Case Number: 6006284/2024

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms L Fish	v	Circle Health Group Limited

Heard at: Watford, in person and via Cloud Video Platform ("CVP")

On: In public, 2-4 and 7-8 September 2026
and in private on 10 September 2026

Before: Employment Judge Hyams **Members:** Ms L Thompson
Mr D Wharton

Representation:

For the claimant: Mr Andrew Watson, of counsel
For the respondents: Mr Marc Ramsbottom, representative

UNANIMOUS RESERVED JUDGMENT ON LIABILITY

1. The claimant was not dismissed unfairly within the meaning of 98(4) of the Employment Rights Act 1996.

2. The claimant's claim of a failure to make reasonable adjustments within the meaning of section 20(3) of the Equality Act 2010, contrary to sections 21 and 39(5) of that Act, does not succeed and is dismissed.

3. The claimant's claim of discrimination within the meaning of section 15 of that Act does not succeed and is dismissed.

4. The claimant's claims of direct discrimination within the meaning of section 13 of that Act, harassment within the meaning of section 26 of that Act, and indirect discrimination within the meaning of section 19 of that Act, are dismissed on their withdrawal.

REASONS

The claims made by the claimant

1 The claimant's claim form was presented on 21 July 2024. There was a copy of it and of its enclosed "Details of Claim" at pages 9-27 of the bundle put before us

as the hearing bundle. The bundle consisted of 410 pages including its index. Any reference to a page below is to a page of that bundle. There was an early conciliation certificate at page 8. It was dated 21 June 2024 and the date of receipt by ACAS of notification of early conciliation was 10 May 2024. In the circumstances, the claim was in time in respect of conduct occurring on or after 11 February 2024.

2 The first respondent runs a number of private hospitals, which, in addition to providing services to private individuals directly, provides health care services to the National Health Service on a contractual basis. The claimant was dismissed from her position of Hotel Services Manager for two of those hospitals: Cavell Hospital, and The King's Oak Hospital, which are located about a mile from each other. That dismissal was with immediate effect on 29 February 2024, although the claimant was given pay in lieu of notice. The dismissal followed a period of absence from work which started on 3 November 2022. That absence resulted from symptoms arising from the claimant's breast cancer. The claimant originally claimed only that her dismissal was unfair and that it constituted "unlawful disability discrimination".

3 The second respondent was the claimant's line manager at the time of her dismissal. The second respondent was an individual respondent (we inferred) principally because it was originally claimed in paragraph 13 of the details of the claim, on page 25, that "The Respondents have been guilty of unacceptable behaviour and harassment over and above the decision not to allow the Claimant to work flexibly." There was a preliminary hearing on 14 November 2024. It was conducted by Employment ("EJ") Judge Skehan. Her record of the hearing was at pages 49-65. At the end of that document, on pages 55-65, EJ Skehan set out what she described as an agreed list of issues. They were (as stated, in the following order) of

3.1 unfair dismissal;

3.2 direct discrimination because of disability;

3.3 discrimination arising from disability within the meaning of section 15 of the EqA 2010 through the following claimed events.

3.3.1 'In the period from 3 May 2022 to 3 November 2022 the Second Respondent often undermined the Claimant by arranging meetings directly with the Claimant's staff regarding upcoming plans/workloads without inviting the Claimant, even though she was on the premises at the time.'

3.3.2 'On 15th May 2023, the Second Respondent sent an "Unauthorised absence from work" letter accusing the Claimant of not submitting a current sick note and saying that her absence could be considered as unauthorized, even though she had in fact presented a sick note on 20th April 2023.'

3.3.3 'On 3 October 2023, Hana Search asked the Claimant if she "just wants to retire", even though she made it clear on several occasions that she is not ready to retire yet.'

3.3.4 'In November 2022, July/August 2023 and February 2024, the Second Respondent refused to allow the Claimant to work one or two days a week from home.'

3.3.5 'On 29th February 2024, the Second Respondent dismiss[ed] the Claimant.';

3.4 a failure to make a reasonable adjustment within the meaning of sections 20 and 21 of that Act in the form of (1) allowing her to "work from home one or two days per week", and (2) allowing her "to wear alternative shoes to those required under the uniform policy [which required footwear to have covered toes and be closed at the back] to reduce pain and discomfort arising from her disabilities";

3.5 indirect discrimination within the meaning of section 19 of that Act, the protected characteristic for that purpose being disability; and

3.6 harassment within the meaning of section 26 of that Act, the protected characteristic for that purpose also being disability.

4 EJ Skehan listed the "final hearing" of the claimant's claims to take place over six days between 1 September and 8 September 2026. There was, however, in the event no tribunal available to conduct that hearing over those days, and it was put before us to hear over five days, starting on 2 September 2026. We first, through EJ Hyams, discussed the case with the parties, having only just before the start of the hearing been given access to the hearing bundle and witness statements. During the course of that discussion, EJ Hyams (who had read the pleadings in the case, having had access to the digital file before the bundle and witness statements were put before us) pointed out that

4.1 claims of direct discrimination and harassment are very often (because of the definition of "detriment" in section 212(1) of the EqA 2010) capable of being advanced only as alternatives;

4.2 a direct discrimination claim is technically rather easier to press than a claim of harassment;

4.3 a claim of harassment is in practice, in the absence of conduct which was overtly related to the protected characteristic relied on, dependent on the same mental element as that which is required for direct discrimination within the meaning of section 13 of the EqA 2010 (that reality having been recognised by His Honour Judge James Tayler in paragraph 24 of his judgment in *Carozzi v University of Hertfordshire* [2025] IRLR 184);

4.4 it is rare for there to be an animus, or motivation within the meaning of paragraph 72 of the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28, against the protected characteristic of disability; and

4.5 there was no overt act relating to disability which might form a good basis for a claim of harassment pleaded here.

5 On 3 September 2026, the claimant gave evidence all day. On 4 September 2026, Mr Watson said that the claimant, in the light of the comments set out in the preceding paragraph above, was withdrawing her claims of direct discrimination because of disability, harassment within the meaning of section 26 of the EqA 2010, and indirect discrimination within the meaning of section 19 of that Act. We welcomed that withdrawal, as it made complete sense to us.

The evidence before us

6 We heard oral evidence from the claimant on her own behalf, and, on behalf of the respondents, from the following witnesses:

6.1 the second respondent, Ms Hectoria Muthee, who was at the time of giving evidence and was from 1 March 2023 onwards employed as a Director of Operations for the first respondent;

6.2 Ms Lisa Douglas, who was at all material times employed by the first respondent as Executive Director at Kings Oak and Cavell Hospitals;

6.3 Mrs Hana Search, who was at the time of giving evidence and at all material times a Human Resources ("HR") Business Partner employed by the first respondent; and

6.4 Mr Dominic Bath, who at the material time was employed by the first respondent as Regional Director (London and Southeast).

7 At the start of the final day of the hearing before us, we had before us in the form of documentary evidence only the hearing bundle to which we refer in paragraph 1 above. During the course of that day, we were sent

7.1 a summary of the contents of pages of a calendar for the period from May to November 2022, showing the days during that period which the claimant had recorded herself as being at work, or on annual leave, or absent because of sickness, as well as

7.2 those pages themselves, which were in the claimant's possession which had not previously been disclosed but which Mr Ramsbottom accepted were what they purported to be.

The relevant law

Introduction

8 Mr Watson's written closing submissions contained references to much case law. We found much that was in those submissions to be of considerable help in regard to the case law, but as EJ Hyams discussed with Mr Watson on 8 September 2026, there was an apparent conflict between several of the cases concerning the question whether it is just and equitable to extend time for a claim made under the EqA 2010 when it is made outside the primary time limit (extended as applicable by any period of early conciliation).

9 In addition, it is incumbent on a tribunal not to refer to all possible cases which have been reported or are relied on by the parties: it is necessary to state the relevant legal principles as succinctly as possible. We therefore refer below only to the case law which we found to be of particular importance to the circumstances of this case.

Claims of a failure to make one or more reasonable adjustments

10 If a claimant satisfies an employment tribunal that he or she had an impairment within the meaning of section 6 of, and Schedule 1 to, the EqA 2010 at a material time, then an obligation to make a reasonable adjustment within the meaning of section 20(3) of that Act may have arisen where a provision, criterion or practice ("PCP") was applied by the employer which put the claimant "at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled." Section 6(1) provides that "A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities." Section 212(1) of that Act provides that in that Act, the word '"substantial" means more than minor or trivial'. Accordingly, the word "substantial" needs to be applied not only when deciding whether a person was disabled but also whether an adjustment within the meaning of section 20(3) needed to be made.

11 Only if the employer knew or ought reasonably to have known of the claimant's disability and the manner in which the disability was likely to put the claimant at a substantial disadvantage (see paragraph 20 of Schedule 8 to the EqA 2010), may there have been a duty, imposed by a combination of sections 20, 21 and 39(5) of the EqA 2010, "to take such steps as it is reasonable to have to take to avoid the disadvantage". Whether or not it would have been reasonable to make the adjustment sought is a matter for the tribunal to determine, taking an objective approach, and is not to be determined by reference to the "range of reasonable responses of a reasonable employer" approach applicable in the law of unfair dismissal: *Smith v Churchill Stairlifts plc* [2006] ICR 524.

Section 15 of the EqA 2010

12 Section 15 provides:

> "(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."

13 In paragraph 82 of his written closing submissions, Mr Watson said this:

> 'In most cases (including the present), "unfavourable" is to be given the same meaning as "disadvantage" or "detriment: *Trustees of Swansea University Pension and Assurance Scheme and anor v Williams* [2019 ICR 230 (SC).'

14 We did not see that that case was a good authority for that proposition. The part of that case relied on had to be paragraph 27 of the judgment of Lord Carnwath JSC, with which the other members of the court agreed, the effect of which was aptly summarised in the headnote as follows:

> "In most cases little is likely to be gained by seeking to draw narrow distinctions between the word unfavourably in section 15 of the Equality Act 2010 and analogous concepts such as disadvantage or detriment found in other provisions, nor between an objective and a subjective/objective approach. While the Equality and Human Rights Commissions Equality Act 2010 Code of Practice (2011) could not replace the statutory words, it did provide helpful advice as to the relatively low threshold of disadvantage which was sufficient to trigger the requirement to justify under the section (post, para 27)."

15 We bore it in mind here that the word "detriment" in section 39(2) of the EqA 2010 must (applying *Ministry of Defence v Jeremiah* [1980] ICR 13) be something which a reasonable person would say was a detriment.

16 Paragraph L[377.02] of *Harvey on industrial relations and employment law* concerns the question whether any unfavourable treatment "is a proportionate means of achieving a legitimate aim" and is as follows.

> "The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565 to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that

must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'."

17 We found several statements of the applicable test in *Hardy and Hansons plc v Lax* to be of particular assistance. That case concerned the dismissal of a woman who was first employed on a full-time basis and then, having had a baby, sought to be permitted to return to work on a part-time basis. The employer refused to permit her to do so, and the question which then arose was whether that refusal was justified for the purposes of a claim of indirect discrimination within the meaning now of section 19 of the EqA 2010. The main relevant statement was in paragraphs 32-34 of the judgment of Pill LJ, which are in the following terms.

> '**32** Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (*Barry v Midland Bank Plc* [1999] ICR 559) and I accept that the word "necessary" used in *Bilka-Kaufhaus* [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. 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 proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.
>
> **33** The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and

the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman*, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.

34 The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions.'

18 Gage LJ expressly agreed with that reasoning, although he added some of his own (see paragraphs 57-61 at [2005] ICR 1583). What Gage LJ said in those paragraphs was clearly to the effect that, as it was our own understanding, the test for determining whether there has been conduct which was not a proportionate means of achieving a legitimate aim is not the same as the question whether what was done was within the range of reasonable responses of a reasonable employer.

19 Thomas LJ having said (in paragraph 53 at [2005] ICR 1582F) that he agreed with the conclusions of Pill LJ, stated his own reasons for his decision, in the following terms.

'**54** For the reasons Pill LJ gives at paragraph 32, it is for the Tribunal to determine whether the employer has shown that the proposal is justifiable irrespective of the sex of the person to whom it is applied. As it is the Tribunal which must decide on justification without according any margin of appreciation to the employer, the Tribunal must therefore set out a critical and thorough evaluation following the tests set out in *Bilka-Kaufaus GmbH v Weber von Hartz* (Case 170/84) [1987] ICR 110 when making its determination of the merits of the justification advanced. I agree with Pill LJ that this task requires considerable skill and insight.

> **55** Where the economics of the business of the enterprise or its working practices forms part of the justification, then I would expect the reasons to set out at least a basic economic analysis of the business and its needs; the emphasis in *Bilka-Kaufhaus* was on "objectively justified economic grounds". Although the extent of the analysis of the economics of the business and its working practices must depend on the nature of justification advanced and of the enterprise being considered, the analysis must be through and critical and show a proper understanding of the business of the enterprise.'

20 Mr Watson said this in paragraph 98 of his written closing submissions:

> "In *O'Brien v Bolton St Catherine's Academy* [2017] ICR 737 the Court of Appeal held that it was open to an employment tribunal to conclude that it was unreasonable of the employer to have disregarded evidence produced by the employee at the appeal stage suggesting that she was fit to return to work without at least seeking a further assessment by its own occupational health advisers. Also in *O'Brien* the Court of Appeal held that it was entirely legitimate for a tribunal to decide, in the context of dismissal for long-term sickness absence, that its finding that dismissal was disproportionate for the purpose of s.15 EqA 2010 also meant that it was not reasonable for the purpose of s.98(4) ERA 1996."

21 Mr Watson referred us to paragraph 53 of the judgment of Underhill LJ in *O'Brien*, where Underhill LJ said that "The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law." However, we concluded that what Underhill LJ said in paragraph 53 of that judgment could not lead to the conclusion that the test for determining whether a dismissal was outside the range of reasonable responses of a reasonable employer was the same as that which applies when deciding whether the dismissal was a disproportionate means of achieving a legitimate aim. The difference in the two tests is underlined by the decision of the Court of Appeal in *Smith v Churchill Stairlifts plc* [2006] ICR 524, to which we refer in paragraph 11 above.

The law of unfair dismissal

22 In a claim of unfair dismissal within the meaning of section 98 of the ERA 1996, where there is no dispute that the claimant was dismissed, in practice the first question is what was the reason for the dismissal. In that regard, in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

23 Capability is a potentially fair reason for an employee's dismissal. That is because of sections 98(1) and (2)(a) of the ERA 1996.

24 Where the employer has satisfied the tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, which provides this:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

25 In a claim of unfair dismissal where the tribunal concludes that the reason for the dismissal was the claimant's capability, as it is said in paragraph DI[1206]-[1207] of *Harvey*:

> 'The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373, [1977] ICR 301. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.
>
> > "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"
>
> And he added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.'

26 Overall, however, the question whether the dismissal of a claimant who has the right to claim unfair dismissal within the meaning of section 98 of the ERA 1996 was fair is whether it was within the range of reasonable responses of a reasonable employer. The issues arising in deciding that question were set out in paragraph 2.3 on page 56 in the following manner.

> "The Tribunal will usually decide, in particular, whether:
>
> 2.3.1 The First Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.3.2 The First Respondent adequately consulted the Claimant;

2.3.3 The First Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.3.4 The First Respondent could reasonably be expected to wait longer before dismissing the Claimant".

