EMPLOYMENT TRIBUNALS

Claimant: **Ms Dorette Hanley-Osborne**

Respondent: **Croydon Health Service NHS Trust**

Heard at: **London South Employment Tribunal**

On: **31 July 2017, 1 – 3 August 2017 and in chambers on 31 August and 1 September 2017**

Before: **Employment Judge Martin**
Ms Y Batchelor
Mrs J Muir

Representation:
Claimant: **Mr R Clement - Counsel**
Respondent: **Ms H Patterson -Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims are dismissed.

RESERVED REASONS

1. By a claim form presented on 1 September 2016 the Claimant brought claims of race discrimination and disability discrimination. At the preliminary hearing on 16 November 2016, an amendment was accepted to include sex discrimination. The Respondent defended all claims. The Claimant is still employed by the Respondent.

2. The issues were the subject of discussion at the start of the hearing. The Respondent explained the background, namely that the claim form was very short and lacking any detail and that this led to an order at the preliminary hearing on 16 November 2016 that the Respondent send a request for additional information to the Claimant. The Claimant sent further information comprising 15 pages on 4 December 2017. This was the basis on which the Respondent prepared from that point on. The Claimant then sent another document on 31 May 2017 comprising 27

pages, with 26 more allegations which expanded her claim greatly including new allegations against a person not included in previous documentation. The Respondent's position was that the new matters were prejudicial to them and that the new matters in the 31 May document were not pleaded and if the Claimant wanted them included she must make an application to amend.

3. Mr Clement who represents the Claimant made an application to amend. He submitted that his instructions were that at the time when the Claimant attended the preliminary hearing and prepared the 4 December 2016 additional information, she was acting as a litigant in person. She thought she had produced what was required, but then read further and realised her first attempt was not good enough, so produced something she thought was better. He submitted that the Respondent was not prejudiced as it had had the 31 May 2017 document for some time. He was not able to comment on the 31 May 2017 document itself as he had not personally seen it as it was not in the bundle and was first aware of it on the morning of day 1 of the hearing. Mr Clement had been instructed on the Wednesday before this hearing started and perhaps not surprisingly had not read into the case fully given the large number of documents in the bundles.

4. The Tribunal considered the Presidential Guidance on amendments. The Tribunal noted that the ET1 dated 1 September 2016 is 8 paragraphs long with limited detail. The order following the preliminary hearing on 7 November 2016 records that the Claimant was advised to get legal advice.

5. There was no order to provide the 31 May 2017 additional information and this document significantly expanded the Claimant's claim. The Tribunal noted that some matters included post-dated the presentation of the ET1. The ET1 should set out the basis of the claim, in this case the detail was limited hence the order for additional information which was sent in accordance with that order and therefore set out the basis on which the Claimant's claim progressed.

6. On 31 May 2017, the Claimant sent her second document with no explanation as to why she could not have done this before and there was no application to amend. Even though the Claimant is a litigant in person, she has evidently has read about the process and would have been able to find out she needed to apply to amend. She was encouraged to get legal advice on 7 November 2016, but appears not to have taken any advice until Wednesday last week when Mr Clement was instructed.

7. The Tribunal found it surprising that Mr Clement had not seen the May 2017 document and notes there was no request for an adjournment to consider it. He says it is not in the bundle. However, he was instructed by the Claimant and it appears that she did not give it to him or tell him of its existence which one would have expected.

8. The purpose of the preliminary hearing was to ensure that the Respondent and Tribunal knew what the Claimant's case was so it could adequately prepare. The Respondent says there are 26 new allegations

of direct discrimination in the May document and that they are prejudiced particularly as a new person, Ms Baker, is mentioned and they have not been able to get a statement from her.

9. The Tribunal's conclusion was that the Claimant's case is as pleaded and supplemented by the 4 December 2016 additional information. The May 2017 document contains substantial amendments to the original document. The Tribunal has carefully balanced the interests of both parties in coming to this decision. The Tribunal found that that there was relative hardship to the Respondent in that one new witness is identified in the later document and they do not have a witness statement from her.

10. Another factor in rejecting the Claimant's application to amend was the timing and manner of the application in that it was made on the morning of the hearing with no explanation as to why it was not possible to make it earlier and that to allow the amendment would prejudice the Respondent. It also puts in jeopardy the listing of this matter, which both parties have agreed is very tight. The interests of justice require that this case is heard promptly with as little delay as possible especially as the Claimant is still working for the Respondent. It is imperative that the four-day listing is met as it is very difficult to find further dates. The Tribunal finds that the Claimant's claim is limited to events prior to presentation of her claim on 1 September 2016, as detailed in her further and better particulars dated 4 December 2016.

11. The Respondent had prepared a list of issues based on the information before the Tribunal. The Tribunal adjourned to read the statements with the parties liaising to agree the issues. The parties were unable to agree the issues and therefore came back before the Tribunal. Mr Clement said his instructions were that that everything contained in the grievance was an issue for the Tribunal. The Respondent said it was plain that this was a complaint about the time it took for the grievance to be dealt with and to allow it would bring in about 96 new issues. Additionally, whilst the Respondent had a witness to deal with the grievance, their statement and preparation was limited to the delay point only. The Tribunal considered the Claimant's submissions and concluded that the paragraph referring to the grievance only relates to the delay in dealing with the grievance. For the reasons set out above in the first application to amend, this application was also refused. The parties were requested to agree a final version of the issues (there was some information that the Claimant's needed to supply) in time for day two when the Claimant's evidence would start.

