EMPLOYMENT TRIBUNALS

Claimant: Miss F Zhang

Respondent: Imperial College Healthcare NHS Trust

Heard at: London Central (conducted by video using Cloud Video Platform)

On: 4, 5, 8 – 12 November 2021

Chambers: 15 & 17 November 2021

Before: Employment Judge Khan
Mrs M Pilfold
Mr J Carroll

Representation
Claimant: Mr H Tufnell, Counsel
Respondent: Ms H Winstone, Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claims fail and are dismissed.

REASONS

1. By claims presented on 19 October 2020 and 13 January 2021 the claimant brought complaints of disability discrimination, harassment and victimisation. The second claim was amended to add a complaint of unfair constructive dismissal. The respondent resists these complaints.

2. On day six, the claimant withdrew an allegation in relation to the harassment complaint (relating to issue 14(f)).

3. On day seven, by agreement, the respondent amended the aims relied on in relation to the complaints of indirect discrimination and discrimination arising from disability (issues 9 and 13).

The issues

4. The issues we were required to determine were based on an agreed list of issues which was refined over the course of this hearing:

Jurisdiction (the first claim)

1. The claimant contacted ACAS on 24 June 2020. The ACAS early conciliation certificate was issued on 24 July 2020. The claimant is deemed to have lodged her first claim on 19 October 2020.

2. Are any of the claimant's complaints out of time or were they part of a continuing act that is ongoing and hence in time? Should the tribunal exercise its discretion to allow any part of the claim that is out of time on grounds that it would be just and equitable?

Disability

3. The respondent has accepted that the claimant is disabled by reference to anxiety and depression from 12 December 2019. The respondent concedes that it had constructive knowledge of the claimant's disability but only from 22 January 2021.

Direct disability discrimination

4. Did the respondent treat the claimant less favourably that it would treat a hypothetical comparator? The claimant relies on the following allegations:

    a. Khalida Hussain on 13 May 2020 threatening to withhold the claimant's occupational sick pay ("OSP") unless the claimant attended a sickness review meeting with Chris Jones and Sally Punzalan.
    b. The claimant was not notified or considered for a suitable band 7 role within the Renal Education Team, which was advertised between 1-15 April 2021, when she returned from work, by Helen Watts.

5. If so, was that treatment because of the claimant's disability?

Indirect discrimination

6. Did the respondent apply the following provisions, criteria or practices ("PCPs"):

    a. A disability policy. This is agreed.
    b. Withholding OSP if an employee fails to attend a sickness review meeting.
    c. Failing to postpone a sickness review meeting even though an employee is unwell and unable to attend.

7. If so, does that put people who share the claimant's disability at a particular disadvantage when compared with those who do not? The claimant contends for the disadvantages of demotion (a) or an exacerbation of depression ((b) and (c)).

8. If so, does it or would it put the claimant at that disadvantage?

9. If so, can the respondent show that the PCP was a proportionate means of achieving a legitimate aim?

    a. In relation to (a) the respondent relies on the aim of supporting disabled people in the workplace and says the relevant guidance is a proportionate way of achieving that aim, which is to guide managers in supporting disabled employees.
    b. In relation to (b) and (c) the respondent relies on the aim of having a Sickness Absence Management Policy which is to achieve excellence in terms of attendance at work, so that sickness absence and its effect upon service is minimised and managed efficiently, transparently and fairly to all employees who are off sick. This is light of the clear evidence that attendance at work is good for staff health and well-being, in particular for staff with long-term conditions, and where high absence levels affect the delivery of efficient and high quality services to the public. The implementation of the Sickness Absence Management Policy is a proportionate means of achieving that aim.

Discrimination arising from disability

10. The claimant says the "something arising" is anxiety which means she cannot face her line managers and has asked for redeployment in consequence.

11. Does the tribunal find that the claimant's anxiety and/or inability to face her line managers and/or request for redeployment arise from her disability?

12. Was the claimant treated unfavourably because of this? The claimant relies on the following allegations:

    a. Chris Jones threatened her with dismissal if she did not return to Home Therapies during an informal sickness management meeting on 19 March 2020.
    b. Khalida Hussain on 13 May 2020 threatened to withhold the claimant's OSP unless she attended a sickness review meeting with Chris Jones and Sally Punzalan.

13. If so, did the respondent have a legitimate aim and did it follow proportionate means to achieve it? The respondent relies on the aim

of ensuring that employee understand the process which is being used during their sickness absence; the proportionate means is said to be the obligation upon managers, trade union representatives and HR to explain the Sickness Absence Management Policy to staff, hence attaching them to invitations to meetings, for example, in order to maintain transparency and fairness in the management of sickness absence.

Harassment related to disability

14. Did the respondent engage in alleged unwanted conduct as follows:

    a. Chris Jones on 19 March 2020 telling the claimant she would be dismissed if she did not go back to Home Therapies.
    b. Sally Punzalan falsely claiming on 9 June 2020 that booking bank shifts for the claimant was a supportive measure and that they had been booked at the claimant's request.
    c. Khalida Hussain on 13 May 2020 threatening to withhold the claimant's OSP unless the claimant attended a sickness review meeting with Chris Jones and Sally Punzalan.
    d. Sally Martin failing to postpone sickness review meetings on 2 and 31 July 2020 when the claimant was too unwell to get out of bed.
    e. Sally Martin up to and including 13 August 2020 withholding documents i.e. appendices relating to the claimant's formal grievance until five days before the grievance hearing, meaning that the claimant had inadequate time to prepare, and/or misrepresenting the claimant's statements on 19 June 2020 i.e. (i) in relation to the NxStage meeting and (ii) her relationship breakdown with Sally Punzalan and Chris Jones and/or mis-recording information during the investigation i.e. editing the note of her interview with Sally Punzalan
    f. The grievance investigators i.e. Sally Martin, Julie Harris and Robert Nicholls, taking negative comments made by Sally Punzalan on 9 June 2020 at face value i.e. (i) she had not demanded that the claimant worked whilst she was unwell and (ii) the claimant was bullying her and/or failing to collect substantial evidence during the grievance investigation i.e. (i) Mr Jones' note of the meeting on 19 March 2020 and (ii) in relation to the TOIL issue.
    g. On 18 May 2021, Helen Watts repeatedly accused the claimant of refusing to sign the redeployment register.

15. Was any proven conduct at para 14 above related to disability?

16. If so, did the conduct have the purpose of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

17. If not, did the conduct have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation

18. Did the claimant do a protected act within the definition at section 27(2) of the Equality Act 2010 when she submitted her grievance of 18 May 2020.

19. Did the respondent subject the claimant to the following alleged treatment:

    a. Sally Martin failing to postpone sickness review meetings on 2 and 31 July 2020 when the claimant was too unwell to get out of bed.
    b. On 31 July 2020, at a formal sickness management meeting, Mia Oliver told the claimant that if she were to be placed on the redeployment register and was unable to find a suitable job within three months, she would be dismissed.

20. If so, is that treatment a detriment?

21. If so, was that treatment carried out because of the claimant's protected act?

Failure to make reasonable adjustments

22. Did the respondent apply the following PCPs:

    a. Requiring line management i.e. Sally Punzalan and Chris Jones to host the sickness review meeting on 22 May 2020
    b. Failing to postpone the claimant's sickness review meetings on 2 and 31 July 2020
    c. A disability policy. This is agreed.

23. Was the claimant put at a substantial disadvantage by the application of the PCPs in comparison with persons who are not so disabled? In relation to (a) and (b), the claimant says that she was more susceptible to depression and at greater risk that the PCP would exacerbate her disability (depression). The claimant contends that (c) would have put her at the disadvantage of demotion.

24. If so, did the respondent know, or could it reasonably have been expected to know, that the claimant would be put at this disadvantage?

25. Would the following steps have alleviated any substantial disadvantage?

    a. Permitting a neutral person(s) to host the sickness review meeting on 22 May 2020.
    b. Rescheduling the sickness review meetings on 2 and 31 July 2020.
    c. Redeploying the claimant to a suitable band 7 role within the Renal Education Team i.e. the role advertised between 1-15 April.

Unfair constructive dismissal

26. Did the respondent breach the implied term that the parties to the employment contract would not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence which should exist between employer and employee?

27. The claimant relies on each of the alleged acts of discrimination set out above which, taken either individually or cumulatively, amount to repudiatory conduct. The claimant relies on the allegations at paras 14(g) and 25(c) as the final straw.

28. Did the claimant resign in response to one or more of the respondent's alleged breaches?

29. Did the claimant waive or affirm the respondent's alleged breaches?

30. If the tribunal finds that there was a dismissal, the respondent relies on the potentially fair reason of capability.

The evidence

5. The claimant gave evidence herself.

6. For the respondent we heard evidence from:

    (1) Sally Punzalan, Head Nurse, Renal Home Therapies
    (2) Chris Jones, formerly Renal Satellite Lead Nurse
    (3) Khaleda Hussain, Senior HR Advisor
    (4) Sally Martin, formerly Deputy General Manager, Renal & Transplant Service
    (5) Mia Oliver, HR Business Partner
    (6) Kevin Croft, People and Organisational Director
    (7) Helen Watts, Lead Nurse in Dialysis, formerly in this post on an interim basis (August 2020 to October 2021)

7. There was a bundle of 1672 pages. By agreement, we admitted into evidence several emails, and video with audio recordings. We read the pages in this bundle to which we were referred.

8. We also considered closing submissions from both parties.

9. References below to numbers in square brackets are to the pages in the bundle.

The facts

10. Having considered all of the evidence, we make the following findings on the balance of probabilities. These findings are limited to points which are relevant to the legal issues.

11. The respondent is an NHS trust providing acute and specialist healthcare.

12. The claimant was employed by the respondent for 17 years from 21 June 2004 until 23 July 2021.

13. It is accepted that the claimant was at all relevant times a disabled person by reference to the effects of anxiety and depression on her daily activities. The respondent accepts that it had constructive knowledge of this disability from 22 January 2021.

14. The claimant was promoted to the band 7 post of Home Dialysis Manager on 15 October 2018. She was based at the Renal Home Therapies Unit in Hammersmith Hospital. There were two teams: the Home Haemodialysis team ("HHD") in which the claimant was based; and the Peritoneal Dialysis ("PD") team. Both are life-sustaining treatments for patients with kidney failure which are administered at home. Whereas haemodialysis uses an artificial kidney i.e. a haemodialysis machine such as NxStage, in Peritoneal Dialysis the peritoneum is used. These teams collaborated with other colleagues in satellite units, including Northwich Park Renal Centre and St Charles Dialysis Centre, for example, in training new patients to use haemodialysis machines at home.

15. It is agreed that in her first year in post, the claimant led an expansion of the HHD service. The number of patients supported by her team doubled from 18 to 36. The claimant was committed to improving the quality of life for her patients and proud that the service had grown so that it was able to this benefit more patients. However, this was unsustainable for both the claimant and the HHD service because of a lack of clinical staff and administrative support. The claimant ran this service single-handedly for much of this period. She was meant to have two band 6 nurses in her team but there was only one and he was underperforming (which added to her workload because she had to double-check the work he did). This colleague left in late 2019. There was no funding for an administrator. The claimant was routinely working 60 hours a week.

16. The claimant emailed Chris Jones, Renal Satellite Lead Nurse, on 11 September 2019 [360] to query when a band 2 administrator could be recruited. She explained that because funding for such a role had been

frozen and the PD administrator had no capacity to take on more work, she was spending at least 10 hours a week on admin work instead of supporting patients in the community and planning for the expansion of the HHD programme. She copied her email to Dr Neill Duncan, Renal Consultant and Clinical Lead for HHD, who emailed Claire Edwards, Head Nurse, Northwich Park Hospital ("NPH") Renal Unit, the next day to make the case for the immediate recruitment of a band 2 post. Mr Jones agreed to raise this at the next finance meeting.