27 We referred ourselves also to what was said in paragraph DI[1221] of *Harvey* in considering those questions, which was this:

> 'The importance of consultation was stressed in the following passage from the judgment of the EAT in *East Lindsey District Council v Daubney* [1977] IRLR 181, [1977] ICR 566:
>
> > 'Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done".'

28 In addition, we took into account this, as stated in paragraph DI[1226] of *Harvey*:

> "Although, as the *East Lindsey* case indicates, a decision whether or not to dismiss for ill health is not purely a medical question so that consultation with a doctor is not generally sufficient on its own to justify a fair dismissal, it will often be a necessary step for the employer to take. It all depends on the particular circumstances."

Time limits

29 Mr Watson referred to a series of authorities relating to the question whether it is just and equitable to extend time for the making of a claim of a breach of the EqA

2010. The first three subparagraphs of 77.6 of his written closing submissions were as follows.

> "(a) The discretion to extend time under the just and equitable jurisdiction is a wide one: *Robertson v Bexley Community Centre* [2003] IRLR 434 at [23]-[24].
>
> (b) However, time limits are to be observed strictly in the tribunals. 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 failure to exercise the discretion. The exercise of the discretion is the exception not the rule: *Robertson v Bexley Community Centre* [2003] IRLR 434 at [25]; *Miller v Ministry of Justice* UKEAT/003/15 at [10(ii)].
>
> (c) The burden of persuading the tribunal to exercise its discretion to extend time is on the claimant: *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 at [26]."

30 Mr Watson also said this in paragraph (g) in that sequence:

> "As to the relevance of the reason for the delay:
>
> (i) Whether there is any explanation or apparent reason for the delay, and the nature of any such reason, are relevant matters to which the tribunal ought to have regard. It is not a prerequisite for an exercise of the discretion that the claimant explain the delay or that the tribunal be satisfied that there is a good reason for it: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 (CA) at [25].
>
> (ii) However, if the reason for the delay is unacceptable, it is very unlikely that a Tribunal would decide it was just and equitable to extend time, regardless of all the other circumstances: *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0320/15 (EAT) at [27]."

31 We found that passage to be at first sight difficult to reconcile with the one which we have set out in paragraph 29 above. In the end, we found that what was said in paragraph 25 of the judgment of Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 had to be seen against the background of the facts of that case, which included that the claimant, as it was said in the headnote, "[f]or many years ... suffered from a depressive illness, though the severity of the illness fluctuated and her symptoms were controlled by medication". In addition, the appeal was against a decision of the employment tribunal that it <u>was</u> just and equitable to extend time. The challenge to that decision could be successful only if an error of law had been made, and the Court of Appeal concluded that none had been made. Accordingly, what was said in

paragraph 25 of the judgment of Leggatt LJ was not inconsistent with the relevant proposition stated in paragraph 26 of the judgment of Wall LJ in *Caston*, namely:

> "Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour)."

The facts as found by us

32 Having heard the oral evidence before us and the documentary evidence to which we refer in paragraph 7 above, we made the following findings of fact.

The claimant's work

33 The claimant's work was described in paragraph 2 of the details of her claim (on both page 15 and page 23) in the following words.

> "The Claimant was employed as a Hotel Services Manager over 2 hospitals, The King's Oak and Cavell Hospital. Her work and role involved, amongst other things, managing the housekeeping of general areas and theatres, portering (general and theatre porters), monitoring catering, vending and coffee machines etc., window cleaners, gardeners, pest control, general look and feel of the hospitals, cleanliness, signage, general garbage disposal plus surgical and medical waste disposal etc."

34 There was much oral evidence before us about the work of the claimant and whether any of it could in practice have been done at home. We consider the latter issue in paragraphs 147-152 below. Here, we state our findings of fact about, and in relation to, the work itself.

35 The words in the passage which we have set out in paragraph 33 above were in our view apt. They themselves recognised that the claimant's role involved "monitoring" the things described after that word appears in that passage. Those words were written possibly without an appreciation of their potential impact on the claimant's claims as stated in the ET1 form, but in any event they were, we concluded, a reliable statement by way of overview of what the claimant's job was.

36 All of the witnesses who gave evidence for the first respondent (including Ms Muthee, who was of course herself the second respondent), other than Ms Search, gave extensive evidence about the claimant's work and the extent to which it could in practice be done effectively from home. While we recognised that there was a risk that those witnesses' evidence was tailored to the respondents' case in these proceedings, we accepted it, if only because, applying what we will call some common sense and assessing the evidence on a balance of probabilities, we found it to be cogent. By way of example only, we record that we therefore accepted the following passage of Ms Muthee's witness statement.

"5. ... [The claimant] was responsible for approximately 26 staff which included a mixture of full-time, part-time and temporary workers. Her main duties and responsibilities were to deliver high-quality hospitality services within the hospital, ensuring excellent service for patients, visitors, and consultants. This includes the direct management of portering and housekeeping, and close collaboration with catering providers to maintain standards and manage costs within budget.

6. Lorraine will be expected to manage and host all Hotel Services external contractors, ensuring the delivery and compliance of agreed service level agreements. The role is also front facing, acting as a key point of contact for patients, visitors, and consultants to receive and respond to feedback on hospitality services, thereby ensuring patient satisfaction is effectively managed.

7. The role ensures the highest possible standards are maintained to promote and safeguard the well-being and interests of patients, staff, and visitors. Lorraine is responsible for completing and complying with relevant departmental and commercial audit cycles, including controlled risk self-assessments and internal audit requirements, as well as managing any incidents or complaints related to Hotel Services in real time.

8. ... Lorraine was required to provide direct hands-on support when peaks in demand risk affecting service delivery.

9. Lorraine is also a member of the hospital management team, she is expected to attend key meetings, collaborate across departments, and support the Director of Operations in achieving the hospital's non-clinical objectives.

10. Lorraine was required to always be on site during her working hours. She was expected to work 37.5 hours per week. Lorraine worked across two hospital sites – the Kings Oak and Cavell Hospitals in north London. They are located on separate sites about a mile apart from each other.

11. The cleanliness of the hospital site is of vital importance to patient safety as well as an important aspect in ensuring infection control and in always creating a safe hospital environment. This is a very hands-on role because all the staff work on site, there are no remote workers, and it is vital the manager is on site and able to direct staff and respond to situations that may arise on a day-to-day basis. Most of the staff in Lorraine's team would be unskilled manual workers and English is often not their first language. The turnover of staff is quite high in this area, and there is a constant routine of on-site training, induction and supervision to ensure that standards are maintained. It

is not like office cleaning, the work is more demanding and to ensure adequate infection control and health and safety. These staff do not have email accounts or access to IT equipment as part of their normal working day so there is heavy reliance on Lorraine to provide direction and ensure that all staff are meeting the required standard. The Hotel service lead also work on the floor as part of a working shift, for example the housekeeping leads will come directly to cleaning while prepping deliveries and the Porter leads will be driving or performing a general Porter shift upon arrival for their shift. While the Leads [have] email access they are heavily reliant of [i.e. on] verbal communication and management updates, they only access computer of [i.e. in] non-scheduled protected time that works in line with their patient activity related duties."

37 We record here also that we accepted also the evidence of Ms Douglas about what the claimant's role involved. That was primarily in paragraphs 14-25, 27 and 29 of her witness statement. That evidence was firmly tested in cross-examination, but nothing which Ms Douglas said in cross-examination in our judgment detracted from what was said in those paragraphs.

The claimant's reduced attendance at work in the period from 2021 onwards and its impact

38 Mr Watson's written closing submissions started so far as relevant with the following passage about the facts.

"***The Claimant's first period of working partly from home***

3. Following her diagnosis of breast cancer in May 2021, the Claimant commenced two periods of chemotherapy treatment. From 24 May 2021 up to and including 26 July 2021, she had chemotherapy on a three-weekly cycle. From 26 August 2021 up to and including 4 November 2021 she received ten weekly doses of chemotherapy.

4. In this time, the Claimant had two separate working patterns to accommodate her chemotherapy treatment—see LF/¶28, LF¶34. In particular:

    4.1. In the first period (24 May to 26 July), there was a three-week cycle, consisting of week 1 (after chemotherapy) off sick; week 2 working remotely from home all week; week 3 working full-time from the hospitals.

    4.2. In the second period (26 August to 4 November), she worked on a weekly cycle: chemotherapy on Thursday afternoon, off sick on Friday, working from home Monday, and working on-site Tuesday, Wednesday, and Thursday morning.

5. The Claimant's position is that this worked well. There were no complaints made to her by her staff or others across the two hospitals.

6. The Respondents have adduced no credible, detailed evidence that this pattern did not work well. Ms Douglas in her statement at LD/¶26, 30 suggests that it did not, and that employees complained to her about the Claimant's lack of support for them on site, but as witness testimony that evidence is entirely generic – not a single specific example is given – and it is unsupported by contemporaneous documentary evidence. This latter point is particularly damaging to the credibility of the testimony, given that she has given no specific examples and produced no documents (even though she claims some concerns were raised in emails copied to her).

7. The absence of evidence from the Respondents on this speaks volumes. If there were indeed complaints and concerns, it would be an easy matter to find them and produce them.

8. The Claimant maintains that this first period of working from home was a success and, contrary to Ms Douglas's unsupported assertions, no complaints were raised about lack of support from her."

39 One problem with what was said in the final three paragraphs of that passage was that while Mr Watson put the point to Ms Douglas in cross-examination that she had given no examples of the things that she described in paragraph 26 of her witness statement, when he did that, she said that she "could give a few if that would be helpful", but Mr Watson then stopped her from doing so.

40 Secondly, we could not accept that it was necessary to adduce documentary evidence to support the oral evidence of Ms Douglas before we could safely accept that oral evidence. If it had been correct then it would have meant that only oral evidence which was corroborated by documentary evidence could safely be accepted.

41 A third problem with what was said in the final three paragraphs of the passage set out in paragraph 38 above was that there were significant gaps in the documentary evidence for both sides in this case. That is well illustrated by what we say in paragraphs 48 and 73 below. It was therefore, in the circumstances of this case, especially unsafe to conclude that the absence of documentary evidence to support an oral assertion of fact was fatal to an acceptance of that assertion.

42 What Ms Douglas said in paragraph 26 of her witness statement about the effect of the claimant's limited attendance at work during 2021 was this:

> "I am aware that staff and team leads in Lorraine's department expressed their frustration about the need for Lorraine's support on site while she was

> allowed to work from home over a period during her treatment. They would have to send messages or emails and await a response, and felt that they needed more guidance and assistance in the workplace. Staff expressed this to me, I am aware that they reported also to Rachel Boxall and to Hectoria, and I was copied on emails that they also wrote to Lorraine directly to ask for help and guidance, expressing their frustration."

43 We could see that that paragraph probably applied not only to 2021 but also to 2022, because Ms Muthee (to whom Ms Douglas referred in her witness statement as "Hectoria") only started to work for the first respondent on 7 January 2022. We therefore looked at the claimant's record of the days when she worked nominally for 16.5 hours per week in 2022 (which was sent to us on the final day of the hearing before us, namely 8 September 2026, in the manner which we record in paragraph 7 above) to assist in our assessment of the evidence of Ms Douglas in paragraph 26 of her witness statement. That record showed that the claimant worked from home on 1 September and 3 October 2022, and that during the period from 3 May to 3 November 2022, she

43.1 worked on only two days in the second week of June 2022, namely 7 and 8 June, and in the following two weeks was on annual leave, after which she was sick for the whole of the following week,

43.2 took a week of annual leave August 2022, and

43.3 took two weeks of annual leave in September 2022.

44 We therefore concluded that what Ms Douglas said in paragraph 26 of her witness statement was said not only in relation to 2021, but also in relation to 2022, and that it applied to the times when the claimant was not working at all as well as when she was working from home.

45 As for emails showing the difficulties caused by the claimant's absence from the workplace, there was at pages 195-197 a chain of two emails starting with one sent on 9 June 2022 by Mr Terry Butler to the claimant and Ms Muthee, to which Ms Muthee had replied, which was at least one example of a difficulty which might not have arisen if the claimant had been able to work full-time in the workplace. That chain was as follows.

45.1 At 12:55, Mr Butler wrote:

> "Dear colleagues.
> I would like to respectfully ask for some support regarding Franco Gioai. i was stopped in the corridor by Lisa [i.e. Ms Douglas] telling me that franco had complained about his shifts. Since I have been here I have designed a Rota so that he could utilize his domestic situation sometimes at my own sacrifice. I have had nothing but negativity to me and other members of staff. I am doing my best to be professional and understanding but have reached the end of my

patience to the point of stress and frustration. I would welcome ideas and support regarding this so we as a team could move forward.

Thanks for your continuing support."

45.2 At 1:32pm on the same day, Ms Muthee replied:

"Hello Lorraine

Can you please facilitate a recorded conversation to address this, please invite me."

46 Ms Muthee gave evidence in paragraph 28 of her witness statement about the impact on herself of the claimant's absence, and she referred to that email chain in support of what she said in that paragraph. That paragraph, in full, was as follows.

"I was finding the working environment/workload at that time was also becoming very unsustainable for me and the Leads within hotel services. They were burnt out, they were frustrated daily about the operational problems, patient complaints and struggled with communication lines with the clinical teams in managing work outputs/expectations which was a direct reflection of Lorraine not been [i.e. being] on site. There are some examples of this below:

28.1. **P203-206**: Is an email exchange between myself and Harry Sorce. This should have been something that Lorraine resolved. My response dated 8 July 202[2] show me intervening trying to resolve the issue for Harry.

28.2. **P216-217**: This email exchange around 10 February 2022 between myself and Melanie Newnham shows me being granted access to enable me to undertaken appraisals for the department Leads. This would have been something that Lorraine would have done.

28.3. **P195-197**: Email from porter lead Terry Butler dated 09-06-2022. An example of the Lead expressing frustration was due to the lack of hands-on support and an ED escalating concerns directly to the Lead because of limited management visibility within Hotel Services.

28.4. **P219-222**: Email from housekeeping lead Lucia Vieru dated: 10-11-2022. The complaint highlights ongoing staffing shortages and over-reliance on overtime, leaving staff exhausted and morale low. Lucia and Janet felt unsupported by Lorraine, with unclear responsibilities being pushed onto them while they already manage an excessive workload across operational and managerial tasks. Consultants and staff are increasingly dissatisfied, and there is concern that without a

clear plan or better organisation, the department will deteriorate further."

47 While, as Mr Watson submitted, it would have been unsatisfactory (and arguably an error of law) to decide whether or not what any witness said was true by reference to a general assessment of the reliability of that witness's evidence, we did ask ourselves having heard all of the evidence and made at least tentative findings of fact whether we had any concerns about the reliability of the witness's evidence generally. We also tested each material part of the witness's evidence against the rest of the factual background and assessed it by applying a balance of probabilities test. Having done that, we came to the conclusion that Ms Douglas had done her best to tell us the truth as she recalled it and to have been balanced and realistic in doing so. We also found that Ms Muthee did her best to tell the truth, and that she was also balanced and realistic when giving evidence. Here, in particular but not only given the factors and evidence to which we refer in paragraphs 147-152 below, we accepted (1) the evidence of Ms Muthee which we have set out in the preceding paragraph above and (2) Ms Douglas' evidence to the effect that the claimant's working pattern in May to November 2021 was not, as claimed by the claimant, "a success".