12. At the start of the hearing on day two, the Tribunal was told that the issues which had thought to have been agreed the previous day were now not agreed. There was argument from both parties. The Tribunal adjourned to consider this matter and concluded that it had decided yesterday that the relevant pleadings were the Claimant's ET1 as supplemented by the 4 December 2016 document and no others. It was up to the Claimant to set out her claim with full particularity when she was given the opportunity at the preliminary hearing which she had failed to do. The Tribunal was mindful that if it allowed the amendment it would inevitably result in an adjournment with the result that the hearing would

be put off for approximately a year given the current listing situation in the Tribunal. The Tribunal considered that the Respondent would be severely prejudiced by this and given the Claimant is still working for the Respondent it was important that this matter was resolved quickly. The Tribunal did not find it was in the interests of justice to allow an adjournment and for the Claimant to provide further particulars. There had to be finality and the preliminary hearing had made it clear what was required.

13. Following this, the issues were agreed as set out in the appendix to this judgment.

14. The Tribunal then heard the evidence hearing from the Claimant on her own behalf and for the Respondent from Ms Mary Wocial (Assistant Director of Operations for the Trust), Dr Priyadharshini Thayaparan (Locum Consultant in Sexual Health), Ms Carly-Emma Knell (General Manager for Family Services) and Ms Alison Smith (Deputy Chief Operating Officer). There were four full lever arch files numbered to 1,348 although there were more pages than that in the bundles. Adjustments were made for the Claimant including allowing her medication breaks when needed, provision of a suitable chair and rearrangement of the witness table. The Claimant expressed her gratitude for the adjustments made by the Tribunal.

The relevant law

15. The relevant statute is the Equality Act 2010.

<u>Reasonable adjustments</u>

16. An employer is required to make reasonable adjustments under ss.20 and 21 where a provision, criterion, or practice (PCP) applied, placed a disabled person at a substantial disadvantage in comparison with non-disabled persons. Failure to do so amounts to unlawful disability discrimination. Tribunals determining whether it would be reasonable for the employer to have to make a particular adjustment in order to comply with the duty must take into account the extent to which taking that step would prevent the disadvantage caused by the PCP (Equality and Human Rights Commission's Code of Practice on Employment).

17. The case of Environment Agency v Rowan [2008] ICR 218 set out guidance on how to approach reasonable adjustment cases. It held that the Claimant must show:

i. There was a PCP
ii. The PCP put the Claimant at a substantial disadvantage in comparison to persons who did not share his disability
iii. The adjustment would avoid that disadvantage
iv. The adjustment was reasonable in all the circumstances
v. The failure to make the adjustment caused the losses alleged.

18. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (Archibald v Fife Council [2004] IRLR 651, HL).

19. The correct approach to assessing reasonable adjustments is addressed in Smith –v- Churchills Stairlifts plc [2006] IRLR 41; Environment Agency –v- Rowan [2008] IRLR 20; and Project Management Institute –v- Latif [2007] IRLR 579.

20. In Smith, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in Archibald. Maurice Kay LJ stated: ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in Archibald that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

21. With regard to knowledge the EAT in Secretary of State for the Department of Work and Pensions v Alam [2009] UKEAT 0242/09 held that the correct statutory construction of s 4A(3)(b) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is also 'no', there is no duty to make reasonable adjustments.

Direct discrimination

22. Section 13 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."

23. Section 23 provides that: "On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case."

24. In considering the claim of direct discrimination, the task of the Tribunal is to decide whether the Tribunal finds primary facts as proved by the Claimant, and any appropriate inferences which can be drawn, that there is sufficient evidence for the Tribunal to reasonably conclude that there had been unlawful discrimination and to whether the Respondent can show that what occurred to the Claimant was not to any extent because of the relevant protected characteristic as set out in the Equality Act 2010. In each case, the matter is to be determined on a balance of probabilities. The fact that a Claimant has a protected characteristic and that there has been a difference in treatment by comparison with another person who does not have that characteristic will not necessarily be sufficient to establish unlawful discrimination. In all cases the task of the Tribunal is to

ascertain the reasons for the treatment in question and whether it was because of the protected characteristic. The provisions of section 136 of course apply to any proceedings under the Act, and not only to claims of direct discrimination.

Harassment

25. Section 26 of the EqA provides:

(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 subsection (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.

(5) The relevant protected characteristics are - . . . disability"

26. A Tribunal should consider all the acts together in determining whether or not they might properly be regarded as harassment (Driskel –v- Peninsular Business Services Ltd [2000] IRLR 151, EAT and Reed and Bull Information Systems Ltd –v- Stedman [1999] IRLR 299, EAT).

27. The motive or intention on behalf of the alleged harasser is irrelevant (see Driskel above).

28. The Court of Appeal confirmed in Land Registry –v- Grant (Equality and Human Rights Commission intervening) [2011] ICR 1390 *"when assessing the effect of a remark, the context in which it is given is always highly material".*

29. In Richmond Pharmacology –v- Dhaliwal [2009] ICR 724 the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

Discrimination arising from disability s15

30. Section 15 of the EqA provides:

"(1) A person (A) discriminates against a disabled person (B) if –

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

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

31. It therefore needs to be established whether there was a causal connection between the unfavourable treatment and the disability. If there is the burden shifts to the employer to establish justification i.e. a proportionate means of meeting a legitimate aim.