17. As will be seen, the respondent concluded that having alerted her managers to this issue in September 2019, it failed to act promptly to address the claimant's workload.

18. From 1 October 2019 the claimant was line managed by Sally Punzalan, Head Nurse, Renal Home Therapies, who was now responsible for managing the HHD and PD teams.

19. In early October, Ms Punzalan emailed colleagues about a new group email she had set up with the aim that enquires would be sifted before being referred to senior staff, including the claimant. We accept the claimant's unchallenged evidence that this did not reduce her workload as she needed to check the group email inbox herself.

20. Sydney Bunting, a band 6 management trainee, was brought in to provide some support to HHD. Although the claimant's evidence was that Ms Bunting was double-checking the work of her underperforming band 6 colleague and correcting his mistakes which did not reduce her administrative workload we find that it is likely that Ms Bunting had some, albeit limited, impact on the claimant's administrative burden, for example, she was able to complete all patient medical history records whilst the claimant was on leave in October 2019.

<u>The NxStage and Task and Finish ("T & F") Group meetings</u>

21. We do not find that Ms Punzalan instructed the claimant that she should not attend meetings which were relevant to her work and should instead discuss her ideas with her so that Ms Punzalan could present them as her own, as the claimant alleges. There was no evidence that the claimant was excluded from any meetings by Ms Punzalan. The claimant referred to two meetings: an NxStage meeting and a meeting of the T & F Group, the latter of which was focused on strategy and the progression of the service. As was subsequently found, when this issue was investigated as part of the claimant's grievance, neither of these meetings had been arranged by Ms Punzalan or Mr Jones but by other managers who had not understood that the claimant's attendance was or may have been required.

22. Ms Edwards emailed the claimant on 14 November 2019 confirming that two nurses in the PD team, Garry and NJ, based at NPH, who were already training patients to use haemodialysis machines, would provide temporary support for home visits. She listed 12 patients. They agreed that the claimant would need to shadow these nurses for two weeks on home visits. Ms Edwards had already discussed this with Ms Punzalan. The claimant says that Ms Punzalan came into her office aggressively, the following day,

and asked her how Ms Edwards knew about these 12 patients. The claimant says she replied as follows

> "You knew what was the email about as you spoken [sic] to Claire over the phone. It would be nice if you have told me that you have already had discussions with Claire and knew her plan".

We find that it is clear from this that the claimant was exercised by the fact that Ms Punzalan had already discussed this issue with Ms Edwards and this added to her mistaken belief that Ms Punzalan had excluded her from the NxStage and T & F Group meetings. She felt threatened by this. It is likely that her response related to the fact that she was used to working autonomously; she was also overworked and overstretched. Nor do we find it likely that Ms Punzalan acted aggressively. As will be seen, we find that the claimant misconstrued interactions she had with her managers and HR advisors and perceived threats and accusations where none were made.

23. The claimant emailed Ms Punzalan four days later, on 19 November, to say that she was struggling with the administrative burden [376]. She explained that Garry only wanted to visit local patients and NJ could not drive which meant that she would still need to cover the majority of home visits. She had accumulated 150 hours of TOIL, would continue to accrue TOIL and wanted to know what Ms Punzalan's plans were for supporting HHD. This was copied to Dr Duncan, Mr Jones and Ms Lynch.

24. Ms Punzalan emailed the claimant on 29 November to confirm that she had back-dated bank shifts on 26 and 28 November, and thanked her for her "continued hard work for HHD" [393]. There is no evidence that the claimant requested payment for the additional hours she had worked. We accept the claimant's evidence that she did not find this supportive; what she needed was hands on support so that she was not required to work additional hours. She asked Ms Punzalan to stop booking bank shifts for her when they met on 3 December.

25. On the same date, the claimant declined an invite sent via email by Mr Jones to attend a meeting which she understood, quite reasonably, to be in relation to the progression of the service because the email was headed "Home HD program progress". She explained that she was working hard to cover the service given the lack of staff resources; and, for the same reason, the HHD programme was on hold so she anticipated there would be little to discuss. In his reply, Mr Jones was insistent on a meeting and wrote [392]:

> "I would like to discuss your diary with your line manager Sally next week – this meeting is non-negotiable. Your impression that we cannot plan, progress or develop the service is why the meeting is urgently needed."

The claimant responded that she had booked patient assessments on 4 December and asked for the meeting to be rescheduled on another day that week. She says Mr Jones' email was aggressive and hostile. We find that Mr Jones told the claimant that this meeting was "non-negotiable" because he was concerned that the claimant was not prioritising this meeting which he wanted to take place without delay in order to discuss how she could be supported. However, he had failed to clearly identify the purpose of this meeting in his initial email. As will be seen, the respondent subsequently

concluded that this failure added to the claimant's stress.

The meeting on 3 December 2019

26. We viewed and listened to a recording made covertly by the claimant of her meeting with Mr Jones and Ms Punzalan on 3 December 2019. When the claimant subsequently revealed to her employer that she had recorded this meeting she explained that she had done so by mistake. The claimant repeated this explanation on the first day she gave evidence. However, on the second day of her evidence, she conceded that she had deliberately recorded this meeting. We therefore find that the claimant deliberately misled the respondent, in addition to which she misled the tribunal under oath before she corrected her evidence.

27. The claimant was evidently upset and affronted by Mr Jones' instruction that this meeting was "non-negotiable". She began the meeting exercised by this issue and she returned to it, still upset by it, at the end of the meeting. She told her managers that it had made her very upset and she had been crying over the weekend. Mr Jones explained that he had wanted to meet with the claimant and Ms Punzalan to discuss the support which could be given to her. He knew the claimant was busy but felt she had been avoiding a meeting and wanted to make it clear that it had to take place. He apologised if this had made the claimant more stressed. The claimant said that she did not feel stressed and also that she was very happy with her work, however, she also reported that in addition to the hours which she had recorded on the eRoster she was working on evenings and weekends.

28. Mr Jones was concerned about the emails that the claimant had sent which signalled that she was overworked, struggling, stressed, close to breaking point and which he said did not meet the respondent's values. Although he did not explain which values had not been met, he referred to the way in which the claimant had copied in other colleagues when she had corresponded with him and Ms Punzalan. This also upset the claimant.

29. Although the claimant said that she wanted this meeting to end and rearranged with sufficient notice so that she could bring a union representative, she agreed without compulsion, to continue.

30. The claimant asked Ms Punzalan to stop booking bank shifts because she wanted to block out some time and take a break. The following steps were discussed:

    (1) To provide more administrative support. The claimant was asked to confirm the administrative tasks she was doing. She referred to a list she had discussed with Ms Bunting. This would be used to make a business case for more funding.
    (2) To utilise NJ and Garry. The claimant reiterated that these nurses were able only to provide limited support for home visits. Her managers suggested that they could undertake other tasks from their base in NPH, for example ordering bloods. A batch of blood bottles could be sent to NPH for their use. They had access to patient data, for labels, and their own post room. They could also do blood test audits. Additional work would be funded via bank shifts if needed. NJ

could work half-days in Hammersmith. Ms Punzalan agreed to discuss this with him. Although the claimant agreed that NJ and Garry could provide support she felt they should both be based at Hammersmith as this would save time and aid communication between them.

(3) Recruitment of band 6 nurses. One had been recruited but was not due to start until late February 2020. A second band 6 advert had gone out for which there was potential interest from one candidate. They discussed whether to remove the essential criteria of a driving licence and completion of a renal course. It was agreed that they would wait to see what happened with the current recruitment round before they considered amending the job description.

(4) The claimant would upload a schedule of her appointments and visits on the shared drive for colleagues to access.

(5) She was told that she should not be working on the weekends.

(6) Going forward, they would have regular meetings which would be clearly identified to avoid confusion with other work-related meetings.

31. The claimant said that Mr Jones should have spoken to her in the first instance instead of discussing this with Ms Punzalan and sending the offensive email. She did not understand why she had been "dragged into the office" to be "told off". Mr Jones noted that at the end of the meeting that it still felt confrontational i.e. from the claimant's side. We find that throughout this meeting, the claimant's managers were calm, listened to what she had to say, showed genuine concern for her welfare and were focused on providing practical support to her. We saw no evidence of either manager acting in a bullying or oppressive way. We do not find that the claimant's complaints or evidence to the contrary are well-founded or credible. Notably, in her oral evidence, the claimant agreed that Ms Punzalan was supportive. The claimant sent her managers a record of this meeting in February 2020 [396-8] which she purported to be a "transcript". This was inaccurate and misleading because it did not include the entire discussion which we heard on the video and audio recording she made.

32. The next day the claimant asked to take the following week off as TOIL. Ms Punzalan replied the same day [400] to explain that she was unable to authorise this request "at this point" because it was short notice, however, she asked the claimant to confirm her plans and activities for the following week so that she could explore whether she had the resources to cover essential services. Two days, later, on 6 December, the claimant emailed Ms Punzalan to request that she took at least part of the next week off work "as I am feeling very stressed" [403]. She requested a meeting that afternoon to discuss this. When they met, Ms Punzalan agreed that the claimant could take the following week off as TOIL and the claimant completed a handover of her patients. We do not find that Ms Punzalan insisted that the claimant worked when unwell. Although Ms Punzalan initially refused to authorise TOIL she authorised it once the claimant had explained how stressed she was and they had time to complete a handover.

33. The claimant began counselling on 10 December.

34. On 12 December, the claimant commenced a 14-month period of sick leave. All of the fitness for work certificates ("fit notes") which the claimant

submitted during this period referred to a "Stress related problem" save for one fit note, dated 7 October 2020, which referred to "Mixed anxiety and depressive disorder".

Sickness Absence Management Policy & Procedure ("Sickness Policy")

35. The respondent's Sickness Policy [240-263] provides in cases of long-term sickness absence, defined as being of 28 calendar days or more duration (11.1.1), for: involvement of Occupational Health ("OH") and the Employee Relations Advisory Service ("ERAS") as early as possible (11.1.4); ongoing communication (11.1.3) with contact to be initially by telephone, followed by informal one to one meetings (11.2.1) and if it is apparent that the absence will last for three months or more for formal meetings to take place at intervals of four to eight weeks (11.3.1); for a minimum of seven calendar days' written notice of formal meetings with the right to be accompanied (11.1.7); where the staff member is too unwell to attend meetings at work, for advice to be obtained from OH and ERAS and consideration for meetings to be conducted at home, by telephone, via a representative or for the member of staff to write a covering letter setting out the issues they want to be covered at the meeting (11.1.6); for adjustments to the current role (11.3.3); and where it is "unclear when the member of staff will return to their role, with or without adjustments" consideration of other options including temporary or permanent redeployment (11.3.4) with more information in relation to the latter set out in respondent's Redeployment Protocol and Supporting staff who have a disability: Guidance for Line Managers [224-239] ("the Disability Guidance") which was replaced by the Supporting Staff who have a Disability Policy [291-8] in late 2020 ("the Disability Policy".)

36. The claimant emailed Mr Jones and Ms Punzalan on 23 January 2020 to forward a fit note covering the next four weeks [421]. She explained that her mother had been admitted to intensive care in China, she had been cleared by her GP to travel and be with her family. She did not say how long she was likely to be in China.