The evidence before the respondents before the claimant was dismissed about the claimant's ability to work

Introduction

48 There were some significant gaps in the documentary evidence before us relating to the claimant's attendance at work from 2021 onwards to the date of her dismissal. No satisfactory explanation was given to us for those gaps. However, both parties had apparently lost significant documents relating to that period. We now set out in sequence the medical evidence which was in the hearing bundle and the documents recording the meetings which the claimant had with Ms Muthee and, after the claimant's dismissal, Mr Bath. We also refer in the following paragraphs below to the content of the letters sent by both of those witnesses to the claimant in connection with the claimant's dismissal.

Occupational health report dated 24 May 2022

49 At pages 192-194, there was a "report to management" sent by Ms Emily Mapfuwa, who was employed by the first respondent as an "Occupational Health Adviser". It was dated "24.05.2022". The parties estimated that the report was written on 24 April 2022. That was in part because the report referred on page 193 to an "Estimated return date" for the claimant to return to work of "02.05.2022". In, addition, in the middle of page 192 it was said that the claimant "started second lot of Chemotherapy on 2nd March. So far she has had three cycles and the next one is due 14th May."

50 The "Current Position" was said to be that the claimant on the day of the assessment reported the following things:

> "[S]he still experiences neuropathy pain to both her feet. She is also experiencing some pain and discomfort to her wound site. She rested and avoided work before surgery in order to be fit for surgery. She was signed off from November and had surgery on 8th December 2021.
>
> She is experiencing some low mood at having to go another cycle of chemotherapy.
> Her surgery is still not healed
>
> The main obstacle preventing her return the surgical wound which is yet to heal and the neuropathy pain in both her feet."

Meeting of 6 July 2022

51 Chronologically speaking, the next document recording what happened in 2022 in regard to the claimant's attendance at work was at pages 198-200. It was about a meeting which took place on 6 July 2022. Its subject was stated to be "1-1 Catch -up on phase return / sickness review". There were some "Points of discussion" immediately below that subject line, which were in the following terms.

> "1. Sickness within Phase return (23-06-2022 till the 4th -07-2022 (37.5 hours lost)
> 2. Phase return. LW returned to work on 03-05-2022.
> 3. Work Schedule: 16.5 hours a week, 3 days at 5.5 hours a day. Tuesday-Thursday 10 AM - 3:30 PM - recommendations following occupational health appointment 24-05-2022- please see attached OH report."

52 The "attached OH report" was not, however, in the bundle. Most of what was recorded in the notes at pages 198-200 was recorded in the letter dated 1 August 2022 at pages 211-212, which was of such importance that we have set it out in the following paragraph below. One of the things noted on page 199 which was not said in that letter but which showed why there was a reference in the letter to early retirement, was the passage in the middle of the page, where the claimant was recorded to have said:

> "I feel very attacked, I am confused about the suggestion you have just made, does this mean that there will be another person within my role sharing the same title, I don't think this is wise for the team, and I do not understand why you are not supporting me in granting my request to work from home for the days that I cannot make it into work.
>
> I feel as though I am being pushed into early retirement.

LW [i.e. the claimant, who was known to the respondents at that time as Lorraine Wingate] then expressed her worries about lost of earning / Job benefits if she was to consider the above option."

53 The letter dated 1 August 2022 at pages 211-212 was the claimant's copy, on which she had written some comments and marked up some passages with highlighting. She did not correct any part of what was said in the letter, which was written by Ms Muthee. The letter's heading was "Re: Return to Work Meeting Outcome", below which this was said:

"Thank you for attending the Return-to-Work Meeting with myself on the 6th July 2022.

We have used this opportunity to review the progress of yours [*sic*] phased return to work as follows:

1. Sickness within Phased return (23-06-2022 till the 04 -07-2022 (37.5 hours lost)
2. Phased return. LW resumed work on 03-05-2022.
3 Work Schedule: 16.5 hours a week, 3 days at 5.5 hours a day. Tuesday–Thursday 10 AM – 3:30 PM - recommendations following occupational health appointment 24-05-2022

During the meeting you explained that the working hours have been challenging and currently struggling with coming in to work. You expressed that the neuropathy pain in both your feet and hands have contributed to this and sometime struggle to walk or work with your hands. You have also been struggling with your sleeping patterns which are making you feel exhausted in your working days. You also expressed that it has been nice to be back on site and catch-up with your teams but felt that you can do more by working from home, you also expressed distress as to why this has not been approved. You agreed to get in touch with your oncologist to provide a report that is inclusive of your current working remits restrictions. During this conversation you also shared that your oncologist believed that you should not be working at all till the end of your treatment.

I advised that working from home within the role of a hotel services manager will not be operationally possible as the teams and contracts within your management require onsite hands-on support and supervision. Furthermore, while you are still receiving treatment it would be wise to manage a work life balance cautiously to allow mental and physical rest. Based on the information disclosed about your current health disposition it is wise for us to engage in another occupational health referral.

We discussed the fact that you are at the eighth week of your phased return to work and the expectation is for you to increase your hours slightly or return to full-time hours and you said you were not at full-health to do so, and this was due to the side effects of chemotherapy. You also said that

you were unable to set structural days that you would like to come to work as this is being controlled by your appointments which are changing constantly as well as the side-effects of your treatment.

We would like to support you in the best way possible while you are going through chemo, we need to work together to create better structure around the time spent at work to allow adequate support for the teams that you manage. With this in mind, we should wait for the report of your second occupational health referral that would help us determine a way forward. I suggested that if your working schedule were to remain the same until December 2022 then it would be wise for us to explore a flexible working hour request for a fixed period. You did become upset at this time and said that you felt attacked and confused by this suggestion. You also said that you were worried about losing your earnings and/or your job benefits if you were to consider this option.

I want to reassure you that my suggestion is not intended to make you feel attacked or imply early retirement. The information provided was for you to be aware of all the options available in aiding your treatment recovery while operationally providing support for your team and easing administrative responsibilities of your role as a hotel services manager. As part of our duty of care towards you as an employee, be assured that we will always follow the correct process and policies that are relevant to the support we can provide.

We agreed the following: -

- I will make and follow-up occupational health referral and to provide you with a letter entailing what was discussed within this meeting with an invite to the next meeting. The Oncologist's medical report will also be reviewed as part of your next Occupational Health assessment so the Oncologist report can act as reference to your current physical and mental health and correct working support/ schedule recommendations can be made
- You will speak with your oncologist about your working remit while going through chemotherapy. Oncologist report to be provided at occupational health referral.

- You will engage with the Operations directive - working action log weekly in tracking Hotel service activities hey- to help you prioritise the most pressing items.
- You will be active in sharing your weekly whereabouts with your team and senior management team."

54 We concluded primarily from that letter that there had been a recommendation by an occupational health adviser following on from the short letter at pages 192-194 to which we refer in paragraphs 49-50 above. Mr Watson relied on the

absence of a document recording that recommendation in support of the proposition that there had not been any occupational health recommendation about the number and distribution of hours which the claimant should work. However, we concluded that the absence of such a document did not require us to conclude that the regime of working three days per week from 10am to 3.30pm was not the subject of a recommendation by an occupational health adviser. In the circumstances that

54.1 the claimant did not at the time object to the proposition that those working hours had resulted from such a recommendation,

54.2 both the note of the meeting of 6 July 2022 at pages 198-200 and the letter at pages 211-212 referred to those hours as having been recommended following an occupational health appointment,

54.3 the working pattern of 10am to 3.30pm on three days per week only was unlikely to have been simply plucked from the air, and

54.4 at page 225, in the part of the notes of the meeting of 20 October 2022 which we have set out in paragraph 64 below, the claimant said "We came up with the three days in the occupational consultation",

we concluded on the balance of probabilities that that working pattern was recommended by an occupational health adviser.

<u>The oncologist's letter of 22 July 2022</u>

55 At pages 209-210, there was a letter from a "Consultant Clinical Oncologist" by the name of Dr Lai Cheng Yew addressed "To whom it may concern". On page 210, this was said:

> "This lady is under the care of the breast oncology team at Chase Farm/North Middlesex Hospital. She is currently undergoing chemotherapy three weekly with TDM 1. She will continue this treatment until the end of the year. She has been left with significant peripheral neuropathy affecting her hands and feet since the chemotherapy she had prior to surgery. This has continued throughout this course of chemotherapy and is affecting her function at times.
>
> She is very keen to work but we will require modifications to her working pattern and tasks due to the significant side effects from chemotherapy that she is experiencing. I would be grateful if you could take into consideration the treatment that she is currently undergoing and modify her working arrangements as appropriate. The peripheral neuropathy she is experiencing is likely to be permanent and in some cases can worsen.
>
> Please do not hesitate to contact me should you require any further information. The usual phased return process may not be as appropriate

> for her given that she is on undergoing ongoing treatment for another 6 months."

The occupational health letter of 18 August 2022

56 On 18 August 2022, Ms Mapfuwa sent the further occupational health report at pages 213-214. Under the heading "Fitness to work", she said this on page 214:

> "Based on my Clinical assessment of Ms Wingate today, as well as the information from her Oncologist, it is my opinion that on occasions when the pain is under control she is able to fulfil some of her work/role functions albeit with reasonable adjustments."

57 Under the heading "Recommendations", Ms Mapfuwa said on the same page:

> "When the pain is under control, Mrs Wingate may combine duties onsite and remotely. She is concerned that returning onsite full time may exacerbate the underlying neuropathy pain.
>
> Where operationally feasible for the business please agree alternate days that she can work remotely."

The claimant's consultation with Dr Yew of 27 September 2022

58 On 27 September 2022, the claimant had an in-person consultation with Dr Yew, which Dr Yew recorded in the letter at pages 236-237 which was dated 10 November 2022 and was addressed to the claimant's GP. The text of the letter, at the top of page 237, was as follows.

> "I reviewed this lady prior to her next cycle of TDM 1. She is still troubled with painful neuropathy and has decided to take a period of sick leave as she is really struggling to manage her work with the side effects of chemotherapy. I think it is reasonable given how troubled she had been with peripheral neuropathy in general as her function is currently unpredictable.
>
> We are happy for her to continue on with chemotherapy as planned and we will review her again with an up to date echocardiogram in 3 weeks' time."

The certificate of "fitness" to work of 6 October 2022

59 The next relevant document in the bundle relating to the claimant's health and ability to work was at page 218. It was a "Statement of Fitness for Work", which was signed by a doctor whose signature was illegible. The document was stamped with the stamp of North Middlesex University Hospital NHS Trust. The date of the assessment of the claimant's health was stated to be 6 October 2022, and the date of the document was the same. The statement was that the claimant was not fit for work for "6 months", and there were these handwritten words in

the middle of the page, under the heading "Comments, including functional effects of your condition(s)":

> "Undergoing chemotherapy
> Severe peripheral neuropathy affecting function
> Fatigue".

The meeting of 20 October 2022

60 On 20 October 2022, Ms Muthee, with the assistance of Mr Sean Smith, an HR Partner, conducted a "sickness review meeting in relation to [the claimant's] long-term sickness". Those were the words recorded on page 224, which was the first page of the notes of that meeting, as having been said by Ms Muthee. The claimant was at that time at work, as can be seen from what we say above, so the purpose of the meeting was to discuss the fact that she was only working about half a working week when she was not absent through sickness (or on annual leave, of course). We have recorded in paragraph 43 above the annual leave taken by the claimant instead of working the 16.5 hour working week which had been agreed in the manner which we record in paragraph 54 above. While the claimant had not been absent because of sickness after 6 July 2022, she had worked on Friday 9 September and Friday 14 October 2022, which was a variation from the intended working pattern as can be seen from what we say in paragraph 53 above.

61 The notes of the meeting were in the bundle before us in two versions: the original version and one with hand-written comments on it made by the claimant. Unless we say otherwise, the things recorded by the note-taker (who was a Mr Michael Kleanthous, whose job title was "Executive Assistant") were not disputed by the claimant. In regard to the variation of the working week to which we refer at the end of the preceding paragraph above, the claimant said at the bottom of page 224: "Other days were fluid as I had different hospital appointments." Immediately afterwards, Ms Muthee said (as recorded at the top of page 225) "10am to 3pm was agreed on 24/05. First of all, before we get into that we would like to hear how schedule has been for you." When asked to say whether that was asked "workwise or health wise?", Ms Muthee said:

> "Workwise and scheduled hours in between those times we've had two sickness episodes, one after your annual leave and another which we detailed so talk us through how this has worked out and where are you at."

62 The next row on that page, page 225, was a record of what the claimant said next, and it was of considerable importance to the claimant's case before us. It was as follows.

> "I'm still doing three days but I'm also doing longer days I rarely leave at 3:30pm it's usually 4:30pm or 5pm. I find it hard to get in to work due to neuropathy as I don't sleep at night but I'm usually here at 10:30am. You know I've spoken to you before that three days to come in to work is fine

but I also wanted to work from home as when I come in I spend the first few hours of the day catching up on things that I am not able to finish, but you said work from home is off the table, I could do more and keep up to date more if I was able to work from home like I did when I had chemotherapy before. That's the only thing that I don't understand."

63 Mr Smith then asked: "When you talk about work from home are you talking about work from home with hours that have been agreed or will you do extra hours?", and the claimant answered: "I would do extra hours; the things I'm falling behind on are office-based things."

64 The exchange continued (SS is Mr Smith; LW is the claimant; HM is Ms Muthee):

"SS: One challenge we have is occupational health has already agreed hours you should do, unless they say you're fit to work across five-day period they can't offer you work.

LW: I discussed that with occupational health, and I'd be willing to do an extra day and she agreed that was reasonable.

SS: Your oncologist is saying that the capacity for you to take up more hours is not there.

LW: That's not what the oncologist is saying

HM: I was clear in asking the question about your fitness for work: based on the clinical assessment of your oncologist and occupational health, both reports were clear about your current medical state not been [i.e. being] fit for work to carry out daily activities. Your condition has also lasted longer than twelve months and has breached the sickness policy, and now considered as a disability. Because of this I'm unable to offer any further work/extension to your hours that is not within your current medical report recommendations.

LW: I have pain every day and I'm able to come in on those days because I have to. My oncologist is saying it would be preferable for me to not come in everyday and work from home and I can't understand why that is not allowed. I could do the stuff that I do at the hospital at home and oncologist is happy for me to do this.

SS: My understanding is this has been driven from occupational health, your oncologist speaks to you not us, we follow occupational health, and we can't override them. Our hands are tied.

LW: Occupational health also said work from home would be a good thing.

SS: Would they want you do to that in the three days that you've stipulated.

LW: We came up with the three days in the occupational consultation and I said I would be fine doing another day.

HM: We need to take into consideration the last statement; we've gone past the twelvemonth period, sickness policy only goes up to a certain amount of time. You've been having treatment and you will be going more through further treatment/operations within the next six months plus, this will have prolonged effect on your current ability to perform your day-to-day activities at work. At present we take clinical advice not just occupational health. We must work with that advice and the policies.

LW: I'm the only one who can say how I feel no one else can.

SS: You're right, we must involve occupational health and follow policy and statutes. What are you worried about the most?

LW: Jobwise? I know I've got four more chemo to go.