32. This type of discrimination occurs not because the person has a disability, but because of something connected with the disability. It can only occur if the employer knows, or could reasonably be expected to know, that the person is disabled.

Burden of Proof

33. The burden of proof reversal provisions in the EqA are contained in section 136. Guidance is provided in the case of Igen Ltd –v- Wong [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see Laing –v- Manchester City Council [2006] IRLR 748, EAT and Madarassy –v- Nomura International plc [2007] IRLR 246, CA). If the Claimant does establish a prima facie case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

34. The term '*no sense whatsoever'* is equated to '*an influence that is more than trivial*' (see Nagarajan –v- London Regional Transport [1999] IRLR 573, HL; and Igen Ltd –v- Wong, as above).

35. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (per Lord Nicholls in Shamoon –v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, HL).

36. The Supreme Court in Hewage –v- Grampian Health Board [2012] UKSC has confirmed: "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in Martin v Devonshires Solicitors [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."

37. More recently in Efobi v Royal Mail Group Ltd the EAT held that s136 of the Equality Act 2010 does not impose any initial burden on Claimants to establish a prima facie case of discrimination. It requires the Tribunal to consider all the evidence from all sources, at the end of the hearing to decide whether or not there are facts from which it can infer discrimination. If there are such facts, and no explanation from the Respondent, the Tribunal must uphold the complaint.

Facts and conclusions

38. The Tribunal found the following facts on the balance of probabilities having heard the evidence and considered the documents. This matter has a long and complex history and a lot of evidence was given over the course of the hearing with a substantial number of documents before the Tribunal. These findings of fact are limited to those facts that are relevant to the issues and necessary to explain the decision reached. All evidence was heard and considered even if it is not specifically referred to below.

Background

39. The Claimant was employed by the Respondent from August 1999, she is still employed. The Claimant was managed by Ms Wocial from September 2012 when Ms Wocial joined the Respondent. The Claimant has endometriosis and as a result had significant periods off work from 2010. The Tribunal notes that adjustments were made in June 2013 when she returned from a period of sick leave and in anticipation of a further operation that year. The Claimant returned to work for about a week and was then absent from 1 July 2013. The Claimant was employed as a band 8A Head of Contraception and Sexual Health Services ("CASH").

40. The Respondent was undergoing a major reorganisation as explained by Ms Wocial in her statement: "*In April 2012, the Trust restructured to reflect the merger of acute and community services that had taken place at the end of 2010 and to realise efficiency saving in a more streamlined management. In creating the new Directorate there was an expectation that the community sexual health service and the GUM service would amalgamate*". Ms Wocial joined the team in September 2012 and was informed that one of the planned savings was the streamlining of the management of the Sexual Health Service. In April 2013, there was a new commissioning body which set in train the various consultation proposals which are the subject of this claim.

41. The Respondent concedes that the Claimant is a disabled person. The disability is endometriosis. The Tribunal accepts Ms Wocial's evidence that while she did not consider the statutory definition of disability when managing the Claimant, that knowing about the statutory definition would not have changed how she approached matters.

42. The Tribunal considered the issues as agreed and set out in the appendix in turn.

Direct discrimination

43. The Claimant's comparators are cited to be Mr Teelwah (Band 8A), Lorraine Green (Band 7), Susan Simmons (Band 7), and Shaun McGrath or alternatively a hypothetical comparator. The only comparator who is part of her claim of direct discrimination is Mr Teelwah. The other comparators were therefore not considered.

Was the Claimant the subject of an unreasonably prolonged consultation from 2013 to 2016?

44. The history of the consultations is that in 2013 there were proposals for the merger of CASH and the Genitourinary Medicine/HIV (GUM). Ms Wocial sets out the background in her statement as follows:

> 13. *In April 2013, Public Health in Croydon Borough Council had become the new commissioners for Sexual Health Services and it was indicated that they wished to make significant changes to the contract. In particular they wanted a more integrated service in line with national strategy, including a new model of care (i.e. more emphasis on self-care and promoting public health messages), and 5% efficiency savings year on year for at least three years. They also made it clear that failure to achieve the savings and changes to the services would result in the services being subject to a tendering exercise which in turn could result in another provider taking over the service.*
>
> *14. At this stage we realised that the integration not only needed to be more far reaching than the Band 8a posts but was essential to compliance with the new contract and new service model.*
>
> *15. Due to Mrs Hanley-Osborne's planned sick leave the consultation regarding the integrated services was postponed until the summer of 2013.*"

45. The Claimant returned to work for one week in June 2013 but the Claimant was unable to continue in work and absent again from 1 July to 10 December making the consultation exercise difficult. Ms Wocial was unable to hold off the consultation for a further period and therefore prepared a draft consultation paper in line with the Trust's Change Management Policy. This was circulated on 25 July 2013. There were two phases proposed. The first was a review of the senior management with the two Band 8a roles (the Claimant and Mr Teelwah) being replaced with a single Head of Service supported by two band 7's. The second phase would be a later consultation on the planned integration of services under the leadership of the new management structure. In line with the policy one to one meetings were offered to the Claimant and Mr Teelwah. As a result of the meeting with the Claimant and her union representative and the objections and suggestions made (including that there should be competitive interviews for the newly created band 8A post) Ms Wocial decided not to continue with the consultation.