Invitation to informal sickness review meeting

37. Ms Punzalan emailed the claimant on 10 February 2020 to invite her to an informal sickness review meeting on 25 February and had by this date made a referral to OH [425]. The claimant replied on 20 February [433] to confirm that her latest fit note had expired on that date and she would be on annual leave from 21 February until 1 March, which Ms Punzalan had approved on 20 December 2019. Ms Punzalan's evidence, which we accept, was that the claimant's pre-booked annual leave had been superseded by her ongoing sickness absence, because the claimant had not reconfirmed that she wished to take this leave. The claimant requested a new date for the meeting. She also said that she had been advised by HR that

> "due to the nature of my sickness, stress caused by work and poor working relationship with you, it is appropriate that someone neutral should conduct this meeting with me".

The claimant also requested a copy of the OH referral, confirmation of the issues which Ms Punzalan wanted to discuss and her return to work plan. Both Ms Punzalan and Mr Jones agreed in oral evidence that they

understood from this email that the claimant wanted a neutral party to conduct the sickness review meeting instead of Ms Punzalan.

38. The claimant also contracted HR and spoke to Mia Oliver, Associate HR Business Partner, when she complained about Ms Punzalan. Ms Oliver contacted Sally Martin, Deputy General Manager, Renal and Transplant Service, when it was agreed that the latter would attend the rescheduled sickness review meeting as a mediator. Ms Martin then emailed Mr Jones, also on 20 February [446-7], when she summarised the position: the claimant had complained about the lack of any contact preceding Ms Punzalan's letter, she refused to speak to Ms Punzalan without a mediator and did not want Mr Jones to act as one so she had agreed to mediate the next meeting. Mr Jones replied on 25 February, attaching the claimant's recent email [446] when he noted:

> "F [the claimant] is a tricky situation in that her relationship with both SP (her line manager) and me has clearly deteriorated to the extent she will not meet without a mediator…"

Ms Punzalan now felt that her working relationship with the claimant had broken down. This is demonstrated by her email to Mr Jones, Ms Martin and Ms Oliver of the same date [445] to request an investigation to "clear my name" when she wrote:

> "I am only 5 months in this job and I feel that F has taken every opportunity to attack me…I've worked in the NHS for nearly 20 years and this is the first time that I have staff complaining about me – it is making me anxious."

39. In his email, Mr Jones asked Ms Oliver whether, in relation to a rescheduled sickness review meeting, Ms Punzalan or Ms Martin should send the invite, he should also attend and the claimant be provided with the OH referral and agenda she had requested. Ms Oliver replied [444-5] to advise that the invite should come from Ms Punzalan, as she continued to manage the claimant's sickness absence, and should confirm that Ms Martin would also be attending, the claimant should be provided with a copy of the information she had requested, and Mr Jones should not attend. Ms Oliver copied Khaleda Hussain, Senior HR Advisor, into this email noting that she was on hand to provide support with strategies for managing this situation and included a weblink on mental health awareness training for managers.

40. The sickness review meeting was rescheduled for 11 March 2020.

41. Ms Punzalan forwarded the claimant's email to Ms Hussain on 9 March who advised her [459] to revert to the claimant, attaching the Sickness Policy, to confirm that she did not have the right to bring a union representative because this was an informal meeting under the long-term sickness management process. Although Ms Punzalan agreed when giving evidence that a formal review meeting should have been scheduled under paragraph 11.3.1, when the claimant would have had the right to bring a companion, we accept the evidence of Ms Hussain that she wanted to be flexible by arranging an informal meeting in the first instance to consider how to support the claimant to return to work before the formal sickness management process was applied to her.

42. This meeting was cancelled after the claimant visited Mr Jones in a distressed state on 10 March. This was summarised in an email he sent to Ms Hussain, Ms Punzalan and Ms Martin that afternoon [456]:

> "Michelle has just been to see me and broke down in floods of tears. My impression is she is struggling with everything and the impact of her mother being unwell in China has exacerbated her anxiety. I don't think she is in a fit state to have a conversation around work and I encouraged her to go and see her GP for help. I have told her the meeting can be rescheduled for when she is better."

We accept Ms Punzalan's oral evidence that this was the first time she became aware of the claimant's anxiety; and also Ms Martin's oral evidence that she understood "anxiety" to mean that the claimant had feelings of anxiety which related to her mother's health. When Mr Jones discussed this with Ms Martin and told her that the claimant had agreed to meet him on his own, Ms Martin understood that the claimant no longer wanted a neutral person to attend the sickness review meeting.

43. Mr Jones wrote to the claimant the next day to invite her to an informal sickness review meeting, on 19 March, to discuss her sickness and return to work [461]. He confirmed that this was an informal meeting to which the claimant could not bring a representative. The claimant had an OH appointment earlier that day. Mr Jones followed this up with a letter on 16 March to confirm that the main points of discussion were to review her health and OH advice, and to discuss her return to work, and how this could be supported [462]. He confirmed that it would be just the two of them.

44. The OH report dated 19 March [463-4] confirmed that "with continued good professional support and some workplace input and adjustments" the claimant "will make a good recovery". It recommended a stress risk assessment and a four-week phased return to work. The OH advisor identified that the claimant's

> "present health symptoms are caused by work especially what I understand as excessive workload and at the same time a lack of support from management…I am not aware of any underlying health conditions..."

<u>The informal sickness review meeting on 19 March 2020</u>

45. The respective notes made by the claimant and Mr Jones in relation to their meeting on 19 March are broadly consistent save for the way in which the claimant says Mr Jones threatened her with demotion or dismissal, which Mr Jones denies [456-8].

46. The claimant told Mr Jones that OH had assessed that she remained unfit to work; she was still stressed because of her working relationship with Ms Punzalan; she complained about the meeting on 3 December 2019 following which she said she had not slept that night, had cried throughout her drive to work the next morning and almost crashed her car; she gave two examples of when she felt Ms Punzalan had undermined her. In relation to a return to work plan, Mr Jones explained that the aim was that the claimant would return to her substantive role under Ms Punzalan which could be facilitated by mediation; the claimant stated that she wanted

instead to be redeployed in the first instance to the Auchi Dialysis Unit, where she had worked for 10 years before commencing her current role. Mr Jones told her that there were no band 7 vacancies and one could not be created, there was the option of a band 6 role.

47. We do not find that Mr Jones threatened the claimant with dismissal or demotion to band 6, as is alleged. We accept the evidence of Mr Jones that when the claimant asked about the consequences of not returning to her role he told her that her sickness absence would be managed by Ms Punzalan and could ultimately end in her dismissal. We find that he was explaining what could happen under the Sickness Policy if the claimant was unable to return to her substantive role and there were no suitable band 7 vacancies. This was not a statement of intent to dismiss or demote the claimant.

48. The claimant emailed Ms Hussain on 16 April to ask her for advice on what she needed to do to raise a grievance against Ms Punzalan and Mr Jones "for their intimidating and bullying behaviour which has caused me to be sick, off work, due to stress" [474]. They discussed this on 21 April.

49. By this date, the claimant had been advised by her trade union representative, Tim Sullivan, that all "HR cases" had been frozen because of the pandemic to allow staff to concentrate on their work [482]. Ms Hussain confirmed this on 27 April [483].

50. The claimant forwarded her latest fit notes to Ms Hussain in late April and early May (the latter expiring on 27 May). Ms Hussain spoke to the claimant on 12 May in relation to the sickness absence management process. She explained that her role was to maintain regular contact with the claimant and it would be necessary to arrange another sickness review meeting. The claimant told her that she wanted someone neutral to conduct this. In her oral evidence, Ms Hussain said that she felt Mr Jones would be the neutral person with Ms Punzalan also in attendance as the claimant's line manager. We find that Ms Hussain had therefore disregarded the email correspondence on 20 and 25 February in which it was clear that there was a breakdown between the claimant and these managers, and also the claimant's emails on 16 and 17 April in which she had enquired about pursuing grievances and complaints against them. However, we also find that Ms Hussain's approach was premised on Ms Oliver's earlier advice, that as the claimant's line manager, Ms Punzalan had conduct of the sickness absence management process.

51. Ms Hussain referred the claimant to paragraph 3.5.1. which provides:

> "Failure to comply with the above rules [which included attending "attendance management meetings"] without good reason will result in absences being recorded as unauthorised, disciplinary action being taken and sick pay being stopped…"

We find that Ms Hussain was advising the claimant of the potential consequences of her potential future conduct in circumstances in which she felt that the claimant had already refused to cooperate with the respondent in relation to the sickness absence management process. Ms Hussain was not conveying an intention to withhold the claimant's OSP if she failed to

attend a sickness review meeting with her managers.

The claimant's discussion with Mr Sullivan on 13 May 2020

52. We also find the claimant agreed to attend a sickness review meeting if Mr Sullivan was present and Ms Hussain agreed to contact Mr Sullivan to facilitate this. Following their telephone call the next day, on 13 May, Mr Sullivan called the claimant to discuss the sickness absence management process. We were taken to an email sent by Ms Hussain to Ms Punzalan and Mr Jones at 11.40am in which she noted that Mr Sullivan had agreed to explain the process to the claimant. The claimant does not complain about her discussion with Ms Hussain on 12 May (when we have found that Ms Hussain made no threat) but her discussion with Mr Sullivan whom she says conveyed a threat issued by Ms Hussain that her OSP would be withheld if she refused to meet with Ms Punzalan and Mr Jones. We do not find it likely that Mr Sullivan conveyed a threat from HR to a member of staff he was supporting. We find that it is more likely that Mr Sullivan understood that the claimant was resistant to engaging with this process and advised her of the potential consequences, as Ms Hussain had done.

53. Mr Jones then wrote to the claimant on the same day, 13 May, to invite her to a formal sickness absence on 22 May. He confirmed that he and Ms Punzalan would be in attendance together with Mr Sullivan [491-3]. This would take place via MS Teams. The claimant was asked to confirm her attendance by 20 May.

The claimant's grievance dated 18 May 2020

54. The claimant submitted a grievance on 18 May in which she complained about Ms Punzalan and Mr Jones [503-6]. This was sent to Jane Fisher, General Manager, Renal & Transplant Directorate. The claimant relies on this grievance as a protected act under the Equality Act 2010 ("EQA") and specifically, her reference to the following: "…I am unfit to work and adjustments ought to be made…" [505], "I had to endure 9 months continuous harassment" [506] and other references to harassment and to her health. This grievance does not include any reference to disability or the provisions of the EQA.

55. Three minutes after this was sent, the claimant emailed Mr Jones to confirm that she would not be attending the sickness review meeting with the two people against whom she had brought a formal grievance [501]. She agreed to meet with anyone other than her two managers under the Sickness Policy. She referred to threats to withhold her pay unless she met with her managers and complained that this was further evidence of bullying which had impacted on her health. She wrote:

> "Thinking about this meeting with CJ and SP has caused me emotional and psychological stress and made my condition worse. I have been having panic attacks and cannot breath [sic], I cannot think, I cannot speak."

This meeting was cancelled. The claimant was not therefore required to attend this meeting with her immediate managers. However, we find it is likely that the invitation to attend this meeting with her managers combined with the claimant's perception of the threat that her OSP would be withheld

if she refused to attend exacerbated her mental health.

The Grievance Policy and Procedure ("the Grievance Policy")

56. Ms Martin was appointed to investigate the claimant's grievance under the informal stage of the Grievance Policy. She met with Ms Hussain on 27 March who advised her to try to resolve the claimant's grievance informally in the first instance: to meet with the claimant to discuss her complaints and desired outcome, before she met Ms Punzalan and Mr Jones. She wrote to the claimant on the same date to acknowledge her grievance, and to invite her to a meeting on 4 June when she could bring a companion [565-6].

57. The claimant submitted a fit note dated 29 May in which she was certified as remaining unfit for work because of a "Stress-related problem" until 29 June [568].

58. In an email sent to Ms Martin on 5 June [574] Ms Punzalan agreed to explore mediation, requested a copy of the claimant's grievance and forwarded her email dated 25 February in which she had requested an investigation to clear her name, and she emphasised

> "I have also raised some issues with Chris – my line manager, that I do feel some form of upward bullying – with any form of attacks directed towards me at any given opportunity that Michelle could grab on."