SS: You're covered under the Disability Act and that protects your employment in different ways, but we must protect the business too any operational activities. We need to get through this period, and we want you to get well but HM needs to function, we might need to bring someone else to cover for you. That doesn't mean that you're not coming back, but it can't go on like this. I am in awe of you going through what you're going through and coming into work, that shows dedication. You need to let us make tough decisions to help you through the next few months so the team can function.

LW: I agree, but my fear is that you'll get rid of me.

SS: None of this is our intention to get you out of your job, my job is to look after you and we shouldn't be putting you in a position where you do three more days, but HM can't carry on like this. So, I recommended HM brings someone else in for four /six months and you continue treatment, and we'll review as we move forward. But we can't carry on like this.

LW: I had a call yesterday from the Oncologist; I've got four chemotherapy sessions to go every three weeks so 23rd December 2022 is my last one. There are a couple of things with surgery that need tweaking but not major, maybe a week recovery and the oncologist wants to sign me off sick and I've said no I'll be fine. I got a call yesterday from chemo unit saying there is a note here for you from the oncologist I thought they said there is a note for you, and I think she's left a fit note. I don't believe my oncologist can sign me off without my consent. Can they?

HM: Yes, it is Possible for a medical professional to make an informed decision about your health if they feel that your decision is against their recommended recovery plan. I've been trying to get you to understand the nature of your illness and I've tried to not be impersonal but I'm against a corner, from my experience, clinical people, we must decide, and oncologist can sign you off if they think you're a risk to yourself or you're not getting the recovery you need by continuing to work.

LW: I think she did do the fit note.

SS: Your oncologist is saying you need time off to get well. We can apply for additional sick pay and take care of you."

65 There was then a discussion about sick pay, in regard to which the first respondent had already paid more than was required by the claimant's contract of employment. Ms Muthee then said, as recorded at the top of page 227:

"The discussion now is where to do we go from here. In the next couple of months, we need to come up with a decision, under plan on how we can best support you".

66 The claimant then said: "I've been signed off." The immediately following sequence of recorded statements was also of central importance, so with apologies we now set that out too, with underlining added by us to show the one thing which the claimant later (in the manner stated in the following paragraph below) said she did not say.

"HM: How long for. My reason for asking is that we will need to fill the role as a fixed interim contract. SS correct me if I'm wrong.

LW: I said three months and you said 6 months would be better.

HM: We can explore different ways; we will have to adhere to what your oncologist says.

LW: Six months without pay will affect me. I'm happy to do what is best for everyone but I need to think of myself also.

SS: Let's see what your fit note says tomorrow. It's likely going to be end of January before you have rest of chemo and surgery. I could look at talking to powers that be to extend salary.

LW: Yes

SS: I want you to get well first. Aim to come back to us fit and well. If you come back earlier and there is an overlap with the interim, then so be it. We just want you well.

LW: It's because I've heard rumours.

HM: It's only going to infringe on your health and you're doing a half job, I do not want you to put you through competencies because you're not performing. It's having an adverse effect; and I want you to understand that as a manger [i.e. manager] I have a department and everyone well-being to look after.

LW: I think you're right

SS: We will see what sick note says, if only for a month you need to go back to oncologist and ask to be extended until you are in a well position to fully engaged with your role as an hotel service manager. When we know that we'll make sure you've got a plan and sort out sick pay. HM will be getting someone to cover you. Your job is protected under legislation.

LW: She could have done it for 6 months. That sounds great, thank you.

SS: You can ring me anytime

LW: ok

HM: I think that's the same conversation as before.

LW: I didn't realise it was a fit note. I'll let you know tomorrow.

HM: that would be great please because currently the is servicing [*sic*] has been affected,

LW: That's why I said I could catch up if I work from home.

HM: I want to be clear so that this is noted: We will make the application, but it won't be guaranteed for the whole six months. They will do something but because we've had two extensions, you must keep in mind it's not guaranteed.

LW: I understand.

HM: We've got a lot of work to do for that portfolio, send me an email tomorrow.

LW: If it's a fit note, it doesn't matter if I work for another week if that's ok with you and then a can do a hand over.

HM: That's fine. Once a fit note has been given LW has agreed to work a week to enable the handover. HM has advised there might be financial

implications and LW should consider using annual leave to back fill process of application for sick pay. It was also said that the application might not be for the full six-month period and will be under pro-rota under HR partners. They must follow policies.

LW: I understand."

67 That was the end of the notes as made by Mr Kleanthous. The claimant's hand-written comments were, the claimant said and we accepted, made shortly after receiving those notes and were on the copy at pages 229-233. The only thing which the claimant said in those handwritten comments she did not say as recorded by Mr Kleanthous was "I think you're right", which was part of the sequence which we have just set out: by those words, the claimant had written: "? I Never said this!!".

68 One of the things which the claimant said to us when she was being cross-examined was that (1) the fit note to which we refer in paragraph 59 above was given to her by her oncologist on the day that the fit note was completed by the oncologist, so on 6 October 2022, and (2) the oncologist said that she was giving the claimant the fit note so that she could use it if she wanted to do so.

69 While we refer below to the meetings which followed, we do not refer to them all in quite the same detail as we refer to the meeting of 20 October 2022. Instead, wherever possible, we have focused only on the parts which showed, as we concluded, that the parties' approaches remained essentially the same from then onwards. Before doing that, we state what we saw as the reality of the situation in 2022.

The reality of the situation in October 2022

70 We concluded on the balance of probabilities that the reality of the situation in October 2022 in relation to (1) the claimant's ability or otherwise to work, (2) her reason for being at work at that time, (3) her oncologist's advice, and (4) the effect of the claimant's working pattern as it was at that time on the first respondent's operations and her colleagues, was as follows.

70.1 If the claimant had been entitled to contractual sick pay on 6 October 2022 then she would immediately have taken time off in accordance with the advice given to her by her oncologist in the document at page 218 described in paragraph 59 above, which document was given to the claimant as described in paragraph 68 above.

70.2 That was because the claimant had, as she said (as we record in the sixth indent of the passage set out in paragraph 64 above), "pain every day" and (we concluded from her words "I'm able to come in on those days because I have to") only went to work in order to receive pay. It was also because, as stated in the document at page 218, the claimant was experiencing "Severe peripheral neuropathy affecting function" and "Fatigue".

70.3 The claimant was, we concluded, unrealistically optimistic about her ability to do more work. That was shown in part by the content of the letter whose text we have set out in paragraph 58 above, where it was said that the claimant was on 27 September 2022, so when she was working only 16.5 hours per week, "really struggling to manage her work with the side effects of chemotherapy". We concluded that the claimant was unrealistically optimistic about her ability to do more work because she had strong financial reasons for wanting to continue to work and even increase her working week by working from home on two days and continuing to work three days per week in the workplace.

70.4 If the first respondent had permitted the claimant to work longer hours despite the advice of her oncologist as stated in paragraph 59 above and the claimant's health had worsened as a result, then the claimant would have been able to argue that the first respondent had breached the law of negligence towards her. The first respondent could have defended that claim by arguing that the claimant had consented to the negligence, or alternatively that the claimant was contributorily negligent so that no damages should be awarded to her. However, the first respondent instead declined to take at face value the claimant's assurance that she could work an extra two days per week, at home, and that stance of the first respondent was objectively supported by the content of the letter whose text we have set out in paragraph 58 above and the "fit note" described in paragraph 59 above.

70.5 The claimant's peripheral neuropathy was, as recorded in paragraph 55 above, "significant" and it was "affecting her function at times". It was also "likely to be permanent", and it might "worsen".

70.6 The then-current occupational health advice, which we have set out in paragraphs 56 and 57 above, was heavily conditional: it was to the effect that only "on occasions when the pain is under control" could the claimant work, and even then it was only to do "some of her work/role functions albeit with reasonable adjustments". The advice of Ms Mapfuwa was to permit the claimant to work "alternate days" at home but only "[w]here operationally feasible".

70.7 The claimant did not say at the meeting of 20 October 2022 anything about the effect on her feet of wearing any kind of footwear. We came to that conclusion for the following reasons.

70.7.1 The claimant was in no way inhibited from speaking up on her own behalf and from doing so combatively.

70.7.2 If the claimant had said something about the footwear which was required by the first respondent's uniform policy, then it would either have been recorded in the notes at pages 224-228 or by the

claimant in her handwritten response to those notes. It was not so recorded.

70.8 The first respondent's operations and the claimant's colleagues (including Ms Muthee) were being affected adversely, and significantly, by the claimant working only half a working week at work.

The claimant's consultation with Dr Anna Florczak, "Spr in Oncology", of 18 October 2022

71 At pages 234-235 there was a letter dated 31 October 2022 written about a consultation which the claimant had on 18 October 2022 with Dr Anna Florczak, whose job title was "Spr in Oncology", which we guessed meant that she was a specialist in Oncology. The letter was sent to the claimant's GP and in it, at the top of page 235, this was said:

> "**Current situation:**
> **Review before 11th cycle of adjuvant Kadcyla with dose reduction.**
>
> I had a telephone consultation with Lorraine today. We were also joined by Monica Castro our breast CNS. Lorraine continues to struggle with G2 fatigue and ongoing peripheral neuropathy. We discussed the option of trying duloxetine, however that would exacerbate side effects of pregabaline. She is happy to continue with pregabaline for now and reconsider after completing the treatment.
>
> Dr Yew has recommended sick leave and we strongly suggest Lorraine to take time off to complete and then to recuperate from her treatment.
> She is fit to proceed at the same dose pending satisfactory blood tests. We will talk to her again in 3 weeks' time."

The claimant's consultation with Dr Florczak of 8 November 2022

72 At pages 238-239, there was a copy of a letter dated 28 November 2022 sent to the claimant's GP by Dr Florczak, who had had (she said in that letter) a telephone consultation with the claimant on 8 November 2022. The record of the consultation was at the top of page 239 and was in precisely the same terms as those which we have set out in the preceding paragraph above.

The "Statement of Fitness for Work" at page 265 concerning an assessment by the claimant's GP of 23 May 2023

73 Speaking chronologically, the next document in evidence before us about the claimant's health and ability to work was the statement of fitness for work at page 265, which was dated 25 May 2023 and recorded an assessment by the claimant's GP which took place on 23 May 2023. It was stated simply that the claimant was not fit for work because of "Breast Ca, Neuropathy" and would not be fit for work for the next six weeks. It was the claimant's evidence that her

husband had on 19 April 2023 taken to the reception desk at the Cavell hospital a preceding certificate of fitness to work, but despite us pointing out early on in the hearing before us that it was not in the hearing bundle and both parties searching for that preceding certificate, it was not put before us. The circumstances in which the claimant first said that her husband had taken that certificate to her workplace on 19 April 2023 are the subject of what we say in paragraph 141 below. We did not see any major significance in the fact that the claimant's pleading referred (in paragraph 15 on page 25) to the certificate as having been taken to the workplace on 20 April 2023 (as reflected in paragraphs 3.3.2 above and 166 below).

The "Statement of Fitness for Work" at page 266 concerning an assessment by the claimant's GP of 4 July 2023

74 The document at page 266 was dated 5 July 2023 and stated that the claimant was not fit for work and would not be so fit from 4 July 2023 to 15 August 2023, because of "Malignant neoplasm of female breast".

The letter from Dr Laurence Boakye of 27 July 2023

75 At pages 267-269, there was a report addressed to Ms Muthee and signed by Dr Laurence Boakye, a "Consultant in Occupational Medicine", of an organisation referred to at the top of page 267 as "Health Partners". The report was based purely on an assessment carried out by what Dr Boakye referred to as "our regional occupational physician, Dr Sperber". There was no copy of a report of that assessment by Dr Sperber before us. The report of Dr Boakye stated this on page 268:

> "Our physician indicates that Lorraine is keen and highly motivated to return to work.
> Although it is difficult to comment on her prognosis with certainty our physician is of the opinion that it may be possible for Lorraine to return to work in September this year once she has completed her treatment for her dental condition.
>
> Clearly any return to work will be dependent on Lorraine's symptoms improving/Lorraine being able to self-manage her symptoms and her problems with drowsiness improving.
>
> If Lorraine is able to return to work in September, she is likely to benefit from the workplace recommendations outlined below:
>
> - It is our physician's opinion that she is likely to benefit from some homeworking in the first instance following her return.
> - She is likely to benefit from a phased return to work programme and our physician has suggested that she initially works 2 days per week, with 1 of the days being from home, for the first 2 weeks, then to increase to 3 days per week in weeks 3 and 4,

with a day from home, and then to increase to 4 days per week in week 5, working 2 days from home. I would then recommend that any further increments in her hours of work are done in consultation with her and only if she is coping.

- Other adjustment she will benefit from include maintaining regular contact with her line manager or a senior colleague to ensure she is coping.
- If necessary, she will benefit from having time off to attend her medical appointments including appointments for investigations.
- She is likely to benefit from having an assessment of her workstation which will help determine if she requires any specific adjustments or is likely to benefit from being provided with any specialist equipment.
- She will benefit from an opportunity to sit if required to stand for prolonged periods.

Although our physician suggested a follow-up appointment at 6 weeks following her return, there is no indication that this will be necessary if Lorraine is coping. However, if she has any difficulties during the phased return to work period or if you have any questions or concerns regarding her case then it would be reasonable to re-refer her to occupational health.

In my opinion her case is likely to be covered by the disability provisions of the Equality Act. The recommendations outlined above should be viewed as appropriate adjustments, however as you are aware it is ultimately a managerial/ organisational decision to determine if a particular adjustment is reasonable. Further guidance on the Equality Act can be obtained from https://www.gov.uk/definitionof- disability-under-equality-act-2010 ."

The "Step 2 Sickness Meeting" of 3 October 2023

76 On pages 270-271 there was a letter from Ms Muthee dated 12 September 2023 inviting the claimant to a "Step 2 Formal Sickness Meeting" to take place with her on 3 October 2023. That meeting took place on that date. The notes of it were made by Mrs Search (referred to in the notes as "HS") and were at pages 272-274 and again at pages 275-276 with the claimant's handwritten comments and two (as far as the claimant was concerned) corrections. Almost all of the notes were highly material.

77 After being asked by Ms Muthee how she was, the claimant said this (as recorded on page 272, with underlining added by us for emphasis):

"I'm ok. I have now finished chemo. My hands are a lot better but still having issues with my feet. OH mentioned about my hands and not being able to write but it's not that I just cannot grip very well, like with jars. [We read that as a statement that the claimant was able to write but could not grip for example jars very well.] I am having treatment currently every 6 weeks to stop it going to my bones, but I am having side effects which cause me to

> cease [presumably that meant "seize"] up. I have 3 to go. I'm also taking vitamin d to strengthen my bones. I'm not sleeping well so this also has a knock-on effect. Honestly it has been a complete nightmare. During the first chemo I continued to work, and I was alright and I was told the second chemo shouldn't be as bad but it has been worse for me apart from not losing my hair. The neuropathy has been so bad."

78 After Ms Muthee then said "Thank you for your certificate which extends your absence until November. You are on treatment currently, is there anything else you will need to have?", the claimant said this:

> "Yes. I will need corrective surgery. I have been signed off due to the problems I had with the chemo. I am currently looking into another drug which I have sent to my oncologist. Someone claimed they took this drug and all their neuropathy had gone within 2 weeks. They said they would look into this, but this isn't something that is normally prescribed. It is expensive."