46. Ms Wocial wrote to the Claimant while she was still on sick leave (she was expected to remain so for a further period).

> "*re: Outcome of recent consultation*

Based on the feedback I have decided to review some of the details in the proposal and to revise the proposed process of change. So I will be redrafting a consultation document for a launch later this year.

…..

There are also the practical operational management issues of covering your duties and responsibilities during your sick leave.

Kris Teelwah has been helping out on an ad hoc basis with some managerial issues in CASH but I have now formally asked him to take on the role of Service Manager for Sexual Health Services (including HIV Services and Smoking Cessation Team) as an interim arrangement for 3 month period with immediate effect……"

47. On the same day, Ms Wocial wrote to Mr Teelwah confirming what she had written to the Claimant about the interim arrangement and adding that any "*permanent arrangement in the future will be subject to a competitive selection process*".

48. A draft consultation paper was prepared in 2014 but this was never published. The next published consultation paper was on 26 November 2015. By this time the proposals had changed significantly. The consultation paper sets out the proposals:

> 32. *The new service needs a workforce that can support the delivery of a more flexible and responsive service model that meetings the needs of the varied and changing population of Croydon. This will include more outreach work, more light touch services and greater emphasis on prevention and self-care while maintaining the specialist provision required for more complex health needs. To achieve this we need the front line workforce to provide a more integrated one stop service.*
>
> 35. *The proposed 8a Business Manager for Integrated Sexual Health Services will replace the current two band 8a posts; the Clinical Head of Service for GUM/HIV and the Head of Sexual Health Nursing (CASH). Both current post holders will be placed "at risk" and the Business Manager for Integrated Sexual Health Services position will be ring-fenced for the current post holder to apply. The unsuccessful candidate will be employed in one of the Lead Sexual Health Nurse positions and re-graded to a band 7, with a period of protected salary as per the Trust policy and contract of employment.*

49. The Tribunal has considered the two published consultations and conclude that they are separate and not one continuing consultation or part of the same consultation as suggested by the Claimant. The suggestions made by the Claimant in the 2013 consultation were taken on board and that consultation ended. Her suggestions were acted on during the 2015 consultation as a competitive exercise for the Band 8A post was held.

50. The Tribunal does not find that there was an unreasonably prolonged consultation as alleged. The Tribunal appreciates that there was uncertainty within the service about the proposals in that change was inevitable. However, this did not just affect the Claimant. Mr Teelwah was also in the same position as the Claimant and the reasons for the time

taken were explained by the Respondent as set out above and were not related in to the Claimant's disability, sex or race. The process was the same for all the named comparators and the Tribunal finds this was not less favourable treatment of the Claimant.

Failure to make reasonable adjustments

51. The issues refer to paragraphs 2.2, 3.2 and 4.2 of her further and better particulars dated 4 December 2016. The further particulars asked are what the less favourable treatment was in relation to race, sex and disability. In all three the only answers provided were: *"Reasonable adjustments have not been made either at all or in full"*. There is no indication of what adjustments she is referring to or at what time. This issue is therefore very vague The Tribunal having heard the Claimant's evidence and read her submissions is none the wiser as to what is being referred to. The Claimant's evidence was that everything she wanted from Ms Wocial were put in place. Therefore, the adjustments referred to must be in her role as modern matron when Ms Knell was her line manager. The Tribunal has heard about the adjustments put in place, which included no weekend work, Friday's off work, not being required to attend early morning meetings without sufficient notice and being able to occasionally work from home with the proviso that as the Matron role required visible leadership this may be reviewed if the frequency was high and impacted on delivery in the role.. In cross examination, the Claimant agreed these adjustments had been made. This part of the claim is not made out.

Harassment

Kathy Wocial circulating the 2013 consultation paper broadcasting that the Claimant had been demoted.

52. The paper the Claimant is referring to is the consultation paper which is discussed above. The purpose of the paper was to open for discussion the proposals. The proposals did include the merger of two band 8A posts into one and the creation of two band 7 roles. The paper states that both holders of the band 8A role were at risk and that the unsuccessful band 8A person would be given a band 7 role with protected salary. It did not set out who that person would be. In any event, the 2013 consultation was not proceeded with and the Claimant was not demoted. Ms Wocial wrote to all staff on 25 September 2013:

"Based on the feed back received from the recent consultation on the proposed management changes to support the phased integration of sexual Health Services, I have decided to review some of the details proposed and a revised proposal will be launched for consultation later in the year.

However, in the meantime we still have to address the need for managerial leadership across the service tin order to meet the Trust and Service priorities…….There is also the practical operational management issues within CASH that need to be addressed because of Dorette's long term sick leave.

Kris Teelwah has been helping out on an ad hoc basis with some of the Dorette's work but I have now formally asked Kris to take on the role of Service manager

for Sexual Health Services….as an interim arrangement for 3 months with immediate effect. This will be reviewed when Dorette is able to return to work and resume her full duties.

Those of you previously line managed by Dorette will now report to Kris. Please can you communicate this message to your teams".