Ms Punzalan therefore remained aggrieved and felt that she had been bullied by the claimant.

The informal grievance meeting on 5 June 2020

59. The grievance meeting was conducted remotely using MS Teams. It was chaired by Ms Martin, the claimant was supported by Mr Sullivan. The claimant confirmed that her complaints were about: (1) her workload; (2) bullying and harassment by Ms Punzalan; and (3) bullying and harassment by Mr Jones. The claimant said that she was too scared to return to work under Ms Punzalan and Mr Jones. At the end of this meeting, Ms Punzalan agreed to reconvene in a fortnight once she had gathered further information. The claimant thanked Ms Punzalan and said she was pleased because she felt heard. The claimant repeated this sentiment in an email to Ms Punzalan the next day [581] when she made two further points of clarification and complained about "the mismanagement, hostile & toxic working environment" she had endured for the last nine months and referred to the respondent's "duty of care to ensure employee's health and safety at work, including their mental wellbeing". Neither Ms Martin's record of the grievance meeting [575-80] nor this email contain any reference by the claimant to disability or to the provisions of the EQA.

60. The claimant's OSP went down to half-pay on 12 June.

61. At a second MS Teams meeting, on 19 June, when Mr Sullivan was also in attendance together with the claimant, Ms Martin confirmed the outcome of the informal stage of the grievance process. She neither upheld nor dismissed the claimant's complaints and instead recommended several action points which included: exploring support to improve the claimant's

"psychological state and decrease stress"; facilitating mediation between the claimant and Ms Punzalan; and exploring a band 7 vacancy in another clinic. They agreed to meet one week later to agree on next steps.

The informal grievance outcome letter dated 19 June 2020

62. Ms Martin provided written confirmation of this outcome on 29 June in a letter dated 19 June [618-9] when she invited the claimant to another meeting on either 1 or 3 July, to continue their discussion in relation to an informal resolution and next steps. She confirmed that there were no Renal nursing vacancies at bands 7 or 6 and explained that the normal practice would be to seek to resolve relationship issues with a manager by mediation in the first instance and redeployment would usually be considered if recommended by OH. We do not find that Ms Martin misrepresented the claimant's statements in relation to the NxStage meeting and her relationship breakdown with Ms Punzalan and Mr Jones, as is alleged. Her letter was a summary in which she set out the steps she had taken or proposed to take in relation to the seven areas she had identified. It did not purport to be an account of the representations which the claimant had made on 5 June. Ms Martin explained that if the claimant wished to proceed with a formal grievance meeting then she would need to confirm this by 10 July.

Arranging a formal sickness review meeting

63. Ms Martin wrote to the claimant on 24 June to invite her to formal sickness review meeting on either 2 or 6 July [636-7]. She referred to the abortive meetings on 25 February, 11 March and 22 May which she said the claimant had declined because of her decision to raise a grievance against her managers.

64. When Mr Sullivan replied to confirm that he be would on leave from 6 July, Ms Martin rang the claimant the next day, on 25 June, to discuss meeting on 2 July. The claimant told her that she was disappointed and disheartened by their last meeting, stated "I cannot get out of bed, the meeting has absolutely destroyed me", refused to proceed with the sickness review meeting until she had received an outcome to her formal grievance and said that she was not in a condition to discuss her sickness. The claimant also requested copies of the notes taken by Ms Martin at their last two meetings on 5 and 19 June. Ms Martin relayed these details to Ms Hussain an email on the same day [642]. She was very concerned about the claimant and following advice from Ms Hussain, it was decided to proceed with a sickness review meeting on 2 July and to make another OH referral. We accept Ms Martin's evidence that she felt that this was the best way to support the claimant to get her back to work and whilst she understood that the claimant viewed this process as punitive she hoped that by meeting with her she could correct this misunderstanding. She emailed the claimant on 26 June [645-6] to confirm that this meeting had been rescheduled on 2 July, it could not be postponed again because the claimant had already declined three previous meetings and if she chose not to attend it would proceed in her absence. The fact was that the claimant had been on sick leave for more than six months, she had had one sickness review meeting to date and none in the last three months. Ms Martin confirmed that she had made an

OH referral. She also confirmed, in relation to the grievance process, that she was formalising a written response. This related to the claimant's request to proceed with a formal grievance, which she made during a call on 25 June.

65. The meeting on 2 July was postponed when Mr Sullivan confirmed on the same date that he was no longer unavailable on that date.

66. The claimant followed up her discussion with Ms Martin in an email on 29 June [653-4] in which she complained that the respondent had failed to take her grievance seriously, her concerns had been dismissed and her health had been affected. She also complained that her managers had known that she was suffering from stress due to excessive workload, extra hours and being left to work single-handed but failed to conduct a risk assessment; she had not been allowed to take time off when she was unwell; she had been harassed during her sickness absence "with unpleasant emails to attend hostile meetings"'; the recommendations made by OH had been dismissed; and she had been accused of not following policy. She requested five items of information relating to her grievance.

67. In a fit note also dated 29 June the claimant's GP confirmed that she remained unfit for work for four weeks because of "Stress-related problem" and commented "At risk of mental break down. Unfit for managerial meeting on 2nd July 2020" [652].

68. Upon receipt of this fit note, Ms Martin amended her OH referral [658-9], in which she had identified that the claimant's sickness absence was long-term, and that the claimant had made allegations of harassment/bullying and work-related stress, by adding the GP's comments and requested advice on whether there was a medical reason which precluded the claimant's attendance at a sickness review meeting. As the claimant noted in an email on 1 July [664-5], Ms Martin had failed to comply with the Sickness Policy because she had not discussed this referral her in advance which was disappointing because she had complained about the same issue in her grievance.

69. Ms Martin emailed the claimant on 1 July to offer final alternative dates for a sickness review meeting of 20 or 21 July [665].

70. The claimant emailed Ms Martin two days later, on 3 July, when she reiterated her request that her grievance was formally investigated and she provided an annotated version of the outcome letter [668-73]. She emailed Professor Janice Sigsworth, Director of Nursing, two days later, to raise her concerns about the grievance process, alleged bullying and harassment, and victimisation for raising this grievance and to seek assistance in returning to work.

71. Ms Martin wrote to the claimant on 8 July to invite her to a formal sickness review meeting on 20 July [681-2]. The claimant was told that this meeting could not be postponed and would proceed in her absence if she chose not to attend because she had declined to attend the meetings on 25 February, 11 March, 22 May and 2 July. When this meeting had to be rearranged to fit around Ms Oliver's availability, Ms Martin wrote to the claimant again

[690-2] to offer the dates of 29 or 31 July. The claimant would be accompanied by Mr Sullivan. The meeting would take place via MS Teams. Unlike the previous invite the claimant was not warned that this meeting would proceed in her absence and Ms Martin explained:

> "This formal sickness meeting has been rescheduled a number of times now. It is really important that you participate in this meeting, as the primary purpose of this meeting is to identify how we can support your wellbeing and return to work".

The claimant replied on 20 July [706] to confirm that she was available on 31 July. Although she complained that she had been "falsely" accused of declining three sickness review meetings and about the warning that the 2 July meeting would proceed in her absence, the claimant said that she looked forward to discussing the management plan to support her return to work on 31 July.

72. In the meantime, the claimant had a telephone assessment with OH on 10 July [684-7] and the OH report of this date noted "As you are aware, Michelle has been absent from work over six months due to alleged work-related issues" and outlined the claimant's allegations of being overworked, the threats of dismissal on 19 March, and of having OSP withheld if she failed to attend the meeting on 22 May, the failure to treat her grievance fairly and seriously, and being pressurised to return to work with the same managers which she felt would "bring back bad memories of the work-related issues". This report advised:

> "Due to the above prolonged and unresolved work-related issues, Michelle has developed some medical symptoms such as recurring episodes of panic attack, hand and feet tremor, palpitation, insomnia, negative night mares and flash back. She was also diagnosed with vertigo with tension/pain in the neck and tinnitus affecting the right ear. Michelle states that she has never had these symptoms until the work-related issues began. Her activities of daily living are restricted due to dizziness and she receives support from her partner who works from home. She remains under the care of a General Practitioner and she is receiving series of prescribed medication which can cause drowsiness, especially in the morning. Michelle also suffers from dizziness and vomiting which can be triggered with certain positioning of the head…"

The report also advised that a return to work was dependent on the resolution of the claimant's "work-related issues" as well as an improvement in her symptoms which were expected to improve in around three weeks as a result of new medication; when fit to return to work, the claimant would be able to resume her contractual duties and a phased return to work over four weeks was recommended together with a stress risk assessment; redeployment to another dialysis "department" should be considered as a long-term adjustment. In relation to whether there was a medical reason which precluded the claimant's attendance at a sickness review meeting, the report referred to the claimant's vertigo-related symptoms of dizziness and vomiting (and drowsiness), and new medication, and anticipated that these symptoms would be alleviated over time and suggested that a face-to-face meeting could take place around the date that the claimant's current fit note expired (i.e. 27 July 2020) and suggested that the claimant's representative should be allowed to accompany her at any future meeting

to reduce her anxiety. The claimant's anxiety and stress-related symptoms were therefore linked to work stressors and her other symptoms were being managed by her GP pending a consultation with an ENT specialist. The respondent was therefore on notice that if the work-related issues could be resolved or the claimant was redeployed then subject to the effective management of the ear-related symptoms she would be able to return to work to her full duties.

73. When the claimant emailed Ms Martin on 14 July about the grievance process, Ms Martin responded on the same date to explain that the next step would be a formal grievance hearing and a provisional date of 30 July had been identified. She confirmed that she would provide the claimant with a "management response document" and the information she had requested, where relevant, in advance of this formal meeting. Ms Martin wrote to the claimant again, on 29 July, to confirm that the provisional date for the formal grievance was no longer suitable. Referring to the impending sickness review meeting, she noted that the recent OH report had suggested that long-term redeployment was the best option and this would be discussed then.

<u>The sickness review meeting on 31 July 2020</u>

74. The claimant attended the sickness review meeting on 31 July. She had agreed to this date and did not request a postponement. She did not tell her managers in advance that she was too unwell to attend and nor was there any medical or OH advice to this effect. The claimant participated in this meeting via audio only as she felt dizzy and needed to lie down in spite of which she agreed to continue the meeting. She was offered the option of temporary redeployment into a band 6 role at either the Auchi or NPH sites on her band 7 salary. This would be for an initial period of four weeks with the options thereafter being a temporary extension of this arrangement, a return to her substantive post or permanent redeployment. The applicable provisions in relation to a permanent redeployment were set out in the Disability Guidance (which the Sickness Policy referred to). Ms Martin confirmed this in writing on 6 September [735-738].

75. The claimant was clear, she wanted to return to a different dialysis unit on band 7 on a permanent basis and felt that the offer made would result in a demotion. When she asked about the redeployment process Ms Oliver explained that the process was that if no suitable role had been identified by the end of the three-month period and all options had been explored, including any adjustments, there would be a final stage meeting chaired by an independent manager which could result in dismissal. We do not find that Ms Oliver told or threatened the claimant that she would be dismissed if another role was not found within three months nor that all options had already been explored, as is alleged.