79 On the next page, page 273, there was this exchange (with the only correction proposed by the claimant shown in square brackets; we have again added some emphasis by underlining).

> "HM: There are policies in place and we have a duty of care.
>
> HS: Shall we spend some time reviewing the proposed phased return to work plan from OH.
>
> LW: OH spoke of working from home (WFH) but there is no point as HM said that this was completely off the table.
>
> HM: I said there was no scope to do your role long term from home. It is detrimental to the hospital/ team not having someone physically present.
>
> LW: In the past I spent days in the office to catch up on administrative duties, so what is the difference.
>
> HM: There is no one physically present if and when needed. It is within my right as a manager to assess what is possible and what isn't operationally. Long term this would not be conducive.
>
> LW: When I was away from work I would speak to the staff on the phone, they were happy. I didn't just up and leave. When I was on chemo I had one week of chemo [the claimant corrected this by hand on page 276 to "one week off following chemo"], one week from home and then one week at work. This worked well. Even Lisa sent me a letter to thank me for how I worked throughout my chemo. The Dops was

off at the time, Janet the supervisor had a stroke but I still kept up with everything.

HM: The requirements of the role and scope is materially different from before covid. There is a lot more scrutiny and KPI's for these teams. Not to mention a number of changes to procedures, processes, systems. The role requires a physical presence and support to the teams. It's not sustainable long term. Short term to support you back to work then this is fine.

LW: So why couldn't WFH before.

HM: The advice had [at] the time was reduced hours and building these back up slowly to full time hours. The expectation at that point is after the phased return you resume full duties. Last time it was unsuccessful despite the protracted length of time.

HS: I think we need to draw a line in the sand and focus on the now. We haven't discussed a possible return to work and whether what has been advised by OH in terms of a phased return you believe to be doable and supportive enough.

LW: I didn't really review it as I didn't believe the WFH element would be available. I need to re look at the OH report. Can I have a copy?

HM: Provided LW with a copy of reports, notes of the last meeting and other documentation.

HS: Do you think you will be able to return by the time your current sick note runs out, if we can agree what that return looks like?

LW: I'm not sure to be honest. I would love to come back to work but I am not sure I can.

HS: I think you need to review the report and ascertain whether this is doable and the indicative return to work is realistic.

LW: I will need to see what the oncologist says and if I can get this medication that can possibly health [that was probably "help"] my current issues."

What was said by Mrs Search about early retirement on 3 October 2023

80 At the end of the meeting, Mrs Search recorded herself to have said this:

"I would advice to seek some support with EAP not just from a wellbeing point but they offer some financial advice. I will send you the details of this.

> Another possibility is ill health retirement – you may be entitled to this; this is reviewed case by case by Aviva. I will send you the details of this also."

81 It was the claimant's evidence that at the start of the meeting, before Ms Muthee had arrived, Mrs Search had said to her "Don't you just want to retire?" Mrs Search was sure (she said in oral evidence before us as well as in paragraph 8 of her witness statement) that she had not said that either at the start or at the end of the meeting. The claimant had not added a note on her printed copy of the notes made by Mrs Search to show that the claimant thought at that time that Mrs Search had omitted to record what she had said to the claimant at the start of the meeting about retiring. On the following day, 4 October 2023, Mrs Search had sent an email with the heading "Options discussed". The email was at pages 277-278, and was about (1) "Ill Health Retirement" and (2) "Employee Assistance Programme". The email started:

> "Hi Lorraine
> Was lovely to meet you yesterday.
> See below some further detail as discussed in our meeting yesterday."

82 The claimant had replied in the email at the top of page 277, sent at 10:52 on the following day, 5 October 2023, in the following terms:

> "Hi Hana ,
>
> It was a pleasure to meet you too.
>
> Many thanks for this information, it is really helpful to me for guidance at this difficult time in my life.
>
> Thank you Hectoria for the copies of documents I requested at the meeting to help get my head around items which we discussed. My previous Occupational Health Report from 24.05.2022 was also requested for my records but unfortunately this wasn't included in the documentation given to me. Would it be possible to email or post me a hard copy for my records please?"

83 Mrs Search said that her normal practice at a meeting to consider an employee's sickness absence was to spend half an hour with the employee's manager alone first. She said that (1) she "looked after" 18 sites of the first respondent in London and the South East, (2) she attended numerous meetings of the sort which occurred on 3 October 2023, and (3) she attended to ensure that policies were followed and that the stages of the process which needed to be gone through were indeed gone through. She said that (1) she did not at that time (3 October 2023) know the claimant's age and (2) she might not have looked at the digital records available to the first respondent in relation to the claimant, which, as with the records relating to the first respondent's workforce generally, were held by Peninsula.

84 There was therefore here a direct conflict between the evidence of the claimant and that of Mrs Search. We resolved it after considering all of the other evidence before us. We concluded on the balance of probabilities that Mrs Search did not say to the claimant at any time "Don't you just want to retire?" We did so in part because of the oral evidence which we heard, but also because the claimant did not at any time before, on 25 April 2024, she said it to Mr Bath in the appeal hearing, as recorded on page 316, assert that those words had been used on 3 October 2023. We concluded that if they had been used then the claimant would have noted that on her copy of the record of the meeting of 3 October 2023. What we record in paragraph 86 below the claimant as having written by hand on the letter at pages 281 could have been written at any time, and in any event was not to the effect that Mrs Search had said "Don't you just want to retire?"

<u>The letter of 5 October 2023 to the claimant following up the meeting of 3 October 2023</u>

85 On 5 October 2023, Ms Muthee signed the letter at pages 281-282. The first page of the letter was consistent with the notes which we have set out in paragraph 79 above. The letter ended with the following passage all of which was on page 282 and all of which we accepted was accurate, or at least genuinely believed by Ms Muthee to be accurate.

> "We discussed the Occupational Health report in detail and in consequence it was agreed the next steps would be for you to review the proposed return to work plan and to discuss with your oncologist. You agreed you would contact us to update us and then we would go from there.
>
> It was discussed that if you are fit to return work we could accommodate the reasonable adjustments as advised by Occupational Health. This includes a phased return as advised by Occupational Health. Your possible return to work date would be at the end of your current fit note which is 7th November 2023.
>
> We discussed if you remain unfit for work and there are no prospects of you returning to work in the near future this case will need to be referred to Step 3 of the management process in line with Policy. This process was discussed and explained to you during the meeting. I am obliged to inform you that a possible outcome to this meeting is dismissal due to capability on the grounds of ill health.
> In the meantime, please do not hesitate to contact me should you have any queries or require any further assistance. I wish you a speedy recovery."

86 The claimant did not respond in writing to that letter. She had, however, written by hand at the bottom of page 281 in response to the sentence "We also discussed ill health retirement and Hana has since sent you the details of this.":

> "(Their suggestion not mine) (See attached)".

November 2023 medical advice

87 On 3 November 2023, the claimant sent the email to Ms Muthee and Mrs Search at page 286, apologising for the fact that her latest "Sick Certificate" had not yet been sent to the first respondent, as it was "prepared but still at the GP surgery waiting to be signed by the doctor before [being] released to myself." It had, said the claimant in that email, "been made valid from 1st November".

88 At pages 287-288, there was a document which appeared to be a print-out of records made by the "Medical Oncology Service" at the Royal Free London NHS Foundation Trust's Chase Farm Hospital on 7 November 2023, on the first page of which there was this passage.

> '**History of each presenting complaint or issue**
> Neuropathy problematic still
> Takes gabapentin intermittently, but this causes side effects
> She is currently not able to work as has not been offered "working from home" long-term, mobility affected by neuropathy
> Physically unable to work on site reliably, therefore unable to work due to disability
> Try duloxetine 60mg for neuropathy/mood"

89 There was then, under the heading "Actions for GP", the entry: "Continue duloxetine". At the end of the record, on page 288, under the heading "Plan and requested actions", this was said:

> "Procedures None
> 3/12 to assess neuropathy/duloxetine effectiveness".

90 That had by it, in the claimant's handwriting: "New Medication (Review in 3 months – end of January 2024)". On the right hand side of that page, the claimant had also written this: "This report was shown to HM and H Search at step 3 sickness meeting on 27/11/23 which was penultimate meeting prior to my dismissal." That was a reference to the meeting to which we now turn.

The meeting of 27 November 2023

91 The claimant was invited to a "Step 3 Formal Sickness Meeting" to take place on 27 November 2023. The letter containing the invitation was at pages 289-290 and was dated 17 November 2023. The unannotated notes of the meeting were at pages 291-293, with only one correction of their text stated by the claimant in her copy with her handwritten comments on, which was at pages 294-296. The material parts of the notes included the following records, none of which was the subject of correction by the claimant.

91.1 When asked by Ms Muthee whether she had "discussed prospects for a return to work with [her] consultant", the claimant said (on page 291): "It is too early to tell. I have another appointment for the 3rd December."

91.2 The claimant said (on the same page) that she was feeling better and that she felt that her "medication ha[d] helped".

91.3 When asked whether she felt that she "could return to work soon, the claimant said (on pages 291-292): "I am doing a lot more than before. I have been going out and walking fine. I went to a shop on Oxford Street and that was the most walking I have done in a long time. I feel hopeful but I can't be 100% sure. I am aware there is now another person in the team covering. How will that work if I return?"

91.4 The claimant said (as recorded on page 292): "I do want to point out that there was previously a recommendation from OH for me to work from home, but this was not honoured." In response, Ms Muthee said (the punctuation, capitalisation and textual errors being original):

> "Yes we discussed this at the last meeting. We could honour working from home short term but not long term. Also, this has be part of Your OH recommendations for your Phased return. unfortunately, this not operationally possible as a long-term plan."

91.5 The claimant, after saying that she was "aware that someone else historically got 2 years of sick pay", which she believed set a precedent, said (on page 292): "Working from home shouldn't be an issue, I did before and it was fine. The team would just call me. What has changed." Ms Muthee replied:

> "Operationally I cannot support my management team working from home long term. The role requires visibility and there is a lot to be done at site operationally. Since Covid the scrutiny, processes/ procedures have extended considerably. Your absence potentially puts pressure on others when there is a requirement to attend issues at site and manage anything."

91.6 We saw that the claimant had written by hand next to that passage, on page 295:

> 'Not requested "long term". Only extension passed [i.e. past] "6 week return to work period".'

91.7 Also on page 292, the claimant said this:

> "I am already claiming from one pension currently. This is why I cannot claim for statutory sick pay. I did also see Citizens Advice and explored other types of disability benefits."

91.8 A little later, on the same page, the claimant said:

> "Citizen's advice confirmed my condition would fall under the Equality Act – even when you are in remission. And so, I have protected rights."

91.9 Mrs Search then (at the top of page 293) asked: "Do you feel you could come back to work in the near future personally, given how you are feeling now?". The claimant's answer was:

> "I don't know."

91.10 Mrs Search immediately afterwards asked: "Will you discuss this at your next appointment if you continue to feel better with these new meds?", and the claimant said:

> "The doctors tell me to take the time off. In the past I tried to continue to work and did even though they signed me off."

91.11 A little further down page 293, Ms Muthee said: "I am glad you are better. It has been 1.5 years and so hoped we would be able to discuss a return to work. But you need to agree this with your consultant." The claimant then said:

> "I cannot be sure when I can."

92 After discussing a "follow up appointment", there was this exchange (all on page 293, none of which was the subject of a correction on page 295) which was also of major significance in our view.

> "LW: I am now on a drug that has started to work but is early days. Feels unreasonable you can't wait a further few months. And now we are discussing dismissal.
>
> HS: It's not that we won't wait a few months, we just need to know when a possible return will be. We unfortunately cannot keep a role open indefinitely.
>
> LW: I am aware you can't. I am a manager; I understand the process. I had a staff member off for a long time, was 2 years. I needed a doctor note to say they could return.
>
> HS: Agreed, we need to have sign off from your consultant to confirm you can return and some guidance on what that looks like, so you can be supported appropriately."

93 That meeting was recorded in the letter from Ms Muthee to the claimant dated 14 December 2023 at pages 297-298. The next development was the further "Step 3 Formal Sickness Meeting" to which the claimant was invited in the letter from Ms Muthee dated 15 February 2024 at pages 299-300.

The final Step 3 Formal Sickness Meeting of 23 February 2024

94 The notes of that meeting were at pages 301-303 and the claimant's annotated version was at pages 304-305. There was one claimed factual correction, which was that the claimant wrote that she "never said" the words "But understand that's not doable long term" immediately after the words "My ideal, would be to work a few days a week at site and rest at home long term."

95 In fact, we concluded that it was likely that the claimant did in fact recognise that working a few days in the workplace and the rest of the days of the week at home (which is what we and the parties agreed those words meant) "was not doable long term". That was especially (but not only) because of the passage from the notes of the preceding meeting that we have set out in paragraph 91.6 above. Whether or not the claimant said those words was, however, of no weight here.

96 What was important was the passage, which was on pages 301-302, none of which was disputed by the claimant, which we set out in this paragraph and the following paragraph below.

> "HM: How was the oncologist appointment? I am aware from our last conversation that you saw someone in the oncologist team and not the usual consultant
>
> LW: I think she is a consultant; I have seen her before, not sure if oncologist. Had examination and talked about new medication.
>
> HM: How is the medication going?
>
> LW: Most of time ok, hit and miss. Trying to get out more and be more active.
>
> HM: Have you increased your activity?
>
> LW: If active it can make it worse, but very up and down. I try to walk to town, can do it but affects me later. Drowsy this morning as needed meds to sleep last night. Was able to sleep but drowsy today.
>
> HM: Meds helping neuropathy? Less pain?
>
> LW: Problems with gripping things with my hands and get a bit of pain now and again. Try to put my badge on but couldn't. Fingers a bit numb. Writing and typing ok. So frustrating.
>
> HM: What did the doctor say about your recovery?
>
> LW: Said next steps were up to me – could increase the dose and take an alternative drug together. But again, makes me drowsy. Drug is meant for anxiety originally so helps with that too.

HM: What is an average day for you in terms of functionality?

LW: Depends on the day in terms of pain. Some days can be ok – with comfortable shoes. Can get through the day but if I do increased activity then it's at night it hits me. Exercise vibrating plates are meant to be good. Had a dexo/ bone scan yesterday as I am getting pain in my knees. Been nearly a year, it's getting more painful. Could be due to this or old age, it is hard to know."

97 We pause to record that that was the first time in the written records of meetings with the claimant before her dismissal that she mentioned footwear. After a short exchange about vitamins, the exchange continued:

"HM: When saw oncologist did you discuss RTW?

LW: I really can't give you a significant answer. I don't know. I thought may be come in some days and work some days from home but that is not possible.

HS: We discussed it can be for a phased return to work to support you back but could not be accommodated in the long term.

LW: Not sure that will change anything anyway. If I had a crystal ball I would tell you. But don't want to commit to something I can't do. Oncologist cannot be sure either. There isn't much I can really give you about returning."

98 The notes were plainly not verbatim, and we accepted Mr Watson's proposition, in paragraph 62 of his written closing submissions, that "the first sentence [of the claimant's reply to the question whether she had discussed a return to work with her oncologist] does not correspond to normal speech" as the word "significant" 'is not a natural adjective for describing "*answer*"'. However, we thought that the thrust of the response was clear and consistent with what was said in the final response of the claimant which we have set out in the preceding paragraph above. We agreed with Mr Watson's analysis, in paragraph 64 of his written closing submissions, that the claimant "[did] not want to commit to a phased return where working from home [was] only available in the short term because she [could not] do that".