53. If the Claimant is referring to this letter rather than the consultation document itself, it was written at a time the Claimant was on long term sick leave and is informing staff what the interim position was in relation to management which the staff needed to know about. It does not say she has been demoted, just that Mr Teelwah was covering for her in her absence.

54. The Claimant accepted that this issue was not in relation to sex or race, just disability. Ms Wocial says she was not influenced by the Claimant's disability as exemplified by her delaying the consultation process until she could meet with the Claimant and seek her views which she then took on board leading to the 2013 consultation being abandoned and the 2015 consultation incorporating a competitive interview process as suggested by the Claimant.

55. The Tribunal does not find it reasonable to conclude that this had the effect of creating a hostile, degrading or humiliating environment for the Claimant and even if it did, it was not related to her disability.

Kathy Wocial's failure to confirm that the Claimant was not being demoted when the consultation was suspended.

1. The Tribunal refers to paragraphs [51-54] above. There was no demotion so therefore it follows that there was no need to confirm there would be no demotion. It is implicit in that the 2013 consultation was abandoned that the proposals contained within it were not being taken forward. The Tribunal does not find it reasonable to conclude that this had the effect of creating a hostile, degrading or humiliating environment for the Claimant and even if it did, it was not related to her disability or any other protected characteristic.

***Doctor Priyadharshini Thayaparan dumping an unreasonable amount of work on the Claimant on 22 December 2015 with a deadline for completion by 4 January 2016*.**

2. The Claimant shared an office with Dr Thayaparan who was the clinical lead (the Claimant being the managerial lead) on a new initiative 'test and go'. The Claimant attended various meetings when the need for 'test and go' to be up and running by 4 December 2016 was discussed. Dr Thayaparan says in her witness statement that the Claimant was not excluded from meetings and attended all relevant meetings held on 16 November 2015, 24 November 2015, and 16 December 2016. These meetings dealt with the implementation of test and go. The deadline was set by the commissioner (Croydon Borough Council). Dr Thayaparan says she did not put pressure on the Claimant and did not expect the

service to be completely up and running by 4 January 2016 but operational.

3. The Tribunal had in the bundle minutes of the meeting o 24 November 2014 which record that the Claimant was present and "*the team have met around operations and roll-out. Still aiming for roll-out of T&G screens in current CaSH setting for 4th January (workforce permitting)*".

4. Even if the Claimant had been 'dumped' with a lot of work to do at short notice, there is nothing to suggest this was because of any protected characteristic. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

***Kathy Wocial breaching Trust Policy in respect of alternative role (Gynaecology Matron) in March 2016*.**

5. The Tribunal understands the Claimant to be referring to her not being 'slotted in' for the role of Matron but being told she was to be interviewed for the post. The Respondent's Change Management Policy states "*Slotting in may occur where a post is the same band as the individuals current post or where it remains substantially the same with regard to the job content, responsibility, grade, status and requirements for skills, knowledge and experience*."

6. Ms Wocial in her witness statement says that following a meeting with the Claimant, she ring-fenced the Matron post pending the outcome of the merged band 8A position (which was subject to a competitive interview). The Claimant was not successful and therefore the Matron post was available for her. Ms Wocial felt the role was significantly different to the Claimant's current role and there should be a selection process. The Claimant disagreed saying she did a significant proportion of the Matron role. This was discussed in mid-March when Ms Wocial said she did not feel it was appropriate to slot any staff at risk into this role.

7. Ms Wocial was due to take up secondment to a new role on 1 April 2016 and needed to finalise matters quickly. Ms Wocial considered the points raised by the Claimant and her representative and was prepared to offer the Claimant the role without interview subject to a trial period of four weeks. However, Ms Wocial still felt that a hospital based Matron role was a physically demanding job with an expectation of cross cover (clinical and management) for Matrons in other parts of the hospital and that given the Claimant had mobility problems it may be difficult for her. The Claimant was given full details of the requirements of the role and accepted the role on 24 March 2016. This was confirmed by Ms Wocial in a letter dated 30 March 2016.

8. The Tribunal cannot find any breach of the policy. There was a difference of opinion between the Claimant and Ms Wocial about whether her role was sufficiently similar to the Matron role. What is clear from the evidence is that Ms Wocial listened to the Claimant and came up with an alternative which was acceptable to both.

9. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

Kathy Wocial requiring the Claimant to attend a meeting at very short notice on 1 April 2016.

10. This follows directly on from the previous issue. The start date for the Claimant's new role was 1 April 2016. This was a Friday. Ms Wocial was leaving her position that day and wanted to meet with the Claimant before she left. The Claimant knew when Ms Wocial was leaving and knew that her new role would start on 1 April as early as 17 March 2017 in an email she sent to Ms Wocial following a meeting on 16 March. She did not indicate any difficulty in starting on that date even though she did not normally work on a Friday.

11. The Tribunal accepts that Ms Wocial was exceptionally busy at this time and although she was aware the Claimant did not work on a Friday this was not at the forefront of her mind when requesting the meeting on 30 March 2016. The Claimant sent an email on 31 March 2016 (in the evening) informing Ms Wocial that she could not attend the meeting that day as she had appointments she could not change at short notice.