76. The claimant complained that this was not fair and was a constructive or unfair dismissal. She replied to Ms Martin on 7 August [759-761] to complain that this was punitive, that when the initial four-week period ended, she faced either demotion or a return to "the hostile and toxic working environment", she was not prepared to consider mediation, and the thought of returning to work with Ms Punzalan triggered anxiety attacks. She also

complained that the respondent was prioritising sickness absence management ahead of her grievance especially when she had made it clear that the latter process was the only means of supporting her to full health. She asserted that OH had acknowledged that her sickness had been caused by an excessive workload and poor support by senior management, and had been prolonged because of unresolved work-related issues which required resolution through her grievance. She wrote

> "Both reports [on 19 March and 10 July] and my GP have verified that I do not have any medical history or family history of…stress related health issues. It is purely caused by the prolonged, poorly handled, unresolved work related issues."

77. In relation to the redeployment process, she complained that she faced dismissal if she was unable to find a suitable role after three months and would not benefit from pay protection if she was redeployed to a lower band, because the "disability policy" would be applied. She repeated that this would be a constructive or unfair dismissal.

78. When Ms Martin responded, on 11 August [758-9], she emphasised that the offer was for a temporary redeployment to support the claimant to return to work; it was not possible for the claimant to undertake her band 7 role at either NPH or St Charles as her post required her to manage the service and the team based at Hammersmith; Ms Oliver had not told the claimant that she would be dismissed after three months if she failed to find a suitable role but had explained the redeployment process in general terms: redeployment was done through the redeployment register, the redeployment period was usually the same as the notice period and if unsuccessful there would be a formal meeting when all options for support would be reviewed before deciding on next steps; the sickness review meetings applied to all staff under the Sickness Policy and their purpose was to support staff to return to work safely; Julie Harris, Lead Nurse, Renal and Transplant Directorate, would have conduct of the formal grievance process and an invite and management response would be forwarded.

<u>The invitation to the formal grievance dated 13 August 2020</u>

79. Ms Harris wrote to the claimant on 13 August [765-6] to invite her to a formal grievance one week later. She confirmed that Ms Martin would attend to present the management response to the grievance, a copy of which was enclosed together with appendices. Ms Martin did not complete her response until 10 August and did not disclose this document and appendices to the claimant because she was advised by HR that they would be sent to the claimant together with the invite to the formal grievance hearing seven days in advance, which we find was the respondent's normal practice.

80. The claimant complains that Ms Martin failed to collect substantial evidence because these appendices did not include Mr Jones' record of the meeting on 19 March 2020 and there was no evidence which related to the assertion that she had requested TOIL. As we have found, Mr Jones did not threaten the claimant with dismissal on 19 March and we do not find that the omission of Mr Jones' record of this meeting, which did not substantiate the claimant's allegations of bullying and harassment, placed the claimant at any material

disadvantage. In relation to TOIL, Ms Martin's management response [752] identified appendix 32 which was an email headed "C request for TOIL dated 29.11.19" which shows that the claimant requested TOIL to be taken on 24 December 2019 which Ms Punzalan agreed to.

81. The claimant emailed Ms Haris and others two days later [770-95] to complain that Ms Martin had deliberately withheld the minutes of their meeting on 5 and 19 June, had misrepresented her in that she had deliberately failed to record what she had said about how the incidents she had discussed had made her feel and impacted on her health, and had disregarded vital evidence. She also complained that "This is clear breach of 'mutual trust and confidence' and acted in a manner which destroyed that trust and confidence."

The formal grievance meeting on 20 and 28 August 2020

82. The claimant attended a formal grievance hearing which took place on 20 and 28 August via MS Teams. This hearing was chaired by Ms Harris, who was supported by Ms Oliver. Ms Martin presented the management case. The claimant was supported by Mr Sullivan. The claimant provided a transcript of the meeting on 3 December 2019 which she explained she had recorded accidentally on her phone. As we have found, this was deliberately misleading because this recording had been deliberate.

83. The claimant's grievance was partially upheld. In her outcome letter, dated 29 August [811-8] Ms Harris outlined the claimant's complaints of: (1) workload; (2) bullying by Ms Punzalan and Mr Jones; and (3) the management of her sickness absence by Ms Punzalan and Mr Jones; and noted that the claimant said that she could not work with Ms Punzalan as their working relationship was "too damaged" and wanted to return to work at another haemodialysis unit on the same pay and conditions, and for a stress risk assessment to be conducted.

84. In relation to issue (1), Ms Harris concluded that there was evidence of excess workload and additional hours, and levels of stress which should have been acknowledged and addressed sooner than they were; and that Ms Punzalan and Mr Jones had tried to meet with the claimant to support her but there had been a failure to communicate the purpose of the meeting on 3 December 2019 which had added to the claimant's stress. In relation to bank pay, Ms Harris concluded that there was no evidence that the claimant had requested bank pay nor evidence that she had objected to it when Ms Punzalan emailed her to confirm that she had been allocated a bank shift. In relation to issue (2), Ms Harris found that there was no evidence to support this allegation. In relation to meetings, there had been an initial oversight and the claimant had been invited to all relevant future meetings. There was no evidence that her managers had demanded that the claimant continued to work while unwell: the claimant had initially requested TOIL on 4 December 2019 and when she requested leave because of stress, two days later, this was agreed. In relation to issue (3), Ms Harris concluded that Ms Punzalan and Mr Jones had followed the Sickness Policy although it would have been good practice for the OH referral to have been discussed with the claimant before it was sent. In respect of the meeting on 19 March 2020, Ms Harris concluded that Mr

Jones had not threatened the claimant with dismissal but had explained the Sickness Policy process which could lead to dismissal, although she accepted that this is what the claimant had understood due to her stress and anxiety. A common theme in relation to each of these issues was poor communication between the claimant and her managers.

85. Noting that Mr Jones was no longer employed by the respondent and Ms Punzalan was willing to participate in mediation, Ms Harris supported the previous recommendation of mediation but emphasised that this was voluntary and if the claimant did not agree to it then she could return to work on the basis discussed at the sickness review meeting on 31 July. She clarified that this was not a "de-banding" but a temporary redeployment following OH advice into a band 6 role on her band 7 salary, as a first step to get her back to work, subject to review and possible extension. This would be supported by a stress risk assessment and phased return, and implemented following discussion with Helen Watts, Interim Lead Nurse for Dialysis, who had replaced Mr Jones.

86. On 8 October, the claimant submitted her latest fit note dated 7 October in which she was signed off work for another four weeks because of "Mixed anxiety and depressive disorder" [824-5].

Stage two grievance (appeal)

87. The claimant submitted an appeal on 13 October and ten days later was invited to a stage two grievance hearing on 24 November by Rob Nicholls, Divisional Director of Nursing, who had been appointed to chair this appeal [869-70]. Once again, this meeting took place via MS Teams and the claimant was supported by Mr Sullivan. Ms Harris was also in attendance to present the management response. Mr Nicholls dismissed the claimant's appeal. He wrote to her on 1 December 2020 to confirm this outcome [944-9].

88. It was agreed that management had failed to promptly address the claimant's workload issues when she had first raised this issue in September 2019, a risk assessment had not been completed nor further action taken to support the claimant. It was also agreed that asking the claimant to work bank shifts was unacceptable. However, Mr Nicholls concluded that the claimant's allegations of bullying and harassment had not been substantiated and her managers had acted appropriately and attempted to support her during her sickness absence. The claimant would now be supported in returning to work on the basis of a temporary redeployment to another site on the same grade and pay. In respect of permanent redeployment, there were no band 7 vacancies but Mr Nicholls said that this:

> "should be explored with you on a regular basis and if there are any vacancies you should be given an opportunity to trial it for an agreed period. It is important to note that any redeployment has to be matched to an existing vacancy and to your skills and ability to meet the job specification."

89. By this date, Ms Watts had taken over conduct of the claimant's sickness absence management. They met via MS Teams on 6 November and Ms Watts summarised their discussion in an email on the same day [886-7].

The claimant confirmed that she remained unfit for work with stress and depression and her ongoing grievance was affecting her recovery. She was receiving counselling support from several sources. The claimant also explained that she was anxious about the redeployment process. Ms Watts told her that this should be dealt with as part of her grievance process and when the claimant was well enough she would look at vacancies and discuss her options with her. The claimant would require a period of orientation because of her long-term absence.

90. They had an informal meeting on 27 November via MS Teams and Ms Watts emailed the claimant to suggest that they met again with Mr Sullivan on 11 December to plan her return to work and an OH referral [959]. At this follow-up meeting, the claimant reported that her health had deteriorated following her receipt of the grievance appeal outcome. Ms Watts confirmed that there would be a formal sickness review meeting on 29 December when they would discuss temporary redeployment to another site. In an email of the same date [963] Ms Watts also confirmed that the claimant would be supported with a four-month period of reorientation before permanent redeployment was "arranged". She also confirmed that the claimant would be able to use her accrued annual leave as she was approaching nil OSP.

91. The claimant then wrote to Professor Tim Orchard, Chief Executive, on 16 December, to complain about the grievance appeal. Professor Orchard replied two days later to confirm that he had asked Keven Croft, Director of People and Organisational Development, to look into the concerns she had raised [991].

Formal sickness review meetings on 19 and 29 January 2021

92. At a formal sickness review meeting on 19 January 2021 with Ms Watts and Ms Oliver when she was supported by Mr Sullivan, the claimant reported that her health was improving and her intention to take annual leave when her current fit note expired on 24 January. A return to work at the Ealing satellite site was discussed. Ms Watts confirmed that this would be for four months when the claimant would cover a band 6 role and remain on her band 7 pay. It was agreed that they would continue this discussion on 29 January which would be informed by updated OH advice. In writing to the claimant to summarise their meeting, Ms Watts emphasised that whilst they hoped to retain the claimant within the Renal Service, should a permanent band 7 not become available then a wider search would be necessary. Ms Watts also explained that because the satellites were undergoing an establishment review there remained some uncertainty in relation to vacancies within the service.

93. The OH report dated 22 January 2021 [1073-4] advised that "It is likely that the Equality Act 2010 will apply as the condition has lasted over a year and has affected activities of daily living". This report also confirmed that the claimant was fit to return to work and a full recovery was likely "in the right environment". A phased return in a supernumerary capacity and redeployment to another site or role was recommended for at least three months. The claimant would require a period of re-orientation and need to complete all mandatory training as well as any Covid-related training.

94. At the follow-up formal sickness review meeting on 29 January, when Karen Elsmore, a Vocational Rehabilitation Consultant from Remploy, was also in attendance, it was agreed that the claimant would be temporarily redeployed to the Ealing satellite site for an initial period of four months. This would include an eight-week phased return as Ms Elsmore had recommended. The claimant would cover a band 6 role on her band 7 terms. She would be supernumerary and would use this time to reorientate, update her training and upskill. Ms Oliver explained the redeployment process: the claimant would be placed on the redeployment register for three months and would be given priority over anyone else who was not on the register for any band 7 vacancies in Renal, this would involve consideration before a job advert was circulated and a trial period; if there were no band 7 vacancies in this period then the claimant would have the option of permanent redeployment into a band 6 post, without pay protection; if the claimant did not agree to this, the worst case scenario would be a final review meeting to consider all the options which had been explored and the reasonable adjustments made which could result in her dismissal. The claimant complained that this was direct discrimination and reiterated that she would not accept "downbanding". Mr Sullivan also complained that the lack of pay protection put disabled staff at a disadvantage when compared with staff who benefited from two years' pay protection under the Pay Protection Policy (which applied to down-banding as a result of organisational change).
95. Ms Watts wrote to the claimant on 6 February [1087-9] to summarise this meeting when she referred the claimant to section 8 of the Supporting Staff who have a Disability Policy ("the Disability Policy"). Ms Oliver emailed this policy to the claimant on the same date. The claimant replied to challenge the application of this policy instead of the Pay Protection Policy and asked "Please specify what are my disabilities?" [1091].