99 There was then a discussion about alternative roles, during which the claimant said that she was "[no]t sure what [she] could do" and in answer to the question whether she was driving again: "No not driving yet. Could get support with financing a new car. Not sure even having an automatic would help. Frighten[ed] to do this and potentially put others in danger."

100 Ms Muthee then said (as recorded at the bottom of page 302): "We always worked on the basis you wanted to get better and return to role and anticipated

that would be the case. At the last meeting we discussed alternatives. As a HOD difficult to offer that flexibility but could be a possibility in other roles, if these were available." The claimant replied (at the top of page 303):

> "This was why I was stubborn to go off to begin with, even though Consultants told me to stop working, I continued. It's hard. We are where we are."

101 The claimant's handwritten comments on page 305 included this one:

> "IMPORTANT:
>
> P.S. During this meeting I spent a long time telling them that I was definitely not ready to retire for a good few years yet. Hence the talk of finding alternative jobs if I were to be dismissed as was told no alternative employment is available within Circle Health at present. My statement that I was not considering retirement for a long time yet has not been recorded within these minutes!"

102 On what we guessed was the final day of February 2024, Ms Muthee sent the letter at pages 306-307 informing the claimant of the "Step 3 Formal Sickness Meeting Outcome". The letter was dated 28 February but on the second page Ms Muthee wrote:

> "Your dismissal is effective immediately and your final day of employment is therefore 29th February 2024. You will receive 3 months' pay in lieu of notice in accordance with your contract of employment, subject to normal deductions of tax and National Insurance contributions."

103 The substance of the letter was on page 306 and was as follows.

> "Over the duration of your absence, we have held a number of meetings to discuss your welfare and consider how we can support your return to work. In addition, we have sought medical opinion. The most recent Occupational Health report confirmed that you may have been fit to return to work in September 2023, as you are aware we have since met in November 2023 and you have been unable to return to work. In the meeting on 23rd February 2024, you were unable to provide an estimated return to work date and confirmed that your oncologist was also unable to provide any guidance on this.
>
> We have been unable to find any alternatives or adjustments to help facilitate a return to work. During the meeting you were given the opportunity to raise any mitigating circumstances or present any further information. We then discussed alternative roles however, you felt at this time unless these were roles that could be carried out at home you were unable to do these. We also discussed that you were still unable to drive currently.

Do please find enclosed a copy of the notes of the meeting.

Since our meeting I have considered the information available to me and prospects of a return to work in the near future. Unfortunately, as this cannot be determined it is with regret I have taken the decision to dismiss you from your employment with Circle Health Group on the grounds of ill health capability."

104 We found that to be an accurate statement of (1) the situation and (2) the real reason(s) why Ms Muthee decided that the claimant should be dismissed.

The claimant's appeal against the decision to dismiss her

105 On 8 March 2024, the claimant appealed against the decision to dismiss her. The grounds of appeal bear being repeated in full here. They were (as stated on page 308) as follows.

"1. The unfairness and intransigence which has been shown by the organisation when deciding that I should be dismissed. I have made it clear that, despite my medical condition, I am perfectly able to do my job providing the organisation is prepared to be a little accommodating by allowing me to work from home part of the time. This is a small concession which could be made without having any impact on my ability to carry out my duties. The various medical reports support my position.

2. Hectoria Muthee has not even considered my requests for home working. She has not shown any flexibility or proposed any reasonable adjustments to my working pattern beyond a standard six week phased return to work. This is a flagrant breach of the organisation's duties under the Equality Act 2010.

3. On many occasions I have asked to come back to work partly from home and partly on site. I have also explained that this has proven to work successfully in the past when I was going through my chemotherapy treatment. If my suggestions had been agreed when I first raised it, I would have been able to return to work much sooner.

4. Lack of consideration or flexibility with Uniform Policy with my welfare and comfort not considered based upon my diagnosed disability. This is an example of the unfair and discriminatory treatment I have suffered in the past.

5. I feel that my previous history of long service of 29 years and my dedication whilst working throughout my chemotherapy and other necessary treatments during my illness proves my dedication to working for Circle Health and should have been taken into

consideration, not only with the decisions re working flexibility, but also with your decision to dismiss me.

6. Based on the above, I feel that the decision is unfair and discriminatory and should be reconsidered."

106 When deliberating, it struck us how unrealistic and inaccurate those grounds of appeal were. That was for the following reasons.

106.1 We could not see how it could reasonably be said that the claimant had "made it clear that, despite [her] medical condition, [she was] perfectly able to do [her] job providing the organisation [was] prepared to be a little accommodating by allowing [her] to work from home part of the time."

106.2 It was clear that Ms Muthee had, contrary to ground 2, "considered [the claimant's] requests for home working." She plainly had done so, but she had concluded that the claimant's role could not be done at home to any material extent on a long-term basis. Whether or not that was a breach of the EqA 2010 was a matter for this tribunal, of course.

106.3 We did not think (as we record in paragraph 47 above) that the claimant's working from home had been "proven to work successfully in the past when I was going through my chemotherapy treatment".

106.4 There was no record of the claimant having before 8 March 2024 referred to any kind of "Lack of consideration or flexibility with Uniform Policy with [her] welfare and comfort not considered". The first time, as we record in paragraph 97 above, the claimant referred to footwear was on 23 February 2024, and there was no allegation even then that she had been refused permission to wear comfortable footwear at work.

<u>The uniform policy question</u>

107 We had already, during the hearing before us, made it clear that we were aware of the absence of a reference to the first respondent's uniform policy in the documentation until the claimant's appeal against her dismissal. It is convenient here therefore to state our conclusions in regard to the question whether or not the claimant at any time before that appeal mentioned the uniform policy and that she wanted to wear shoes which did not comply with it.

108 The first time that the claimant asserted that she had referred to the uniform policy was on 8 March 2024 in ground 4 of her appeal, as we record in paragraph 105 above. The next time was in the hearing of 25 April 2024 to which we turn in the next section of these reasons below. That reference was on page 317, where the claimant said this:

"[T]he uniform thing was when I came back after the first lot [presumably of chemotherapy] and after the surgery – May 2022, I came in and met with

> Rachel Boxall about different things, and when I could start the return to work, she spoke to me about uniform policy and wearing closed in shoes front toes and backs, this was all to do with chemo. Things happen to your body; Toenails fall off etc. I could only wear flip flops and Ugg boots due to comfort. I have a problem with my feet as a result of a chemo, I took a picture and offered to show her, they were bleeding and really sore, she said you have to adhere to uniform but I said I know people who have had adjustments, I wore black slippers in the end. It's embarrassing. I bought it up with Hectoria, I noticed that they had sandals on, sling backs etc and no one said anything, I was being made to wear these. I asked Hectoria about uniform policy. She said let me look into it, then not long after that an email went out to all the staff telling them to comply with the policy. I have felt they haven't helped me."

109 The next time that the claimant referred to the uniform policy was in the details of her claim to this tribunal, where, in paragraph 13 on page 25, the claimant said this:

> "On or around 3 May 2022, when discussing her Return to Work with the then Executive Director, Rachel Boxall, (no longer with the company), [the claimant] requested that she be allowed to wear a different type of shoe to the one required under the uniform policy. The reason that she required different shoes was because she had just returned to work following chemotherapy which had caused debilitating sores and swellings on her toes. She required alternative shoes to alleviate the pain and discomfort caused by the usual shoes. The request was denied despite the fact that other staff with disabilities have been allowed to wear footwear not compliant with the 1st Respondent's uniform policy. She later brought this subject up again a few months down the line with the 2nd Respondent (who was herself wearing open toed non-uniform policy shoes, as were many other staff members within both hospital sites, and yet the Claimant was denied this request."

110 The claimant then referred in paragraph 22 of her witness statement to the uniform policy, saying this:

> "In addition to this, had they granted my request to wear open toed, non-uniform shoes, to ease the pressure caused by my Neuropathy, I would have been back to full time hours many months sooner."

111 Then, in paragraph 53 of that witness statement, the claimant said that her feet were "suffering from the effects of the Uniform Policy which required fully enclosed shoes" and in paragraph 54 the claimant said:

> "Despite my numerous requests, no adjustment to uniform policy was made for me even though I had a disability and was suffering from a medical issue with painful Neuropathy in my feet as a direct result of my ongoing Chemotherapy. I felt totally unappreciated after 29 years of service.

> Photographs of my feet, taken on 4th April 2022 are on pages 343 to 345 of the Bundle."

112 We pause to record that the parties agreed that those photographs were taken in April 2022 (that not being clear from what was in the bundle before us). However, the claimant did not contend that those photographs were in fact put before the respondents before the dismissal of her appeal against the decision to dismiss her (since the claimant did not say even as recorded in the passage from page 317 that we have set out in paragraph 108 above that she did show the photographs to Ms Boxall). We could see that the photographs were not referred to in any correspondence or record of a hearing. Nor were they asserted by the claimant to have been referred to in a meeting or hearing and not recorded in the notes of that meeting or hearing.

113 The claimant referred to the uniform policy also in paragraph 55 of her witness statement, and in paragraph 56 of that statement, she said this:

> "Being categorised as disabled surely justified my request to wear minimally open toed shoes to lessen my discomfort and enable my return to work full-time at the end of my planned phased return to work. I know this request has been granted to another staff member in the past (Jane Boswell). Ms Boswell also had a disability and I distinctly remember her wearing non-uniform shoes; being supplied with special desk chairs, equipment etc. However, when I brought this up with management and named Ms Boswell as an example of an employee, who was classified as disabled and allowed to wear non-uniform shoes to aid a problem with her feet, I was told that there was no record of anything pertaining to Ms. Boswell being allowed to wear non-uniform shoes. This happened many years ago, but Ms Boswell's Manager, D. Mellowship, still manages the same department and would have remembered this disability allowance if asked."

114 In paragraph 67.b of the claimant's witness statement, she referred to her "constant requests to wear non-uniform shoes".

115 Ms Muthee's witness statement contained this passage (it was paragraph 13):

> "I can remember in various one to one meeting when we discussed the impact of Lorraine's neuropathy talking about the pain in her feet and hands and how this was affecting her sleep, but there was no discussion about problems with any footwear. Lorraine did not raise this as being an issue at that time, and there was no request to me either verbally or in writing for her to be excused from the uniform policy. Lorraine was classed as non-clinical staff member and at 8.2 of the policy it states that all footwears must have an enclosed toe and heel. This is for health and safety reasons. If Lorraine had at any time come forward and asked for an exemption from the policy, for example to wear open toe shoes, because of her condition, a risk assessment would have been completed first and I would have been in full

> support of trying to agree something with Lorraine to resolve any discomfort to her until resolved."

116 Ms Muthee in oral evidence explained that the need for shoes with an enclosed toe and heel arose in relation to employees whose work involved moving heavy things, and arose from the need to protect against the possibility of something dropping on the employee's foot.

117 We add that there was no reference in any record of a consultation with a doctor or occupational health adviser to a need for any kind of adjustment with regard to (1) the claimant's shoes, or (2) the first respondent's uniform policy.

118 Given all of that evidence and those factors, we could not accept that the claimant had at any time before stating the grounds of appeal against her dismissal referred to the first respondent's uniform policy on the basis that it had put her at a disadvantage. We concluded on the balance of probabilities that she had not made such a reference until she did so in those grounds of appeal.

What was said during the appeal hearing of 25 April 2024

119 The claimant's appeal against her dismissal was determined by Mr Bath. The hearing was originally arranged to take place on 21 March 2024, as we saw from the letter dated 15 March 2024 at pages 309-310. It was then, we saw from the letter dated 22 March 2024 at pages 312-313, put back first to 11 April 2024 and then to 25 April 2024, when it did in fact take place. Mr Bath was accompanied by Ms Alison Moss, the first respondent's "Head of People Operations".

120 The notes of the appeal hearing were at pages 314-324, and, with the claimant's handwritten comments and corrections, at pages 325-335. The claimant's statements to Mr Bath in that hearing were in part to the same effect as those which she had made previously to Ms Muthee. We now turn to the additional things stated in those notes (including those things which were said by Mr Bath) which were of particular relevance.

121 On page 314, the claimant was recorded to have said shortly after the start of the hearing:

> "I have just felt really unhappy about the whole thing, I have spoken to people who have said do this and that and one is a solicitor who is a friend of ours, it just felt wrong how I have been treated. So, I decided yes, it is wrong, and I shouldn't just put up with it."

122 On page 325, the claimant had written by the side of those words, in which she had put yellow highlighting on the words "is a friend of ours": "I actually said my daughter-in-law".

123 On page 315, Mr Bath said: "Separate from this case, I have been around for 12 years mostly in hospital and these roles are at least 80% present, physical

presence, audit, checking deliveries, roster, appraisals, Kronos etc." On page 320, he said this:

> "I was an ED for many years and my expectation was that a hotel service manager would be on site, that would be my expectation. I don't think that is an unreasonable ask for this role. I would also estimate (and this is my opinion) there would be around 20% of the role needed for admin, in a dual site maybe 40% admin. So, I need to consider if I were in the position of the management here could I reasonable accommodate someone with this situation, what would have been reasonable. I don't think it can be done remotely but that doesn't mean some support could have been accommodated."

124 We wondered whether the word "not" was missing from before the word "could" there. In any event, the claimant then said:

> "I agree with you generally that would be the case if a person is not poorly or in my position, and I wasn't asking for this to be forever."

125 We could not see how the fact that an employee was unwell could affect the needs of the employer. In any event, Mr Bath responded:

> "The difficulty is that you couldn't manage the three days, the letter then says it became more difficult for you, so even if we made the accommodation / adjustment would that have changed the outcome, even today you can't say that as you has said earlier [*sic*] that still you would not be able to commit to full time hours and would still need to be working from home for periods of time. Yet that conversation happened last year, and you are saying you are not in a different place now?"

126 The claimant then said:

> "I could say that. I could say that I can come back to work if I could work from home, it worked before and I could manage, I proved it worked and Lisa wrote to me to thank me that is proof. I said I don't want it to be forever just as I improve, I said I couldn't commit to how long it would be for because I didn't know."

127 On page 316, Mr Bath asked the claimant: "do you just not accept that your role should be present in the hospital?", and the claimant replied:

> "Maybe if that is one but I am over two, the volume of work and admin I have is high and I could have been given the time off to help me with that."

128 We pause to observe that we found it hard to see why the fact that the claimant was responsible for what we will call the "hotel services" provided at two hospitals rather than one meant that her role did not require her to be (using Mr Bath's words) "present in the hospital".

129 On page 317, when Mr Bath asked the claimant "If I were to assume a physical presence is needed for most of the time, what would you be able to do at this time"?, she said:

> "There are some weeks I would be fine, and I sleep quite well. I can cope with lack of sleep. After the chemo I am lucky if I get 4 or 5 hours sleep some nights but that is fine, It's hard to say that I could do this from this date forward. I can't commit that is the problem."

130 She then said:

> "I don't know how long I will be off for before I am fully recovered. I am trying various treatments at the moment to see what will work for me."

131 Ms Moss then asked: "So, in terms of considerations for working and how you feel?" The claimant replied: "Three months' time is a further review." The claimant then said the things about the uniform policy which we have set out in paragraph 108 above.