12. The Tribunal finds that given the date of the matron role being finalised and Ms Wocial's leaving date it was inevitable that a short period of notice of the meeting would be provided. The Claimant had known for two weeks when the role would start and when Ms Wocial was leaving but made no steps to remind Ms Wocial that she would not be at work on the 1 April 2016.

13. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

Kathy Wocial widely circulating criticism of the Claimant's failure to attend the meeting on 1 April by email of 4 April 2016 / Kathy Wocial criticising the Claimant by email on 4 April 2016.

14. The email referred to was sent to the Claimant and copied to various managers one of which was Ms Knell the Claimant's new manager. The email says:

"Dear Dorrette

I read your email early on Friday, But was not in a position to reply.

I was disappointed that you had not flagged up earlier your prior commitments last Friday in your email accepting the re-deployment, which included acknowledgement that this was with effect from 1st April.

I assume you will contact Carly this morning to discuss your induction. In the meantime my original email outlined a number of actions that you can initiate".

15. This email expressed disappointment that the Claimant did not flag up that she was unable to attend the meeting on 1 April 2016 in advance and gives the Claimant and her manager, information about what she suggests can be done immediately.

16. The Tribunal finds that it was reasonable for Ms Wocial to be disappointed as she wanted to finalise matters before she left. The Claimant made no mention as to what the appointments were that she had to attend on 1 April 2016. There is nothing to suggest that this was in relation to any protected characteristic.

17. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

The Claimant being strongly pressured by members of her new term to attend work on a Friday.

18. In her previous role, the Claimant did not work on a Friday and this is when she tried to make her medical appointments for. There was a management meeting to discuss issues one Friday every month. This was a meeting that the Claimant was expected to attend in her position as Matron. The Claimant was unwilling to explain why she did not work on Fridays to her colleagues and they expected her to attend. The Tribunal finds on balance that colleagues asked the Claimant to attend these meetings as it was important that she was there in her role as Matron. There was no evidence of strong pressure being applied for her to work on a Friday.

19. The members of her new team did not know she did not normally work Fridays, or of her disability. The Claimant accepted that she could make appointments on other days and the Tribunal finds that the Claimant could have adjusted her work pattern for one day per month especially as the letter of 29 April setting out the terms of the appointment Matron states "Working hours over four long days, with Friday's routinely being your day off, although you are happy to apply flexibility to this where required". The meetings the Claimant was being encouraged to attend were on one Friday per month and were interdisciplinary meetings. The Claimant accepted it would be reasonable for a Matron to be present at these meetings.

20. The job description for the Matron role states *"direct support and supervision" "visibility". Participate in rota, late shift and weekends*". This was adjusted for the Claimant but being visible and attending meetings is part of the job.

21. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

Kathy Wocial putting the Claimants name on a weekend working rota on ……

22. The Tribunal finds that Ms Wocial did not put the Claimant's name on the weekend rota. This allegation is not made out. Ms Knell was the Claimant's line manager when she took up the Modern Matron position. Ms Knell did not know of the Claimant's disability until the four-week trial period had ended when the Claimant informed her on 28 April 2016. The rota was compiled by Ms Chestnut who was unaware of the Claimant's disabilities and previous adjustments. Once the Clamant explained the situation she was removed from the weekend rota.

23. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

Kathy Wocial sending an inappropriate email to the Claimant two hours before her interview for the Business Manager role on 9 March 16.

24. This email says:

"Apologies I found this in my drafts mail box I thought I had sent this Monday.

Dear Dorette

Thank you for sending me your notes of our meeting on 29 February. It was not the intention to formally minute this meeting for any of the follow up discussions that have occurred as the purpose and outcome of the meeting was covered in my letter.

Your notes are not an official record and I don't accept that as a full accurate but it is useful to receive them. I don't intend to comment on every item however I think it would be useful to respond on a couple of issues raised by you.

I agree with hindsight that the timing of the recruitment of the band 7 service manager roles across the directorate could have taken into consideration the outcome of this change management process. However, there were wider directorate pressures and priorities that required us to proceed with this recruitment without delay. as one of these posts remains vacant I am happy to delay further recruitment to include this as a potential option for redeployment within the change management process.

With regard to the percentages you cited in relation to the proposed Matron post in Woman's Services. I am advised by HR that the Change Management Policy makes no specific reference to percentages. As previously state, the job description is being drawn up and will be shared with you when it is finalised.

Finally, I have followed up and considered your question with regards to Equality and Diversity and whether the impact of the changes had any impact on protected characteristics. I have considered this question and I did not believe on launching the consultation that any protected characteristics would be detrimentally impacted by the proposed staff changes and having reconsidered this point I still do not. However your note suggests that you have a specific concern or issue in mind in relation to disability and it may be helpful if you could be more explicit about these concerns if I am to respond in any meaningful way".

25. There are two aspects to this email. The first is whether the email is inappropriate and the second is the timing of when it was sent. The email follows the Claimant sending Ms Wocial her notes of the meeting she had with her on 29 February 2016.