96. Section 8 of the Disability Policy [295-6] is headed "Redeployment to Suitable Alternative Employment" and explains that redeployment will be considered when reasonable adjustments to the current post have been fully explored (8.1); and makes clear that the gateway to the redeployment process is the redeployment register:

> "8.4 The manager will establish what type of work the member of staff is able and qualified to undertake. Specialist occupational health advice is available…Once the manager and member of staff agree what would constitute suitable alternative employment, the manager must e-mail the relevant form…which will be managed by the Recruitment Business Partners. The employee details are entered onto the redeployment register data base…
>
> 8.5 The manager is sent an email from the redeployment inbox outlining the next steps and confirming that the employee has now been added to the redeployment register.
>
> 8.6 The employee will also receive an email from the redeployment inbox that they have been added to the redeployment register and outlining the next steps.
>
> 8.7 A job search for alternative employment, redeployment, will be undertaken for a period of time equivalent to the individual's notice period (up to a maximum of three months)…"

97. In between these meetings, the claimant also met with Mr Croft, on 26 January 2020. He emailed the claimant on 17 February [1101-2] to confirm that the grievance procedure had been exhausted. He noted that the claimant had raised her concerns externally via the Employment Tribunal. He also noted that the claimant had been recently assessed by OH as fit to return to work with adjustments and temporary redeployment had been discussed at the meetings on 19 and 26 January. He referred to the Sickness Policy which provided for a three-month temporary redeployment with the aim being to return the member of staff to their substantive post. In relation to the redeployment process, Mr Croft explained:

> "We will continue to support you to find a permanent and suitable role, however the Trust is not in a position to guarantee you a band 7 role, as you would appreciate it is subject to a suitable role becoming available. We will continue to search for any suitable similar roles and notify you should any roles become available. As discussed in the meeting with Mia and Helen on 29 January you will remain prioritised should a role become available. The reference to dismissal was not intended to cause any upset but to notify you of the possible outcomes contained within the Sickness and Absence Policy and to assist you in making an informed decision."

Although this email did not refer to the redeployment register, we do not find that Mr Croft was conveying to the claimant that this was not required in her case. He referred to the meeting on 29 January when Ms Oliver had explained the process; and by the date of Mr Croft's email, Ms Watts had written to refer the claimant to section 8 of the Disability Policy and Ms Oliver had sent this policy to her.

98. Notably at the meeting on 29 January, the claimant requested that another meeting was not arranged until after 16 March when she had a preliminary hearing in relation to these tribunal proceedings. This was agreed.

99. In the meantime, Ms Watts contacted the claimant to notify her about a fixed-term band 7 role vacancy on 10 March. The claimant did not respond.

100. The claimant commenced a phased return to work on 31 March to the Ealing satellite site as agreed, the claimant having met with Ms Watts two days earlier, when redeployment was not discussed. The focus was on supporting the claimant back into work.

Band 7 Clinical Practice Educator ("CPE") vacancy

101. A band 7 CPE vacancy in the Renal Nursing Education Team was advertised by the respondent between 1 and 15 April.

102. As the job description for this role [1104-9] made clear this was an education and coaching role. The role-holder would be required to spend an average of 80% of their time working in clinical areas supporting mentors, assessors and students in an educational capacity. The focus was therefore on staff and students and not directly on the delivery of care to patients of the Renal Service. The person specification for this post [1109-10] included the essential requirement of a minimum of 12 months' recent experience managing or supervising a clinical area and nursing team, and the desired

requirement for a management course, Postgraduate Certificate of Education or MA in Education, or a willingness to complete such training.

103. The respondent failed to notify the claimant about this vacancy and did not therefore consider her for this role. The claimant obtained a screenshot of the webpages on NHS Jobs website in which this job was advertised [1142-3]. It was unclear to us when the claimant obtained this screenshot although we find it is self-evident that the screenshot was taken when the job was being advertised and therefore likely that it was forwarded to the claimant within the same period. We also take account of our finding above that the claimant misled her employer and the tribunal in relation to her covert recording of the meeting on 3 December 2019. We therefore find that the claimant had the opportunity to apply for this vacancy and elected not to do so which suggests to us that she did not feel it was a suitable role.

104. We accept Ms Watts' evidence that she was not aware of this vacancy at the time. It was within Ms Harris' remit and not hers. As a result of the pandemic, business meetings when potential vacancies across the Renal Service would be discussed and approved were not taking place. We also accept Ms Oliver's evidence that she did not know about this vacancy. As she explained, it was the role of her HR colleagues in the Recruitment Team to identify any potentially suitable roles for staff who were on the redeployment register.

105. We also accept Ms Watts' oral evidence that the pandemic had resulted in a rapidly changing service and new ways of working, and staff were overstretched, exhausted and stressed (in addition to which, training had been suspended for more than one year); and it was necessary for the person coming into the CPE role to be able to hit the ground running. As the job specification emphasised, recent management or supervisory experience in a clinical setting was deemed to be essential.

106. One month into her return to work, on 30 April, the claimant emailed Ms Watts about redeployment [1193] in which she stated that she had been "cornered to take the lower band role" with four months' pay protection which was due to end on 31 July, and asked Ms Watts to confirm whether there were any band 7 vacancies, whether she was looking for vacancies and whether the pay protection would be extended if no suitable vacancies had been identified. Ms Watts replied to suggest a meeting with Ms Oliver, Mr Sullivan and Ms Elsmore on 11 May to "talk through and plan the redeployment process". In her response, on 4 May [1191-2], the claimant said that she had restarted counselling, repeated her previous questions and requested an agenda for the proposed meeting including any options for redeployment, as she wished to obtain legal advice beforehand. Ms Watts emailed the claimant the next day [1190-1] when she proposed an agenda of five items, including a briefing on the redeployment procedure and register by Ms Oliver, and an update on vacancies which she would give. The claimant replied to request a written response to her earlier questions [1189-90] failing which she promised to "escalate the issue further". She also asked:

> "Can you clarify for me if there are, or have recently been, any band 7 nursing posts available in Renal services that I could apply for with reasonable training?"

We find that this is likely a reference to the CPE vacancy which the claimant was cognisant of (but which Ms Watts was not). In relation to her query about the steps taken to find another role, the claimant referred to her meeting with Mr Croft on 26 January and Ms Oliver's explanation in relation to the redeployment process at the meeting on 29 January that she would be treated with priority and offered a trial period before a role was advertised. However, the claimant had been referred to the relevant section of the Disability Policy which made it clear that she was required to join the redeployment register and we have not found that Mr Croft agreed to an alternative mechanism to redeploy the claimant outside this formal process. In her reply [1187-8], Ms Watts referred to the redeployment register and recited an extract of her letter of 9 February which related to this and the redeployment process. A redeployment registration form was attached with this email, in respect of which Ms Watts wrote:

> "I have attached the form that would need to be completed to instigate this, for you to review in advance of the meeting. Once this is completed, this process described below will commence. We will offer you support in searching for a role across the wider Trust, and you will need to apply for any suitable roles. These would be advertised and you would be given priority consideration as a redeployment register candidate, before non-redeployment register candidates. There is more detail in the supporting staff with a disability policy referred to below."

Ms Watts confirmed that there were no current band 7 vacancies. She also clarified that the claimant was on adjusted duties on her band 7 pay and not pay protection. She invited the claimant to a meeting on 18 May. The claimant agreed to meet on this date.

<u>The meeting to discuss redeployment on 18 May 2021</u>

107. The claimant attended this meeting with Ms Watts to discuss redeployment on 18 May when she was accompanied by Mr Sullivan and a friend. Ms Watts was supported by Ms Oliver and a note taker was also present. The claimant complained about the lack of pay protection under the Disability Policy. She referred to the CPE vacancy. Ms Watts confirmed that this post had been recruited into. She said she had not known about this vacancy and had asked her senior colleagues in Renal to make her aware of any future vacancies. She noted that the claimant was not on the redeployment register. She explained that joining the redeployment register would ensure that other potential options were not missed. It was not possible to fully explore whether the claimant would have met the essential criteria for the CPE role but it was agreed that further consideration could be given to this. The claimant was advised again about the redeployment process and the need to complete a redeployment form. Ms Watts described this as a reasonable management request having explained that it was only by engaging with this process that the claimant would receive support with redeployment.

108. The claimant's oral evidence was that she knew that she needed to complete the redeployment form to access the redeployment process. She told Ms Watts that she would only agree to complete the form once she had received clarification about the failure to consider her for the CPE vacancy

and she also needed to obtain legal advice. Mr Sullivan also explained the benefits to the claimant of engaging with this process. Ms Watts asked the claimant again about completing the form and the claimant repeated that she needed to get legal advice. Ms Oliver proposed that the claimant be given five working days from the date she received an outcome letter to complete the form and send it to Ms Watts. The claimant said that she would need more time to obtain legal advice and also to rest. In writing to summarise this meeting [1152-4], Ms Watts forwarded another redeployment form and asked the claimant to complete this form and return it to her by 4 June. This letter acknowledged that the claimant had found the meeting stressful and that she had been distressed.

109. The claimant emailed Mr Croft and others [1172-3], and Ms Watts [1185] the next day, in which she complained that Ms Watts had accused her repeatedly of refusing to complete the form during this meeting. Having reviewed the respondent's note of this meeting [1169-71] and having also taken into account our findings in relation to the meetings on 3 December 2019 and 19 March 2020, the discussion with Mr Sullivan on 13 May 2020, and the meeting on 31 July 2020, in which we have concluded that the claimant misconstrued her interactions and the information that was being conveyed to her, we do not find that Ms Watts accused the claimant as she alleges. We find that Ms Watts encouraged the claimant to complete the form and Mr Sullivan also encouraged her to engage with the redeployment process in order that she could be supported to secure an alternative role without further delay.

The claimant's resignation on 28 May 2021

110. The claimant wrote to resign on 28 May with notice. She complained that the respondent had constructively dismissed her and she had been working under protest pending a satisfactory resolution. She referred to the meeting on 18 May and the failure to consider her for the band 7 vacancy or to offer her a trial period in this role. Her resignation took effect on 23 July 2021.

Relevant legal principles

Disability

111. Disability is defined by section 6 EQA:

> *(1) 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.*
>
> *…*
> *(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)— (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*
>
> *(6) Schedule 1 (disability: supplementary provision) has effect.*

112. Section 212 EQA defines 'substantial' as meaning more than minor or trivial.

113. Paragraph 2 of schedule 1 EQA provides, in respect of 'long-term' effect:

> *(1) The effect of an impairment is long-term if— (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

114. 'Likely' means that it could well happen (see *SCA Packaging Ltd v Boyle* [2009] ICR 1056, HL; and also the EQA Guidance on matters to be taken into account in determining questions relating to the definition of disability).

Direct discrimination

115. Section 13(1) EQA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

116. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause" of it. The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (see *O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor* [1997] ICR 33, EAT; and also *Nagarajan V London Regional Transport* [2000] 1 AC 501, HL).

117. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. Under section 23(2), where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

118. It is self-evident that the decision-maker responsible for the impugned treatment must be aware of the protective characteristic relied on. Where the protected characteristic of disability is relied on, the claimant must show that the relevant person(s) had actual or constructive knowledge of the disability. This requires actual/constructive knowledge of each element of the statutory test for disability (see *Gallop v Newport City Council* [2014] IRLR 211, CA).

Indirect discrimination

119. Under section 19 EQA, indirect discrimination occurs when a person (A) applies to the claimant a provision, criterion or practice ("PCP") which (a) A applied or would have applied to those with whom the claimant does not share this protected characteristic, (b) put, or would have put those sharing the claimant's protected characteristic at a particular disadvantage when compared with those not sharing the claimant's protected characteristic, (c)

put, or would have put the claimant at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

120. The burden is on the claimant to establish (a) to (c) and if so discharged, the burden shifts to the respondent to justify the PCP (d).