132 However, on page 322, the claimant said (and she confirmed in the hearing before us that this was an accurate record):

> "I wasn't struggling to do three days it was due to the neuropathy, that took its toll on me. my feet were painful being on them for more than the three days would have been a problem."

133 So, on the basis of that statement, the first respondent's uniform policy was not causing the claimant problems with her feet. That was confirmed by what was said by the claimant as set out at the bottom of that page, and a similar statement near the top of the next page, page 323. The words at the bottom of page 322 were these:

> "I have said I would be happy to come in three days a week then work at home the other 2 days. The three days due to the neuropathy as that would then build up and be painful so then the two days at home would have helped me."

134 On pages 316 and 318, the claimant said that the fact that Ms Douglas had sent her a letter thanking her after her period of part-time working in 2021 showed that working from home was a viable possibility: respectively, she said

134.1 "Lisa thanked me for doing such a great job so that tells me it worked fine."

134.2 "My argument is that it all went well before so that proves it can work, Lisa sent me a letter thanking me. That proves it was fine."

135 On page 319, Mr Bath said: “The recommendation says about considering continuing the phased return pattern, but you then went sick?”. The claimant replied:

> “They didn’t take any notice, so I got more stressed and then felt ill and went off sick. I didn’t want it long term just to help short term.”

136 The final passage of the notes of the appeal hearing was material also, and was as follows (it was all on page 324).

> “DB: You came today with an aspiration of an outcome what is that?
>
> LW: Normally I would want to come back to work, but I don’t think I can work with that woman [and the claimant had added on page 335 “after the way she has treated me”]
>
> DB: What about somewhere else? Are you fit?
>
> LW: Depends on the role?
>
> DB: Housekeeping lead or similar to your current position?
>
> LW: No that is too physical.
>
> DB: What could you do or roles you know of that you could do?
>
> LW: Fraser Dawson gave me this role but before that It was more office based. Admin office based. The mobility is a problem for the moment, but I can feel It is getting better.
>
> DB: What about location?
>
> LW: I live 10 mins away from here.
>
> DB: So probably that would be CCH or Hendon as the next closest sites?
>
> LW: Hendon is not a very nice journey. Horrible journey – I don’t know if I would want to go there.
>
> DB: Trying to understand your view and work out if our (the business) actions have been reasonable. Something that possibly hasn’t been said and should have done is Thank you for your service and I am sorry that it has ended up this way.
>
> LW: I couldn’t come back and work for her now. [The claimant wrote on page 335 that that was ‘Not true. I said “I don’t think” or “not sure if” I can.] I also haven’t been paid for about a year and a half.

DB: Is there anything else you want to add?

LW: Nothing other than I can't work for her [and by this, the claimant wrote: 'Not true. I said "I don't think" or "not sure if I can"'], she is horrible. Not just me who thinks that."

137 That was the final printed entry for the meeting, apart from a record that it had ended at 16:54. At the bottom of page 335, the claimant had written:

> "Did not say couldn't come back and work for her now!! I've been asking for adjustments to my work pattern all of this time to enable me to come back and work full time in my current role. I love my job – that's why I've been fighting for it. This would have entailed working with and for her. You don't always <u>like</u> the people you work for!!"

The appeal outcome letter of 29 April 2024

138 The appeal outcome letter was at pages 336-342 and was dated 29 April 2024. In response to ground 1, Mr Bath wrote on pages 337 and 338:

> "During our meeting we discussed your fitness to work, and you advised that you are not fit to attend work fully and could not give any indication of when you might be. You stated that your health was improving and indicated that if you were allowed to work some days in the hospital and some days at home then you would be able to return to work. However, when we suggested facilitating this for you, you stated that you felt unable to return due not just your current health position but also the breakdown of relationship with your line manager, Hectoria Muthee.
>
> I can see from the documentation that following the stage two meeting, the outcome of which is dated 5th October 2023, a phased return was offered to you which included working from home as per the Occupational Health guidance. If it was the case that this would have been acceptable then you could have confirmed at that point your ability to return to work. The outcome letter clearly states that in the short term you could be afforded to work from home and the occupational health recommendations would be put into place. But still at this point you were unable to return, even with these adaptations."
>
> "You also advised us that whilst showing signs of improvement, your condition was still at a stage where medication is being trialled and depending on the success of this your ability to attend work would be impacted. You explained that you would need to be afforded full flexibility / autonomy over when you attended site or not. You said that you felt you could work three possible four days a week but would need to work from home when required. However, again when we asked about us facilitating this you could not commit to a return and stated that you also did not wish to work with Hectoria due to the way she has treated you.

> When asked about alternatives (roles and/or locations) you expressed a desire for something that would be fully desk based due to mobility difficulties. But when discussing alternative locations closest to Kings Oak or Cavell Hospitals you stated that Hendon would be the next closest and whilst you would consider what was on offer there you did not really want to drive to Hendon as the journey is difficult."

139 We found those responses to be at least largely, if not completely, accurate summaries of what had been said in the appeal hearing about ground 1. We add that we found that ground to have been in effect repeated in grounds 2 and 3, so we do not refer to Mr Bath's response to those grounds, but we observe that those responses were to the same effect as Mr Bath's response to ground 1.

140 As for ground 4, Mr Bath's response was in our judgment kind but unnecessary because, for the reasons stated in paragraphs 107-118 above, we found that the first time the claimant raised the issue of the uniform policy was in ground 4 of her appeal. On page 341, Mr Bath said in that regard:

> "Whilst flip flops could present a hazardous situation with the work undertaken at the hospital, I do agree that some discretion should have been afforded to you with your footwear and a suitable alternative found. I understand that you were able to find something suitable in the end, however this could have been agreed upon sooner."

The letter of 15 May 2023 from Ms Muthee to the claimant at page 248, and related factual matters

141 On 15 May 2023 Ms Muthee sent to the claimant by post the letter at page 248. It was written without proper attention to detail, given that the fitness certificate at page 218 to which we refer in paragraph 59 above expired on 5 April 2023 and not 5 May 2023, and given that the claimant's "initial sick note" was not "submitted on 27th October 2023". The letter at page 248 was headed "Unauthorised absence from work" and started: "I am concerned that you have failed to submit an updated sick note to cover your absence from 6th May 2023." Given the withdrawal of the claim of harassment, we did not need to make any determinations of fact in relation to the motivation of Ms Muthee in sending that letter. We did, however, have to consider whether, as it was submitted in paragraph 104.3 of Mr Watson's written closing submissions, "there were obvious lesser steps that could have been taken and, on the evidence, were not taken—such as a telephone call or an informal email" which meant that its sending "[could] not be justified by the legitimate aim of effective management of absence and attendance at work".

142 The letter at page 248 ended with the sentence "I have attempted to make contact with you on several occasions and do have concerns with your level of communication in addressing your absence as this makes it difficult to determine when you may return to work." The claimant had written on it by hand "No missed calls recorded on phone from HM or from withheld tel. number." It was Ms

Muthee's evidence that she had called the claimant on the telephone but not been able to speak to her, and it was the claimant's evidence that the handwritten words were accurate.

143 For the reasons given in paragraphs 166-168 below, we did not need to determine that factual issue. However, we need to record here that the claimant responded to the letter at page 248 at considerable length in the email sent on 19 May 2023 at pages 251-254 (and also at pages 260-261). That email was, we concluded, written with the help of some advice, probably from a lawyer. We say that for the following reasons.

143.1 The tone and content of the letter was inconsistent with the claimant's usual written communications.

143.2 The letter used the word "therein" in the sentence "I feel that the threatening tone of your letter as well as the incorrect content therein is very stressful and has left me feeling extremely vulnerable even though I have done nothing wrong." That word is not part of normal parlance but is often used in letters or documents written by lawyers.

143.3 The claimant referred in her email (at the bottom of page 253) to the seeking of "further advice". That was in the sentence: "I would like to inform you at this point that I dispute the incorrect allegations outlined in your letter and now feel that I must also take the step of forwarding this email to higher levels at Circle Health and will seek further advice as to how I proceed with this matter should I need to."

The need or otherwise for any more medical evidence at the time of the hearing of the claimant's appeal against her dismissal

144 When Mrs Search was giving evidence to us, Ms Thompson asked her whether she had considered advising the obtaining of a new occupational health report because by the time of the appeal of the claimant against the decision to dismiss her, the report of Dr Boakye to which we refer in paragraph 75 above was about nine months old. Mrs Search replied that

144.1 it was clear that the claimant was not going to be able to return to work even on three days per week,

144.2 Ms Muthee was not willing to allow for a phased return on an indefinite timescale,

144.3 it was clear that what the first respondent wanted, which was the return to work of the claimant, with her working at work on a full-time basis, was "not going to happen" as the claimant had to be fit enough to do that, so that

144.4 there was nothing to be gained by getting a new occupational health report.

145 We agreed with that analysis of Mrs Search. In regard to the question whether the claimant was at any time after July 2023 and before her dismissal on 29 February 2024 ready, able and willing to return to work to do her job of Hotel Services Manager on a full-time basis, with a short-term adjustment in the form of a time-limited period of working in part from home, we took into account the first paragraph of Ms Muthee's letter dismissing the claimant set out in paragraph 103 above, read in the light of what we say in paragraphs 91-98 above. As for the position at the time of the appeal hearing, what we say in paragraphs 138-139 above showed that the situation in regard to the claimant's ability to return to work and do her job at work on a full-time basis had not changed. The claimant's focus in the appeal was, we concluded, on what might have been achieved in 2022, but what she was saying in that regard was, we concluded for the reasons stated in paragraphs 70.1 to 70.6 above, not realistic. The proposition that the claimant could have remained in work by increasing her working week, either by one or two days of working at home as well as working 16.5 hours a week at work was, we concluded, unrealistic, and to the extent that the claimant thought that she could have done so, it constituted wishful thinking on the part of the claimant.

146 When she was pressed in cross-examination on the absence of a time limit stated in the report of Dr Boakye (the material part of which we have set out in paragraph 75 above) to the phased return which he recommended (which, we noted, ended at four days per week being worked, with two worked at home, and with "any further increments in her hours of work ... done in consultation with her and only if she is coping"), Mrs Search said that if the claimant had returned to work on that phased basis and had been unable to return to working full-time at work, then that would have been a situation going "beyond the capability process" and that the question would then be whether the first respondent could grant an application of the claimant to work flexibly on a long-term basis. We agreed also with that analysis.

Was it feasible for the claimant's work have been done at home to any extent?

147 The fact that the claimant was responsible for managing the hotel services (as the first respondent called them) at two hospitals meant that (as Mr Bath said as recorded on page 331, in the passage which we have set out in paragraph 123 above) perhaps 40% of her time needed to be spent on administrative tasks. However, that did not mean that it was feasible (by which we mean a practically workable solution for more than a limited period of time) to permit the claimant to work at home for two days a week. It merely meant that she would have to spend 40% of her working time doing administrative tasks. We agreed with Mr Ramsbottom's submission in this regard about interruptions, which was in the second numbered paragraph 4.4 of his written closing submissions, which was on page 20 of those submissions and was as follows.

> ‘During cross examination, the Claimant referred to being “*interrupted*” by housekeeping or portering staff while undertaking work on site and that working from home allowed her to focus on her paperwork. Such enquiries from staff to the Claimant were not ‘interruptions’ to her work, but an essential element of her role and a reason why she would be required [on] site. It was a fundamental element of the role to be on site and available to provide support, assistance and guidance to staff.’

148 The paragraphs of Ms Douglas’ witness statement to which we refer in paragraph 37 above, as well as the evidence of Ms Muthee that we have set out in paragraph 36 above, all of which as we say there we accepted, in our view pointed strongly towards the conclusion that the first respondent had a very strong business need for the work of a person in the role of Hotel Services Manager to work at all times on the premises of the hospital or hospitals to which those services were provided. The same was true of the content of the document entitled “Hotel Services Manager” at pages 66-68, which the claimant accepted was an accurate statement of her duties. It was also true of the following passage of paragraph 30 of Ms Douglas’ witness statement, which we also accepted:

> “In my view allowing Lorraine to work from home 2-3 days a week would have been unsustainable over a period of more than 4-6 weeks. Lorraine would have been in a difficult position of trying to undertake her role remotely, and even with modern communications, the need for her physical presence on site to daily with issues that crop up on a daily basis [*sic*] would have made her position untenable. During the period that Lorraine was informally allowed to work from home part of the week, when she first commenced her chemotherapy treatment, this was largely unsuccessful due to her not being able to commit to or maintain clearly defined working hours and not being available on site. Her staff would then seek support and guidance from other managers for items requiring immediacy, but who were not necessarily *au fait* with the requirements of the role or processes that should be followed. This caused frustration among managers who became distracted from their own objectives. The nature of the staff in Lorraine’s team is that they are unskilled needing more hands on support and oversight; they also do not work in an office on a computer or at a phone, for ease of communication. Staff rotate between 3 buildings as well as the external areas of the 2 properties, requiring broad supervision.”

149 Ms Douglas said in paragraph 29 of her witness statement (which, as we say in paragraph 37 above, we accepted) that because of an increase in the use of technology, “The paperwork or administrative responsibilities today are ... much less onerous than they were during [the claimant’s] employment and the administrative proportion of the role may be as low as 30%, to enable increased visibility on the ground.” In cross-examination, Ms Douglas said in answer to the question “Seeing whether an employee needs chasing can be done online?”:

> “Okay but 90% involves being on site and looking a person in the eye.”

150 We accepted that evidence too.

151 When he was being cross-examined, Mr Bath's evidence was that "with any phased return you need a reasonable end to it; it is not reasonable to expect a business to have an indeterminate end date."

152 We were of course not bound to accept that assertion, as the question of reasonableness was a matter for us. However, we did come to the clear conclusion that in general it would not be reasonable for an employee to have an indeterminate phased return to work, namely a return to work which was not on a clearly time-limited basis. The concept of a phased return to work on an indeterminate basis was possibly even a self-contradiction, since what is normally meant by the concept of a phased return to work is that the phases are defined, but in any event, we bore it in mind that the questions which we had to answer involved the application of the relevant legal tests to the facts of the case as found by us. We now state our conclusions on those claims.

Our conclusions on the claims here

The claim of unfair dismissal

The reason for the dismissal

153 The reason for the dismissal of the claimant was as set out in paragraphs 103 and 138 above. That was capability within the meaning of section 98(2)(a) of the ERA 1996.

The procedure followed in deciding to dismiss the claimant

154 Mr Watson's submissions on the fairness of the claimant's dismissal (which were in paragraph 125 of his written closing submissions) started off by repeating his submissions on the question whether the claimant's dismissal was a proportionate means of achieving a legitimate aim and therefore whether it was discrimination within the meaning of section 15 of the EqA 2010. We deal with that question in paragraphs 171-173 below. However, for the reasons stated in paragraph 21 above, we did not see the tests as being the same, and we were firmly of the view that the questions to be answered in determining the claim of unfair dismissal were only as stated in paragraphs 25-28 above.

155 Mr Watson's other submissions on the fairness of the claimant's dismissal were as follows.

155.1 "Mrs Muthee approached the decision to dismiss the Claimant with a closed mind; she had decided from the outset that no homeworking would be permitted."

155.2 "Allowing the Claimant to trial working from home for more than a short-term period is a step which the Respondent should have taken, applying

the range of reasonable responses test, prior to dismissing the Claimant. It would have been reasonable to wait longer to try this."

