her employment at the Respondent that she was competent and could perform the role. On her own position, no preparation was needed to undertake the treatment in the assessment. Further, the patients allocated were ones that the Claimant was able to be familiar with, and limited in number.

248. The Tribunal did not consider the proposed step reasonable or necessary.

249. The complaint of reasonable adjustments fails.

Discrimination Arising from Disability (section 15 EqA)

250. The Claimant has brought 11 allegations of unfavourable treatment. Each allegation has been considered separately, the requisite legal considerations for each allegation have been considered as far as required and the law has been applied to the findings of fact.

251. As a general note, the Respondent submits that the Claimant failed to put her case to the witnesses.

252. The Respondent submits that in reality the Claimant is not contending she was subjected to unfavourable treatment because of the somethings arising but seemingly appeared to be saying she thinks there was a failure to have regard to her being a disabled person and/or she was treated less favourably because of having a disability.

253. The Claimant's written submissions, were confusing in part and referred to different statutory language and components of different legal tests. The Tribunal considered there may have been some

misunderstanding about the operation of the legal tests in section 15 complaints.

254. The Tribunal sought to deal with each allegation of unfavourable treatment in full. However, for efficiency, it is worth noting here that in written submissions the Respondent said that it did not dispute that the things set out at a, b and c below were things arising in consequence of disability. For ease, the Tribunal adopted the phrase “the somethings arising” to capture more succinctly and enable ease of reference to what is set out at a, b and c.

a. In respect of lupus: fatigue, difficulties with concentration, depressed mood, brain fog, forgetfulness, memory lapses, and slowed thinking.

b. In respect of hypothyroidism: fatigue, difficulties with concentration, depressed mood, brain fog, and anxiety; and

c. In respect of recurrent depressive disorder: harder to focus while conducting image reviews or under performance management

255. The Tribunal, as noted above, checked the issues at the start of the hearing and determined those allegations. At no point during the final hearing did the Claimant make an application to amend.

<u>8A - The Claimant was falsely reported by Gabrielle Clark, Senior Radiographer on 2nd April 2023, which led to Mr Tenny reprimanding her on 3rd April 2023, at which time she was also reprimanded for calling another Senior Radiographer (Nashett Smith) in an emergency on 2nd April 2023.</u>

256. The first allegation of unfavrourable treatment is as underlined above.

257. As set out in the findings of fact, the Tribunal did not consider there to have been evidence of Ms. Clarke making a false report on 2 April 2023. Mr. Tenny’s evidence was clear that he had been told by Ms. Clarke and Ms. Smith that the Claimant had contacted them outside working hours and the Claimant’s own evidence was that she contacted Ms. Smith outside working hours as she considered herself to be in an emergency.

258. The Tribunal did not find that Mr. Tenny had reprimanded the Claimant on 3 April 2023, but rather he sought to explain the team's practice around out of hours contact as she was knew and not aware.

259. Accordingly, the allegation was not found to have happened as a matter of fact.

260. The allegation fails and is dismissed.

261. In any event, the Tribunal did not consider there to be any link at all between the somethings arising and the fact members of the team told Mr. Tenny the Claimant had contacted them and that he then subsequently spoke with the Claimant about the matter.

8B - The Claimant had unfair reports about her having done First Day Chats in or around June 2023, without competencies being signed off, which was escalated to the Service Head, despite having been asked to do it by a Senior and being told that there was no specific training.

262. The Tribunal considered the findings of fact, in particular that the Claimant was asked to undertake a First Day Chat by a more senior colleague and that it is still not known who made the report to Ms. Burland. The report could have been made by the person who asked the Claimant to do the chat or by another colleague who was aware that she had undertaken the chat. There does not appear to have been any enquiry made by the person who reported the matter with the Claimant, or any intervention to ask her to not do the chat if it was known before the chat was undertaken.

263. In these particular circumstances, the Tribunal does consider the reporting to be unfavourable treatment.

264. The Tribunal went on to consider if the unfavoruable treatment was because of the somethings arising. The Tribunal did not consider there was any evidence at all to make such a finding. There is no evidence of any link with the report and the somethings arising.

265. Further, the Claimant's submissions appear to relate to unfairness and lack of investigation and a breach of the ACAS Code.

266. The allegation fails and is dismissed.

8C - Karun Pulani, Senior Radiotherapist, was overbearing in supervision and micro-managed the Claimant on the Unit. For example, on 9th June 2023, Mr Pulani stood less than 30cm away from her.

267. The Tribunal found that Mr. Pulani did not act in an overbearing way and did not micromanage the Claimant. The Tribunal did not find that Mr. Pulani stood less than 30cm away from her on 9 June 2023.