121. A PCP can arise from a one-off or discretionary decision (see *British Airways plc v Starmer* [2005] IRLR 862, EAT; and also para 4.5 of the EHRC Employment Code), however, a PCP connotes a state of affairs which indicates how similar cases are treated, or how a repetition of the same or a similar case would be treated, and must therefore be capable of being applied to others in the same or similar circumstances (see *Ishola v Transport for London* [2020] ICR 204, CA).

Discrimination arising from disability

122. Under section 15(1) EQA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

123. 'Unfavourably' is not defined, although the EHRC Code of Practice of Employment states that it means that the disabled person "must have been put at a disadvantage" (see also *Williams v Trustees of Swansea University Pension and Assurance Scheme and anor* [2019] ICR 230, SC).

124. In *Pnaiser v NHS England* [2016] IRLR 170, EAT Mrs Justice Simler (as she then was) set out the following guidance:

    (1) A tribunal must first identify whether there was unfavourable treatment and by whom.
    (2) The tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and amount to an effective reason for or cause of it. Motive is irrelevant. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.
    (3) The tribunal must determine whether the reason or cause is something arising in consequence of B's disability. The causal link between the something that causes the unfavourable treatment and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
    (4) The "because of" enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

125. The employer will escape liability if it is able to objectively justify the

unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and must represent a real, and objective consideration. As to proportionality, the EHRC Code notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

Harassment

126. Section 26(4) EQA provides that:

> *(1) A person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *…*
> *(4) In deciding whether conduct has the effect referred to in section (1)(b), each of the following must be taken into account –*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

127. In deciding whether the conduct "related to" a protected characteristic consideration must be given to the mental processes of the putative harasser (see *GMB v Henderson* [2016] IRLR 340, CA).

128. In *Pemberton v Inwood* [2018] IRLR 542, CA Underhill LJ re-formulated his earlier guidance in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, EAT, as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider <u>both</u> (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) <u>and</u> (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

Victimisation

129. Section 27(1) EQA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes B has done, or may do a protected act.

130. Section 27(2) EQA enumerates four types of protected act which include:

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

131. As to causation, the tribunal must apply the same test to that which applies to direct discrimination i.e. whether the protected act is an effective or substantial cause of the employer's detrimental actions.

Failure to make adjustments

132. The duty to make reasonable adjustments is set out in sections 20-21 EQA and in Schedule 8. Where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

133. Under Schedule 8, paragraph 20(1), an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled *and* is likely to be placed at a substantial disadvantage by the PCP, physical feature or, as the case may be, lack of auxiliary aid. A tribunal can find that the employer had constructive (as opposed to actual) knowledge both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage. In this case, the question is what objectively the employer could reasonably have known following reasonable enquiry.

134. In *Environment Agency v Rowan* [2008] IRLR 20 the EAT said that in considering a claim for a failure to make adjustments the tribunal must identify:
    (1) the PCP applied by / on behalf of the employer, or
    (2) the physical feature of the premises occupied by the employer
    (3) the identity of non-disabled comparators where appropriate, and
    (4) the nature and extent of the substantial disadvantage suffered by the claimant

135. The onus is on the claimant to show that the duty arises i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not so disabled. The burden then shifts to the employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made this adjustment.

136. The test for whether the employer has complied with its duty to make adjustments is an objective one (see *Tarbuck v Sainsbury's Supermarkets* [2006] IRLR 664, EAT). Ultimately, the tribunal must consider what is reasonable (see *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA). The focus is the reasonableness of the adjustment not the process by which the employer reached its decision about the proposed adjustment.

137. The tribunal must also have regard to the guidance contained in the EHRC Code of Practice on Employment 2011 and in particular the following six factors it enumerates when considering the reasonableness of an adjustment:

    (1) Whether taking any particular steps would be effective in preventing the substantial disadvantage
    (2) The practicability of the step
    (3) The financial and other costs of making the adjustment and the extent of any disruption caused
    (4) The extent of the employer's financial or other resources
    (5) The availability to the employer of financial or other assistance to help make an adjustment (such as through Access to Work)
    (6) The type and size of the employer

Detriment

138. Section 39(2)(a) EQA provides that an employer (A) must not discriminate against an employee of A's (B) by subjecting him to any other detriment.

139. A complainant seeking to establish detriment is not required to show that he has suffered an adverse physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see *Shamoon v Chief Constable of RUC* [2003] IRLR 285, HL).

140. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

141. Any alleged detriment must be capable of being regarded objectively as such (see *St Helens MBC v Derbyshire* [2007] ICR 841, HL).

Burden of proof

142. Section 136 EQA provides that if there are facts from the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

143. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must first establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination and something more than a mere difference in status and treatment (see *Madarassy v Nomura International plc* [2007] ICR 867, CA). If the burden shifts, it is for the respondent to show an adequate i.e. non-discriminatory reason for the treatment. This explanation does not have to be reasonable or sensible

provided it has nothing to do with the protected characteristic relied on (see *Laing v Manchester Council* [2006] ICR 1519, EAT).

144. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see *Chief Constable of Kent Constabulary v Bowler* UKEAT/0214/16/RN, EAT). Accordingly, the burden of proof provisions have no role to play where a tribunal is in a position to make positive findings of fact (see *Hewage v Grampian Health Board* [2012] IRLR 870, SC).

Mutually exclusive complaints under the EQA

145. A tribunal cannot find both direct discrimination under section 13 EQA and harassment under section 26 in respect of the same treatment. This is because section 212(1) provides that:

> *'detriment' does not, subject to subsection (5) include conduct which amounts to harassment*

Constructive dismissal

146. For there to have been a constructive dismissal the following three conditions must be met:

(1) There must be a fundamental breach on the part of the employer.
(2) The employee must not, by the time of the resignation, have conducted himself in such a way as to have relinquished the right to rely on the breach. This is known as affirmation.
(3) The fundamental breach must be a contributing cause of the resignation though it need not be the principal cause.

147. The implied terms of a contract of employment include the implied term of mutual trust and confidence i.e. that a party not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the other party to the contract (see *Malik v BCCI* [1997] IRLR 462, HL). This breach can be the result of a single act/omission or of cumulative conduct which culminates in a last straw. A last straw need not amount to blameworthy or unreasonable conduct but it must contribute in some meaningful way to the overall breach.

148. Whether there has been a fundamental breach is an objective test. Accordingly, there will be no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held.

149. If there has been a constructive dismissal, there may still be a dispute over whether the dismissal was fair and, if there is, a tribunal must go on to consider whether the respondent had a potentially fair reason for this dismissal and if so, whether the dismissal was fair under section 98(4) ERA.

Conclusions

The respondent's knowledge of disability

150. The respondent has accepted that the claimant is disabled by reference to anxiety and depression from 12 December 2019. The respondent concedes that it had actual or constructive knowledge of the claimant's disability but only from 22 January 2021. We find that the respondent had constructive knowledge of the claimant's disability from mid-October 2020 for the following reasons:

    (1) Each of the fit notes which the claimant submitted between 12 December 2019 and 25 August 2020 confirmed that she was unfit to work because of a "Stress related problem" whereas the fit note dated 6 October 2020 [824] referred to "Mixed anxiety and depressive disorder". The claimant had by this date been on sickness absence for almost ten months. This fit note confirmed that she would remain unfit for work for another four weeks.
    (2) By this date, the claimant's managers and HR understood that she had a work-related stress condition. They also understood that the claimant's symptoms would be resolved if the work-related issues could be addressed. This had been confirmed by the OH report of July 2020, which advised that if these issues were resolved or the claimant was redeployed then, subject to the effective management of the vertigo-related symptoms, she would be able to return to work and to her full duties. It was also clear that the claimant remained focussed on redeployment as an outcome to the grievance process in respect of which she submitted an appeal on 13 October 2020 and this was scheduled to be heard in late November 2020.
    (3) We find that from the date that the claimant submitted her appeal, the respondent ought to have known that it was likely that the impact of the claimant's stress-related condition, now characterised by her GP as a mixed anxiety and depressive disorder, was likely to last at least a year. It is from this date that it would have concluded that the claimant was disabled, had it considered each element of the statutory test.

151. We do not find that the respondent, or any of the managers or HR advisors who were involved in the claimant's case had actual or constructive knowledge of her disability before this date. Mr Jones' email of 10 March 2020 referred to an exacerbation of anxiety, but this was not the same as a disclosure that the claimant had a mental impairment of anxiety; we agree with the respondent's submission that this did not convey on its own anything more than a state which was capable of being a situational and

short-term response to stressors including the ill-health of the claimant's mother as opposed to a long-term and chronic condition. At that date the claimant had been on sick leave for almost three months and we do not find that the respondent, had it made reasonable enquiries at this stage, would have concluded it was likely that the claimant's impairment would have continued to have had an adverse impact on her daily activities for another nine months or that this would reoccur at the end of this period. Nor do we find that the reference to a "risk of mental break down" in the fit note dated 29 June 2020 had the effect of signalling that the claimant's impairment was likely to be long-term and it is notable that the claimant did not lead evidence that she had a mental breakdown and, as was evident from the documents we were taken to, she was able to continue to engage with her managers and make representations about the sickness absence management and grievance processes, and her allegations of bullying and harassment. It is relevant that the claimant told the respondent on 7 August 2020 that she had no medical history of stress-related ill health; and also that whilst the claimant was certified as being unfit for work throughout this period, the respondent understood that she would be able to return to work to her full duties when her work-related issues had been resolved or she had been redeployed to a suitable role.

152. This means that the allegations of direct discrimination (issue 4(a)), discrimination arising from disability (issues 12(a) and (b)), harassment (issues 14 (a) to (e) and (f), in relation to Ms Martin and Ms Harris) and a failure to make adjustments (issues 22(a) and (b)) which are said to have taken place before the date of constructive knowledge on 13 October 2020 fail.

Direct disability discrimination

153. This complaint fails.

154. Issue 4(a) fails because of our findings on knowledge of disability. For completeness, we have found that Ms Hussain did not threaten the claimant (via Mr Sullivan) on 13 May 2020 that her OSP would be withheld.

155. Issue 4(b) fails because we have found that Ms Watts failed to notify or consider the claimant for this vacancy because she was not aware of it and also because the claimant was not on the redeployment register. The claimant's disability was not an effective cause of this treatment. We find that a hypothetical comparator would have been treated in the same way.

Indirect discrimination

156. This complaint fails.

157. In relation to the Disability Guidance/Policy (issue 6(a)) which the respondent concedes was a PCP, the claimant has not established that this PCP did, or would have, put persons who had the same disability as her at

a particular disadvantage with those persons who did not i.e. a greater risk of demotion under the Disability Guidance or Policy. We also find, for the reasons set out below in relation to the adjustments complaint that the claimant has not shown that this PCP did, or would have, put her to that comparative disadvantage.

158. We do not find that the respondent had a PCP of withholding OSP if an employee failed to attend a sickness review meeting (issue 6(b)). This alleged PCP is predicated on the claimant's allegation that Ms Hussain threatened her on 13 May 2020 in relation to OSP which we have not upheld. We have found that Ms Hussain referred the claimant to paragraph 3.5.1. of the Sickness Policy during their discussions on 21 April and 12 May 2020 which provides that OSP will be stopped in circumstances in which there has been a failure to comply with the rules set out in the Policy which included attendance at meetings ***without good reason***. This is not the same as the PCP contended for.