155.3 "Alternatively, a further OH report ought to have been obtained prior to dismissing the Claimant, or prior to determining her appeal, given that the previous medical opinion was dated 27 July 2023 and her medical situation had changed since that point in time."

155.4 "A discrete point arose at the appeal stage: the Claimant raised an issue as to her working relationship with Mrs Muthee. Mr Bush ought to have investigated that further, including by determining the precise nature of the issue and whether it was resolvable using workplace mediation or something similar. Only then could he reach a properly informed view as to whether to allow the appeal. His failure to do so rendered the appeal unfair."

156 The first of those submissions was correct as a matter of fact, but in our view, refusing to permit the claimant to work at home on a permanent or an indefinite basis was not at all outside the range of reasonable responses of a reasonable employer in the circumstances as they stood at the time of the claimant's dismissal. Those were as we have stated in paragraphs 70-104, 138, 139 and 144-152 above.

157 Given our conclusions stated in paragraphs 147-152 above, the second of those submissions was not well-founded.

158 Given what we say in paragraphs 144-145 above, the third of those submissions was not well-founded.

159 We also rejected the fourth of those submissions. That was for the following reasons.

160 If only because of the evidence which we have set out in paragraph 136 above, we concluded that it was well within the range of reasonable responses of a reasonable employer not to investigate further the relationship between the claimant and Ms Muthee. For the avoidance of doubt, the exchange which we have set out in paragraph 136 above, read objectively, supported the proposition that either (1) the claimant was aware that she was not well enough to do the job of Hotel Services Manager again, even if she did not report to Ms Muthee when doing it, or (2) she did not want to do it again. If only for those reasons, we concluded that the claimant's antipathy towards Ms Muthee was not in reality a block on the claimant's returning to work. However, what put that question beyond any doubt was the fact that the claimant's own note set which we have set out in paragraph 137 showed that she herself did not see having to work for and with Ms Muthee as an obstacle to her (the claimant) returning to work for the first respondent.

161 However, there was another reason why it was well within the range of reasonable responses of a reasonable employer not to carry out an investigation into the claimant's working relationship with Ms Muthee before confirming the claimant's dismissal. That was that, given our findings of fact stated in paragraph 145 above, the claimant was plainly not well enough to do the job in which she would, if she returned, be reporting to Ms Muthee, and it was well within the range of reasonable responses of a reasonable employer to conclude that there was no prospect of the claimant becoming well enough to do that job.

Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

162 In the circumstances which we have described in paragraphs 70-139 and 144-152 above, we concluded that the claimant's dismissal was well within the range of reasonable responses of a reasonable employer.

The fairness of the claimant's dismissal

163 For all of those reasons, we concluded that the claimant's dismissal was not unfair, so that her claim of unfair dismissal failed and had to be dismissed.

The claim of discrimination arising from disability within the meaning of section 15 of the EqA 2010

The claim stated in paragraph 3.3.1 above: 'In the period from 3 May 2022 to 3 November 2022 the Second Respondent often undermined the Claimant by arranging meetings directly with the Claimant's staff regarding upcoming plans/workloads without inviting the Claimant, even though she was on the premises at the time.'

164 We concluded that given that the claimant was working for only 16.5 hours a week and was therefore unable to fulfil all of her duties, a reasonable person would not have seen it as a detriment for the respondents to arrange some meetings to deal with aspects of the claimant's work without the claimant present on some occasions, even though the claimant was working and in could have attended those meetings in working time. The only complaint which the claimant could reasonably have made was not being kept informed about the outcomes of those meetings and where necessary consulted about their subject-matter. If, however, we were wrong in that regard and a reasonable person would have said that it was detrimental to the claimant within the meaning of section 39(2)(d) of the EqA 2010 to have arranged some meetings to deal with aspects of her work to take place without her present on some occasions, even though she was at work and could have attended those meetings in working time, then we would have concluded that it was a proportionate means of achieving the legitimate aim of getting done the work which the claimant would have done if she had been well.

165 While that legitimate aim was not in terms pleaded by the respondents, it was rather obvious. Nevertheless, because of what we are about to say, we did not

need to consider whether we should base our finding on this aspect of the case on that aim: we concluded that this claim was not within our jurisdiction because we concluded that it was made out of time as it was not part of conduct extending over a period, and it was not just and equitable to extend time for making that claim. We came to the first of those conclusions because the complaint was about something which we saw as discrete from the other things about which complaint was made in these proceedings. We came to the second conclusion because

165.1 the claim was made about events which preceded the period in respect of which the claim was in time by at least 15 months,

165.2 there was no hint of an inability of the claimant to advance a legal claim of any sort,

165.3 the claimant was, we concluded, well aware of the potential application of the EqA 2010, at the latest by the time she saw the report of Dr Boakye of 27 July 2027 at page 268 (see paragraph 75 above), and

165.4 the claimant was either in receipt of, or able to seek, advice on the situation, from either the Citizens' Advice Bureau or a solicitor (see paragraphs 91.8 and 121-122 above respectively).

The claim stated in paragraph 3.3.2 above: 'On 15th May 2023, the Second Respondent sent an "Unauthorised absence from work" letter accusing the Claimant of not submitting a current sick note and saying that her absence could be considered as unauthorized, even though she had in fact presented a sick note on 20th April 2023.'

166 The submissions advanced by Mr Watson in support of this part of the claim to which we refer in paragraph 141 above showed that the claimant was not relying on the proposition that she had in fact put before either respondent "a sick note on 20th April 2023". That may be because neither party, but in particular the claimant, did not put such a sick note before us. It may also be because it was rather unlikely that Ms Muthee sent her letter of 15 May 2023 at page 248 having received and been aware of a certificate of fitness having been put before the first respondent covering the period after 5 April 2023.

167 In any event, the claimant was (in our view correctly) not saying that it was not open to the respondents, without doing something which contravened section 15 of the EqA 2010, to contact her to point out that she had not given the first respondent a fitness certificate covering the period after 5 April 2023 and that as a result her absence from work was now unauthorised. The issue was simply whether sending a letter in the post rather than sending a text or calling the claimant on the telephone was a disproportionate means of achieving the legitimate aim of managing absences from work effectively. In that regard, we took into account what was said in paragraph 32 of the judgment of Pill LJ in *Hardy and Hansons plc v Lax* which we have set out in paragraph 17 above, and in particular the sentence that "The employer does not have to demonstrate that

no other proposal is possible." We concluded on the basis of that sentence and our experience of the workplace and workplace disputes that while the respondents could have acted more gently, what they did was not a disproportionate means of achieving the legitimate aim of ensuring that the claimant was warned that the first respondent did not have in its possession a current doctor's certificate to the effect that the claimant was not well enough to work. Indeed, we wondered whether doing anything less than sending a warning in the form of a letter might subsequently have been criticised by the claimant as an insufficient warning that her absence was in the view of the respondents unauthorised.

168 But in any event, we concluded that this too was an instance of conduct which stood on its own, so that it was not part of conduct extending over a period, and that, for the same reasons as those stated in paragraph 165 above, albeit that this claim was less out of time than the one stated in paragraph 3.3.1 above was (this one was about an event which occurred just under 9 months before the period in respect of which the claim was in time), it was not just and equitable to extend time.

<u>The claim stated in paragraph 3.3.3 above: 'On 3 October 2023, Hana Search asked the Claimant if she "just wants to retire", even though she made it clear on several occasions that she is not ready to retire yet.'</u>

169 The words which the claimant claimed that Mrs Search used were, as we say in paragraph 81 above, "Don't you just want to retire?" For the reasons stated in paragraph 84 above, we concluded that Mrs Search did not say that. As a result, the claim stated in paragraph 3.3.3 above could not succeed.

<u>The claim stated in paragraph 3.3.4 above: 'In November 2022, July/August 2023 and February 2024, the Second Respondent refused to allow the Claimant to work one or two days a week from home.'</u>

170 Mr Watson asserted that the claim that it was unfavourable conduct within the meaning of section 15 of the EqA 2010 not to permit the claimant to work from home one or two days a week was linked with the claim that the claimant's dismissal was such unfavourable conduct. We agreed.

<u>Dismissing the claimant</u>

171 The respondents relied in response to the claim that the claimant's dismissal was such a breach on the following two legitimate aims:

171.1 the effective management of absence and attendance at work, and

171.2 ensuring that any sickness absence does not adversely impact on the operation of the business and on other employees.

172 Given what we say in paragraphs 147-152 above, we came to the clear view that the respondents' refusal to countenance the claimant working from home for any more than a limited period during a phased return to work was a proportionate means of achieving a legitimate aim. That was because in our judgment the first respondent had a strong business need for the claimant to work at work when she was working, and to do so on a full-time basis, and requiring the claimant to do those things achieved the second of the two aims set out in the preceding paragraph above, which we concluded without any hesitation was a legitimate one.

173 In paragraph 111.2 of his written closing submissions, Mr Watson asserted that the fact that the most recent occupational health report at the time of the claimant's dismissal was the one of 27 July 2023 to which we refer in paragraph 75 above was relevant to the question whether it was a proportionate means of achieving a legitimate aim to dismiss the claimant. Given what we say in paragraphs 144-145 above, we concluded that no practical benefit would have been gained by obtaining a further occupational health report in relation to the claimant's ability to return to work. We add here that the occupational health reports were all in reality here dependent on the advice of the specialist oncologists who were assessing or treating the claimant, and none of those oncologists was able to say at any time that the claimant would be able to return to working at work on a full-time basis. We add too that on our findings of fact stated in paragraphs 144-145 above, the claimant herself was saying that she would not be able to do that. In addition, by the time both of her dismissal and her appeal against her dismissal, the claimant did not have any advice from an oncologist to the effect that she could in practice return to work on any basis, and when it was suggested to her that she could work at Hendon, as we record in paragraphs 136-139 above, she declined to entertain the idea of doing that. For all of those reasons, we concluded on the evidence before us that

173.1 the claimant was not well enough to return to work except on a rather limited basis, and possibly not even on any basis, both at the time that Ms Muthee decided that she should be dismissed and at the time of the dismissal of her appeal against that decision, and

173.2 dismissing the claimant was a proportionate means of achieving the legitimate aims set out in paragraph 171 above.

<u>In conclusion on the claim of unfavourable conduct within the meaning of section 15 of the EqA 2010</u>

174 For all of those reasons, the claim of unfavourable conduct within the meaning of section 15 of the EqA 2010 did not succeed and had to be dismissed.

The claim of a failure to make a reasonable adjustment

<u>The claimant's case in regard to the claimed reasonable adjustment of being permitted to work from home for one or two days per week</u>

175 The claimant's case at the end of the hearing in regard to the claim of a failure to make an adjustment within the meaning of section 20(3) of the EqA 2010 in relation to working from home was stated in paragraphs 115-118 of Mr Watson's written closing submissions and focused on three periods. In the first of those paragraphs, he said this:

> 'Between June 2022 and November 2022 ... the Respondent *had* made an adjustment by allowing the Claimant a phased return to work. However, they ought to have gone further at this time and allowed the Claimant to work part of the week — one to two days a week — at home.
>
> 115.1. This would have allowed the Claimant to complete the approximately two days a week of office-based work which her job entailed at home, overcoming the disadvantage she faced of having to try to complete her job in the three days a week she was physically able to come into the office.
>
> 115.2. This would have had at least a prospect of overcoming that disadvantage.
>
> 115.3. There is, frankly, no good reason for the Respondent not to have allowed the Claimant to work partly from home during this period. The suggestion that homeworking is not "*operationally viable*" loses its force in circumstances where the Claimant was allowed to work three days a week for six months. On any objective measure, it is more operationally viable for the Claimant to be allowed to work three days in the hospital and one or two days at home. Mrs Muthee's protestations to the contrary in cross-examination lack any credibility.'

176 Given (1) what we say in paragraph 145 above starting with "The claimant's focus" to the end of that paragraph, and (2) what we say in paragraph 172 above, we concluded that it was not a reasonable adjustment within the meaning of section 20(3) of the EqA 2010 to permit the claimant to work at home on one or more days during the period from May to November 2022 as well as 16.5 hours per week at work.

177 The second of the three periods on which Mr Watson's written closing submissions focused was the second half of 2023, after the report of Dr Boakye of 27 July 2023 (to which we refer in paragraph 75 above) had been produced. In paragraph 116.2 of those submissions, Mr Watson submitted that

> "following the OH report, it should have been made clear to the Claimant that she could return to work on the phased return suggested in the OH report. That involved 1 or 2 days home working for, as submitted above, a return to work period spanning potentially significantly longer than the first 5

weeks described in the report. In other words, a return to work involving long-term (i.e. longer than short-term) homeworking."

178 Mr Watson's submissions continued:

> '116.3. The Claimant submits that if this had been offered outright—without any caveats about "only short-term" homeworking, the Claimant would have been in a position to accept it and start back if not on 3 October 2023 then certainly by 27 November 2023.
>
> 116.4. This would have had at least a prospect of removing the Claimant's disadvantage.
>
> 116.5. It was a reasonable step to take. The Respondent will say it was not a practicable step because of the need for the Hotel Services Manager to be on site every day; the Claimant repeats the submissions made above about the viability of working from home.
>
> 116.6. The nub of the Claimant's argument on this is that there is no guarantee it would have worked — i.e. no guarantee that it could have been sustained for long enough, or no guarantee that the Claimant would have been able to build back up to full-time hours. However, the duty to make reasonable adjustments is not triggered only when the adjustment is guaranteed to work. The Respondents were adamant that it was not viable but they did not even try it. They ought to have tried it.'

179 The third of the three periods on which Mr Watson's written closing submissions focused in relation to the question of the claimed reasonable adjustment of working at home was the time of the claimant's dismissal and the appeal against that dismissal. In those regards, Mr Watson submitted this:

> "117. In February 2024, prior to dismissing the Claimant, allowing the Claimant to work from home one or two days a week:
>
> 117.1. In some respects this is pleaded in the alternative. If the Tribunal finds that the duty to make reasonable adjustments was not triggered prior to February 2024, then it was certainly triggered at that meeting. For the reasons given above, at that meeting it was plain that the Claimant was able to return to work if she was permitted to work from home one to two days per week on more than a short-term basis. The duty was certainly triggered therefore, at this meeting, if not before.
>
> 117.2. The Claimant repeats the arguments made above about the viability of making this adjustment.

118. The Claimant is conscious that no specific case has been pleaded that the duty arose again at the appeal stage. An argument as to making this adjustment at the appeal stage has been made under the section 15 claim. The Claimant would make the further point that if the duty to make reasonable adjustments had not arisen by 23 February 2024 then it had, in the further alternative, certainly arisen by 25 April 2024 in the appeal meeting, and then the same arguments as above would apply."

180 Given (1) what we say in the first half of paragraph 145 above (up to and including "had not changed"), and (2) what we say in paragraph 172 above, we concluded that it was not a reasonable adjustment within the meaning of section 20(3) of the EqA 2010 to permit the claimant to work at home on one or more days at any time during the period from 27 July 2023 onwards.

In conclusion

181 For all of those reasons, none of the claimant's claims succeeded and they were therefore all dismissed by us.

Approved by Employment Judge Hyams

Date: 15 September 2026

SENT TO THE PARTIES ON
18 October 2026

T Cadman
FOR THE TRIBUNAL OFFICE