268. Accordingly, the allegation was not found to have happened as a matter of fact.

269. The allegation fails and is dismissed.

8D - There was no one-to-one guidance on completing training competencies (before 19th June 2023)

270. The findings of fact set out a number of one to one meetings with Mr. Tenny that took place, indeed before 19 June 2023 and after, and she was provided with information by email. Further, the Claimant had an assigned mentor and access to Ms. Morris and could raise questions whenever she needed or wished. In addition, senior radiographers sought to give the Claimant guidance and feedback on treatments.

271. Accordingly, the allegation was not found to have happened as a matter of fact.

272. The allegation fails and is dismissed.

8E - The Claimant's completed tasks and progress were unacknowledged: Steward Walker and Praveen Gopi (both Senior Radiographers) often refused to sign completed competencies. Nawda Fazel, a Senior Radiographer, refused to sign an entry and reprimanded the Claimant for not being in the room doing set-ups.

273. The Tribunal considered it helpful to break its conclusion down per person.

274. It is unclear to the Tribunal if the Claimant understood at the time, and now, the difference between patient treatments being signed against and an entire competency being signed off.

275. In relation to Mr. Walker, the Tribunal did not find that Mr. Walker often refused to sign completed competencies. Mr. Walker signed the Claimant's workbook on 23 June 2023.

276. Accordingly, this part allegation was not found to have happened as a matter of fact.

277. This part allegation fails and is dismissed.

278. With regard Mr. Gopi, again the Tribunal did not find that he often refused to sign completed competencies. Mr. Gopi has signed against patient treatments. Mr. Gopi did decline to sign the Claimant's rectum imaging workbook as he considered that the was not capable of independent completion of those duties at the time. In the circumstance of one competency not being signed, and with the explanation as to why being provided, the Tribunal did not consider the factual allegation was made out to have happened as a matter of fact.

279. This part of allegation fails and is dismissed.

280. In any event, the Tribunal did not consider there to be any link at all between the somethings arising and Mr. Gopi not signing the Claimant's rectum imaging workbook.

281. In relation to Ms. Fazel, as per the findings of fact there is no evidence that she was asked and refused to sign an entry and it was not considered that she reprimanded the Claimant in relation to set ups.

282. Accordingly, this part allegation was not found to have happened as a matter of fact.

283. This part allegation fails and is dismissed.

<u>8F - At the meeting on 20th June 2023, Helen Burland, Head of Radiotherapy Services discussed reported concerns about the Claimant, about which the Claimant had had no previous warning (other than an email received on 15th June 2023 inviting the Claimant to the meeting).</u>

284. At the meeting on 20 June 2023 Ms. Burland did discuss reported concerns with the Claimant. However, the Tribunal do not consider the Claimant has no previous warning of the concerns other than the email

dated 15th June 2023. As set out in the findings of fact, there was a chain of email correspondence in which the Claimant was given information about the concerns. In addition, other matters were discussed at the meeting, including if the Claimant wished to raise a grievance, but this does not form part of the allegation, on a plain reading.

285. Accordingly, part of the allegation was fails factually and part of it is made out.

286. In relation to discussing the reported concerns, the Tribunal considered if this was unfavourable treatment. The Tribuanl considered the factual matrix, in short that the was in a hospital setting where patient safety was paramount, she was still in her probation period and needed to know how to improve and she had been told about the nature of the concerns.

287. In this context, the Tribunal does not consider there to have been any unfavourable treatment, and the allegation fails.

288. In any event, even if the Tribunal were wrong, it did not consider there to be any link to Ms. Burland discussing the concerns and the somethings arising.

289. Further, the Claimant's submissions appear to relate to unfairness and a breach of the ACAS Code.

290. The allegation fails and is dismissed.

<u>8G - The Claimant was reported by Ella Thunder, agency Senior Radiographer, by email on 26th June 2023, for allegedly not accepting feedback, being rude to staff and patients and lacking understanding, skills and knowledge.</u>

291. As set out in the findings of fact Ms. Thunder did send Mr. Tenny an email, which could be considered as a report. The email does say that she considers the Claimant was harsh or defensive when given feedback, and the Tribunal considers this to fall within "not accepting feedback".

292. On balance, noting the comments made by Ms. Thunder, the Trinbunal considered that the contents could fall within "being rude to staff and patients" and "lacking understanding skills and knowledge".

293. The allegation is made out factually. The Tribunal considered if the email amounted to unfavourable treatment and concluded that an email with negative information sent to a manager was unfavourable treatment.

294. The Tribunal then went on to consider if the report, the email sent by Ms. Thunder, was because of the somethings arising and concluded it was not. The Claimant's own submissions note that Ms. Thunder was not aware of the Claimant's disabilities, and therefore logically not aware of the symptoms – the somethings arising. Further, the reason Ms. Thunder made the report was because Mr. Tenny had asked her for her feedback. This has nothing to do with the somethings arising.

295. The allegation fails and is dismissed.

8H - The Claimant was criticised by John Tenny in the probationary meeting for allegedly not accepting feedback, being rude to staff and patients and lacking understanding, skills and knowledge.