159. Nor do we find that the respondent had a PCP of failing to postpone a sickness review meeting even though an employee is unwell and unable to attend (issue 6(c)). This alleged PCP is predicated on the allegations relating to Ms Martin and the sickness review meetings on 2 July, which was ultimately postponed, and 31 July 2020, which proceeded. We find that Ms Martin was in fact applying the provisions of para 3.2.1. of the Sickness Policy which stated that attendance at such a meeting was "required, unless they are medically unfit to do so". In relation to the 2 July meeting, whilst Ms Martin initially refused to postpone this meeting when the claimant reported that she was unwell and this meeting was in fact postponed because of Mr Sullivan's unavailability, we find that this meeting would have been postponed had the claimant provided her fit note earlier, or upon receipt of her fit note, had Mr Sullivan been available (in compliance with para 3.2.1.); Ms Martin told the claimant that this meeting would proceed in absentia if she chose not to attend which was not analogous to being certified by her GP as unfit to attend the meeting. In relation to the 31 July meeting, the claimant was not warned that it would proceed in absentia, she agreed to attend this meeting and stated that she was looking forward to discussing the return to work support plan, she did not provide any medical evidence that she was unfit to attend and she agreed to proceed with this meeting in spite of her dizziness (a symptom which is not said to be related to her disability), and was able to take an active part in this meeting, supported by her union representative.

Discrimination arising from disability

160. This complaint fails.

161. Issues 12(a) and (b) fail because of our findings on knowledge of disability. For completeness, we have found that the claimant was neither threatened with dismissal by Mr Jones on 19 March 2020 nor threatened by Ms Hussain (via Mr Sullivan) on 13 May 2020 in relation to the withholding of OSP.

Harassment related to disability

162. This complaint fails.

163. Issues 14(a) to (e) and (f), in relation to Ms Martin and Ms Harris, fail because of our findings on knowledge of disability.

164. For completeness, we address each of the claimant's allegations below:
    (1) In relation to 14(a), we have found that Mr Jones did not tell the claimant that she would be dismissed on 19 March 2020 but explained the process that would be followed under the Sickness Policy.
    (2) In relation to 14(b), we have found that Ms Punzalan made a false claim to Ms Martin that the claimant had requested bank shifts and, in the circumstances in which she knew that the claimant was complaining about her workload, hours and lack of administrative support, we have also found that her assertion that this was supportive was false. Although we find that this conduct was unwanted by the claimant it was not patently related to the claimant's disability and nor did Ms Punzalan have actual or constructive knowledge of this disability at the relevant time.
    (3) In relation to 14(c), we have found that Ms Hussain did not (via Mr Sullivan) threaten to withhold the claimant's OSP on 13 May 2020. Nor, for completeness, have we found that she made this threat to the claimant on any other date.
    (4) In relation to 14(d), we have found that Ms Martin initially failed to postpone the meeting on 2 July 2020; and whilst the meeting on 31 July 2020 was not postponed we do not find that this was unwanted because the claimant agreed to attend this meeting, said that she was looking forward to discussing the return to work support plan at this meeting, and agreed to proceed with this meeting on the day in spite of her dizziness. Although we find that the initial failure to postpone the 2 July meeting was unwanted it was not patently related to the claimant's disability and nor did Ms Martin have actual or constructive knowledge of this disability at the relevant time; and we have found that Ms Martin was required to manage the claimant's sickness absence and wanted to proceed with this meeting to support the claimant to return to work.
    (5) In relation to 14(e), we have found that: Ms Martin did not withhold the appendices to her management response but followed HR advice that these documents would be provided to the claimant by Ms Harris together with the invite to the formal grievance meeting, which was the respondent's usual practice, and which resulted in a three-day delay; Ms Martin did not misrepresent the claimant's statements; and the record of Ms Punzalan's interview was edited on HR advice to remove what was deemed to be inflammatory content to facilitate mediation and the claimant's return to the HHD team. Although we find that the delay in disclosing the appendices to the claimant and the amendments made to Ms Punzalan's interview records were

unwanted by the claimant we do not find that this conduct was related to the claimant's disability but for the reasons set out above; and for completeness, this conduct was not patently related to the claimant's disability and nor did Ms Martin have actual or constructive knowledge of this disability at the relevant time.

(6) In relation to 14(f), we have found that: Ms Martin, Ms Harris and Mr Nicholls did not take Ms Punzalan's comments at face value; in relation to the record of the 19 March 2020 meeting this was not a deliberate omission, it was neither substantial evidence nor did it substantiate the claimant's allegations against Mr Jones; the email which related to the TOIL was appended to the management response (i.e. appendix 32) and showed that the claimant had requested TOIL in December 2019.

(7) In relation to 14(g), we have found that Ms Watts did not repeatedly accuse the claimant of refusing to sign the redeployment form on 18 May 2021.

Victimisation

165. This complaint fails.

166. We do not find that the claimant's grievance of 18 May 2020 was a protected act because this did not contain an allegation that there had been a contravention of the EQA. Although the grievance made reference to bullying, harassment and victimisation, the claimant did not say that she was disabled nor link the impugned conduct with disability or with a previous complaint of discrimination (i.e. victimisation). This can be contrasted with the claimant's grievance in August 2020 (which the claimant does not rely on but which the respondent conceded, and we would have found, amounted to a protected act, if she had) in which she referred expressly to the provisions of the EQA and to her disability of "anxiety and depression" although there was a greater focus on the respondent's alleged breaches of health and safety regulations.

167. For completeness, even had we found that the grievance of 18 May was a protected act we would not have concluded that the claimant was treated detrimentally because of it. We have found that Ms Martin has provided cogent non-discriminatory reasons for her initial refusal to postpone the meeting on 2 July 2020 and her failure to postpone the meeting on 31 July 2020; and we do not find that Ms Oliver's explanation of the sickness absence management process on 31 July 2020 was either a detriment or given because of the claimant's grievance. Ms Oliver was explaining the redeployment process and making the claimant aware of all potential outcomes including that which the claimant did not wish to hear.

Failure to make reasonable adjustments

168. This complaint fails.

169. In relation to the Disability Guidance/Policy (issue 22(c)), which the respondent accepts was a PCP, we do not find that the claimant has established that this put her, or would have put her, at a substantial disadvantage when compared to a person who did not have the same disability in the same circumstances. To the extent that this PCP placed the claimant at risk of demotion, we find that a comparator who was in the same band 7 role and unable to return to it because of a breakdown in their working relationship with their managers but who did not have the claimant's disability would have been put to the same disadvantage. The claimant did not lead any evidence that her disability meant that she was at greater risk of demotion than others under the Disability Guidance/Policy and nor do we find this to be the case. For completeness, if we had been required to make findings on this, we would not have found that the adjustment of redeployment to the CPE role was a reasonable one because we conclude that this would not have been a practicable step for the respondent to make in the circumstances in which the Renal Service required the new post-holder to hit the ground running because the pandemic had resulted in changes to working practices and a cessation of training for more than a year, and the claimant was in the process of reorientating and updating her training, and upskilling; we would also have taken account of our finding that the claimant knew about this vacancy before 15 April 2021 and did not apply for it which suggests that she did not feel this job was suitable for her at that time.

170. In relation to the alleged PCPs set out at issues 22(a) and (b), we agree with the respondent's submission that these are too narrowly formulated to be PCPs because they are allegations of specific unfair treatment which do not connote a state of affairs. For completeness, we go on to consider these allegations by reference to the broader complaints contended for so that the PCP in issue 22(a) is the requirement for line management to host sickness review meetings; and the PCP in issue 22(b) is the same as for issue 6(c).

171. In relation to issue 22(a), we would have found that the respondent applied a PCP which required line management to host sickness review meetings. The provisions of the Sickness Policy make repeated references to the interaction between the member of staff who is on sickness absence and the manager, including in relation to sickness absence reporting and certification, staying in contact, and arranging and conducting informal and formal review meetings. We would have found as a matter of workplace reality and the facts of this case that the reference to "manager" connotes "line manager". We would also have found that this PCP put the claimant to a substantial disadvantage when compared to someone in the same circumstances who did not have the claimant's disability. As a result of this PCP the claimant was invited to attend a meeting on 22 May 2020 with Ms Punzalan who continued to be designated by HR as the manager responsible for managing her sickness absence, together with Mr Jones. We would not have found that such an invitation would have put a hypothetical comparator to the same disadvantage as the claimant: whilst it is probable that a comparator would be anxious about such a meeting, this

would not be likely to elicit the same reaction as the claimant had in that it exacerbated a mental impairment which the respondent accepts was a disability at the relevant time. However, having found that neither Mr Jones nor those in HR who were advising him in relation to this issue, had actual or constructive knowledge of the claimant's disability at the relevant time, we would not have found that the duty to make adjustments was engaged.

172. In relation to issue 22(b) we would have found for the reasons we have given that the PCP in issue 6(c) was not applied to the claimant.

Jurisdiction

173. It is not necessary for us to make findings on this because of our findings on liability.

Unfair constructive dismissal

174. This complaint fails.

175. The claimant relies on the same allegations of discrimination, harassment and victimisation as repudiatory conduct in that it breached her trust and confidence in the respondent.

176. We remind ourselves of the allegations which we have found took place, in respect of which we make the following findings:

    (1) Mr Jones invited the claimant on 13 May 2020 to a formal sickness review meeting on 22 May 2020. We find that Mr Jones had reasonable and proper cause to take this action because it was necessary to convene a meeting to review the claimant's health and prognosis, and to consider whether she could be supported in returning to work, Ms Punzalan remained the claimant's line manager, and whilst HR knew or ought to have known that there was a breakdown in the working relationships between the claimant and Ms Punzalan and Mr Jones, and the claimant had intimated a complaint and grievance against her managers she had not taken such action when she was invited to this meeting. Once the claimant submitted a grievance, the meeting was postponed and Ms Martin was tasked with managing the claimant's sickness absence in lieu of her managers, until Ms Watts took over this responsibility in October 2020.
    (2) Ms Punzalan falsely claimed to Ms Martin on 9 June 2020 that the claimant had requested bank shifts and this had been a supportive measure. We find that this contributed to the claimant's loss of trust and confidence in the respondent but do not find that this alone breached the term of trust and confidence.
    (3) Ms Martin failed initially to postpone the sickness review meeting on 2 July 2020. We find that Ms Martin had reasonable and proper cause to proceed with the meeting on 2 July, in the absence of any medical evidence to the contrary, in the circumstances in which the claimant had been on sick leave for six months, there had been only one review

meeting and none in the last three months and there was a need to manage the claimant's sickness absence and to consider steps to support her back to work. We have not found that the claimant wanted the 31 July meeting to be postponed for the reasons we have given above.

(4) Ms Martin did not withhold the appendices to her management response, she relied on HR advice that these documents would be sent to the claimant together with the invite letter one week before the formal grievance meeting, as per the respondent's usual practice.

(5) The record of Ms Martin's interview with Ms Punzalan was edited to remove comments which were deemed by HR to be inflammatory with the aim of facilitating mediation and the claimant's return to the HHD team. This was reasonable. In any event, we do not find that the claimant relied on this conduct when she resigned because she did not become aware of Ms Punzalan's comments nor the amendments to the same until she received the DSAR material on 23 July 2021.

(6) Ms Watts failed to notify or consider the claimant in relation to the band 7 CPE vacancy in April 2021. This was an oversight. Ms Watts agreed that she would have discussed this with the claimant had she been aware of this vacancy. However, the claimant was not on the redeployment register and had resisted joining it for several months. We have also found that the claimant knew about this vacancy and did not take the opportunity she had to apply for it. Ms Watts' oversight was not calculated to destroy or seriously damage the claimant's trust and confidence as it was self-evidently not a deliberate act or omission and nor do we find, in the circumstances, that it was likely to destroy or seriously damage her trust and confidence in the respondent.

177. For these reasons all the claims fail and are dismissed.

Employment Judge Khan

01.01.22

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

4 January 2022

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FOR EMPLOYMENT TRIBUNALS