296. As noted in the findings of fact, the allegation itself does not set out which probation review meeting this relates to, but in cross examination the Claimant suggested it was about the review meeting on 15 May 2023.

297. The Tribunal had careful regard to all the evidence about what was said at this meeting, and others.

298. The Tribunal did not consider that Mr. Tenny criticized the Claimant but noted that he did explain his, and others, concerns about her performance. The Claimant appears to have taken this as criticism.

299. As the Tribunal did not consider Mr. Tenny criticized the Claimant, it did not consider the allegation to have been established, and therefore fails.

300. However, in case the Tribunal was wrong, it considered if any criticism was unfavourable treatment.

301. The Tribunal understands how it may not be pleasant for an employee to hear negative things about them. However, in the context of a probation meeting the Tribunal do not consider relaying that she was not accepting feedback, being rude to staff and patients and lacking understanding, skills and knowledge was unfavourable. Indeed, the

purpose of a probation review meeting is to discuss performance, and allow an employee to understand any areas that need improvement.

302. In these circumstances, the Tribunal did not consider there to have been any unfavourable treatment.

303. In case the Tribunal was wrong, it went on to consider if the feedback/criticism, was because of the somethings arising and concluded it was not. There was no link at all between the something arisings and the report given. Mr. Tenny, as line manager was relaying areas in which he, and other team members considered needing improvement for the purposes of managing the Claimant's probation.

304. The allegation fails and is dismissed.

305. Again, for completeness the Claimant's submissions do not address the requisite tests in section 15 but refer to a lack of regard for the Claimant's disabilities and procedural fairness.

I - The Claimant was removed from the Unit for two weeks for a no harm incident on 27th June 2023.

306. As a matter of fact, the Claimant was removed from patient facing duties on 27 June 2023. This is slightly different to "removed from the Unit" but the Tribunal considered it to be substantially the same.

307. The Tribunal considered whether this was unfavourable treatment was finely balanced. It recognised that in view of the situation and clinical concerns this appeared to be a sensible step but also considered to put the Claimant at a disadvantage. On balance it found it was unfavourable treatment.

308. The Tribunal considered if the Claimant was removed from patient facing duties because of the somethings arising. It concluded that it did not. The reason why the Claimant was told she must not undertake any patient facing tasks was because the Respondent, namely Mr. Tenny and Ms. Burland considered that the Claimant was not taking on the feedback and learning points and importance of the patient safety in the incidents she had been involved in. There was no link to the somethings arising.

309. The allegation fails and is dismissed.

310. Again, for completeness the Claimant's submissions refer to a lack of regard for the Claimant's disabilities and procedural fairness.

8J - The Claimant was required to undergo a clinical assessment on 11th July 2023

311. As set out in the findings of fact, the Claimant agreed to participate in a clinical assessment. The Claimant was not required. She agreed to the proposal as she was confident she could demonstrate her competence.

312. Accordingly, the allegation as pleaded is not made out factually.

313. However, in any event, even if the Tribunal were wrong the Claimant was required, in view of the fact the assessment did take place on 11 July 2023, the Tribunal did not consider it, on the facts to be unfavourable treatment.

314. The Claimant not only agreed, but she had sufficient notice, the number of patients was small, the patients selected were known to the Claimant, there was gaps between patients, and the Claimant was not required to work with anyone that she did not wish to.

315. Further, should the Tribunal be wrong, it did not consider there to be any link between the clinical assessment and the somethings arising. The assessment was arranged as an innovative way to try and give the Claimant an opportunity to demonstrate her competence in view of the conflicting view between the Claimant and the team.

316. The allegation fails and is dismissed.

317. Again, for completeness the Claimant's submissions do not address the requisite tests in section 15 but refer to a lack of regard for the Claimant's disabilities and procedural fairness.

K - The Respondent determined that the Claimant had failed the clinical assessment on 11th July 2023.

318. The fact that the Claimant failed the clinical assessment is accepted and the Tribunal that the determination that she had failed amounted to unfavourable treatment.

319. The Tribunal considered if the unfavourable treatment, the determination the Claimant had failed the assessment, was because of the somethings arising. The Tribunal did not consider there to be any link between the decision that the Claimant had failed the assessment and the somethings arising. The Tribunal considered the Claimant failed because of her performance during the assessment, as was summarised by Ms. Clarke and Ms. Smith in the findings of fact above.

320. There was no link to the somethings arising.

321. The allegation fails and is dismissed.

322. Again, for completeness the Claimant's submissions refer to a lack of regard for the Claimant's disabilities and procedural fairness.

Time limits

323. As the Claimant was not successful in any of her discrimination complaints the Tribunal did not consider any matters in relation to time limits.

Approved by:

Employment Judge Cawthray

22 June 2026

Notes

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

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