26. Looking at the email, the Tribunal does not find that there is anything there that is inappropriate. Ms Wocial is acknowledging the email from the Claimant dated 2 March 2016 910. This email says "I note that…". Ms Wocial commented that it was not the intention to formally minute the meeting and says that the Claimant's note is "*not an official record and I don't accept them as a fully accurate but it is useful to receive them*". Ms Wocial goes on to agree with some points made by the Claimant and specifically to delay further recruitment into one of the band 7 Service Manager roles pending the outcome of the competitive interview for the band 8A post. She discusses the Matron post (which the Claimant ultimately was appointed to) and says the job description would be sent when ready. She also explains her reasons for not doing an Equality Impact Statement (EIS) and offers the Claimant the chance to discuss it with her. Ms Wocial concludes the email saying "*However your note suggests that you have a specific concern or issue in mind in relation to disability and it may be helpful if you could be more explicit about these concerns if I am to respond in any meaningful way"*.

27. The Tribunal accepts Ms Wocial started the email on 7 March 2016 but did not finish it. She realised this on the 9 March 2016 and immediately completed the email and sent it to the Claimant with this explanation at the top "*Apologies I found this in my drafts mail box I thought I had sent this Monday*".

28. There was evidence in the bundle that this had happened before, when she sent an email on 25 September 2013 believing she had sent it on the 17 September 2013. She again apologised in the same way as in the email set out above.

29. The email was sent to the Claimant at 11.55. The Claimant was due to be interviewed that afternoon competitively for the band 8A post. Ms Wocial the chair of the interview panel. The Claimant's case is that the tone of the email upset her and that thought the email could have been sent after the interview. She implies it was a deliberate ploy by Ms Wocial to unsettle her so she did not perform well at the interview. Ms Wocial explained that she is exceptionally busy and gets many emails a day, and it is her practice to answer what she can when she can and that the

proximity of the interview to this email was not deliberate. The Claimant did perform well at the interview even though she was not successful, there was only one mark between herself and Mr Teelwah.

30. The Tribunal finds first that the content of the email was not inappropriate. The Claimant has focussed on Ms Wocial not accepting her minutes as being completely accurate. The email as a whole is positive in that it accepts arguments the Claimant put forward and invited further discussion on the EIS and disability, whilst reassuring her that the Claimant's interest in the Matron's post was being taken into account. Secondly, the Tribunal accepts the reason for the email being sent when it was given by Ms Wocial.

31. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

Kathy Wocial making inappropriate comments to the Claimant about her health condition during regular managerial meetings.

32. The first matter referred to is a sickness absence meeting in 2015. It is alleged that Ms Wocial said "*given [the Claimant's] health perhaps it would be better for [her] if [she] took the band 7 role*" and "*at least then [she] wouldn't have to worry about pesky management responsibilities*." (see list of issues 11a). Ms Wocial denies saying this and says the word '*pesky*' is not a word she would use. The comment is said to have been made on 27 October 2015 in a sickness absence review meeting. Having heard Ms Wocial give evidence the Tribunal believes her when she says she did not say that and that '*pesky*' is not a word she would use.

33. The Tribunal notes that the Claimant did not make any complaint about this until her grievance in 2016. The Tribunal finds that if the comment had been made, the Claimant would have complained either formally or informally. This supports the evidence given by Ms Wocial.

34. The second matter refers to a statement alleged to have been made on 2 December 2015 after the Claimant suffered an acute migraine following the launch of the revised (2015) consultation, where it is alleged that Ms Wocial patted the consultation document and said "*this cannot have helped*".

35. Ms Wocial says that two staff meetings were held as part of the consultation on 2 and 9 December 2015. On 2 December following the staff meeting the Claimant suffered an acute migraine. Ms Wocial's statement says "*On 2 Dec ember 2015, following the staff meeting, Mrs Hanley-Osborne suffered an acute migraine. I do not recall patting the consultation paper and saying "this cannot have helped". However if I did, I would have meant this in a supportive way to show that I recognise that the consultation process can be stressful, particularly for those whose roles are directly impacted."* The Tribunal accepts Ms Wocial's evidence and considers this would be a reasonable reading of the situation.

36. The third matter refers to a subsequent comment made on 7 December 2015 where it is alleged that Ms Wocial said she was surprised to hear that the Claimant needed to attend hospital for an MRI after her migraine the week before and going on to comment '*I thought you had become less delicate, you seemed stronger over the last few months. However, I can see that I spoke too soon*'".

37. Ms Wocial's evidence was that these were again not words she would have used and would not have referred to the Claimant as being delicate. She said that if she expressed surprise, "*it would have been an expression of concern as I did not think it was routine for a migraine to be investigated in this way, so it suggested the severity of her symptoms. Further I was sorry that the progress she was making in respect of her health had been set back*.". The Tribunal accepts her evidence. The Claimant made no complaint about this, which the Tribunal finds she would have done if such a comment had been made.

38. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

Delay in dealing with the grievance

39. The grievance the Claimant raised was long and complicated (the Respondent said in the applications to amend made by the Claimant referred to above that it introduced approximately 96 issues) and raised issues about senior management within the Trust. The Claimant accepted that the grievance was acknowledged quickly and that the reasons for the delay were given to her. The Judge's note of the evidence is:

Grievance delay as relevant to the Claim	
1130 – you given a full explanation for the delay in this email.	I felt partial explanation
97 points in your grievance, very detailed grievance	If look at grievance many are explanations. Not 97 points of complaint, putting them into context.
OK. It was a very detailed grievance	Yes, C wants break so give break at 10.50 to 11.05.
P986 – 4 April 16 acknowledgement of grievance	Acknowledged quickly
Interviewed 8 June 16	Yes by Alison Smith
In advance you produced an additional document p1015	I produced this as aide memoire, attended with these notes. At the meeting HR advisor asked for a copy, so gave them a copy.
You aware that other interviews had to be carried out	yes
You were kept up to date by HR on delays	Some updates, but had to be in contact to get them. After acknowledgment, nothing for 2 weeks policy says should expect a date in 5 days. Emailed and Mr Knight said looking for someone to manage the interview process, I had to proactively seek updates at time.
Part of the issue is because of KW seniority needed someone more	yes

senior	
I suggest whilst delay unfortunate there was a genuine reason for it	I accept the reason they gave appropriate to let me know having problems before I had to write, don't challenge their reasons.
You provided no evidence to say delays because of sex, race or disability	Not at that time, no, not the initial delays not at all

These notes were typed during the hearing and have not been edited since the hearing concluded.

40. The Tribunal does not find there were undue delays in dealing with the grievance given its complexity and the necessity to find a suitably senior person to deal with it given that the grievance was against Ms Wocial and the numbers of witnesses to be interviewed. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

Feeling under threat when she needed to have time off for operations related to her condition

41. The Claimant's case is she felt she had to take annual leave for her surgery in 2014. In an email of 12 February 2014 the Claimant advises Ms Wocial that she requires further surgery and says *"I felt that since I still have a significant amount of annual leave to take, I would therefore like to take annual leave from 26/2/14 to 12/3/14"* this being the period covering surgery and recovery. Ms Wocial says that the Claimant's email asked for annual leave and that in retrospect she should have insisted it was taken as sick leave but she did not do so at the time as when she queried it, the Claimant confirmed it was her choice.

42. The Tribunal does not find that the Claimant was under threat for having to take time off for surgery related to her condition. There is no evidence that the Respondent ever questioned the time off for her disability, initiated any capability procedures related to time off and the evidence is that they supported the Claimant for example in 2013 delaying the consultation to a time when it was hoped she would be back at work and making adjustments for her when she did return to work. By this time the 2013 consultation had been abandoned and there was no active consultation during 2014. The Claimant confirmed this in cross-examination.

43. The Tribunal does not find it reasonable to conclude that the conduct had the effect of creating a hostile degrading or humiliating environment for the Claimant and even if it did it was because of her disability or any other protected characteristic.

DISCRIMINATION ARISING
(as detailed in ET Order following the PH in November 16)

Was the Claimant treated unfavourably because of something arising in consequence of her disability?

The Claimant asserts that the "*something arising in consequence of her disability*" is her absence from work.

The Claimant asserts that the detriment was the adverse impact of her absence on the consultation process and the outcome of it.

44. The Tribunal has found that there was no adverse impact on the consultation process and outcome due to the Claimant's absence which the Respondent accepts arises from the Claimant's disability. To the contrary, Ms Wocial delayed the consultation until the Claimant was back at work and then had to proceed as the Claimant went on an extended period of sick leave. During that time, there were consultations and the result of the discussions with the Claimant was that the plans in the 2013 consultation was abandoned and a new consultation document was written in 2015 which was taken forward. The Claimant was consulted and her views were taken into account and acted on resulting in the 2013 consultation being abandoned and the 2015 consultation adding in competitive interviews for the 8a role.

45. The Tribunal is satisfied that the interview questions used for the competitive interview for the band 8a role did not disadvantage the Claimant because she had been off work for a period of time. It is clear from the evidence that the questions were generic and able to be answered. As it happened Mr Teelwah scored one point more than the Claimant and she accepted he was qualified for the position. This does not suggest any disadvantage. The Claimant performed well, but not quite as well as Mr Teelwah.

46. This part of the Claimant's claim is not made out.

Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

The Respondent denies that it subjected the Claimant to a detriment as alleged. In the alternative, it asserts that it was a proportionate means of effectively managing the consultation process and that it ultimately selected the best candidate for the role.

100. Even had the Tribunal found there to be unfavourable treatment for something arising from her disability, the Tribunal would have accepted the Respondent's submission that the treatment was a proportionate earns of achieving a legitimate aim. The Tribunal accepts the submissions made by the Respondent where it says that "*it is legitimate to want to select the best candidate for the job and it was proportionate to do so in circumstances where the questions were chosen to ensure the Claimant would not be at a disadvantage. Furthermore the Tribunal is asked to bear in mind that the Claimant wasn't made redundant or demoted as a result of this exercise. She was moved into an alternative 8a role. The Respondent submits that it went above and beyond in the circumstances to ensure the Claimant had an equal opportunity to compete for the role*".

REASONABLE ADJUSTMENTS

What is the PCP relied on by the Claimant?

The Claimant relies on the following PCPs:

(i) The requirement to work onsite from April 2016 – September 2016.

101. The Tribunal have already referred to the letter from Ms Knell to the Claimant of 29 April 2016 which sets out the terms of her appointment to the permanent role of Matron following the trial period. This included provision to work from home. The Claimant accepted the need to be visible in her role. There was no evidence to suggest that the Claimant was prevented from working from home. The issue was that her laptop had broken. However as soon as this was brought to Ms Knell's attention in September 2016 Ms Knell approved the purchase of a new laptop. The Claimant agreed this in cross examination. In any event, the Claimant, rather than ordering a new laptop said she would see if the broken laptop could be fixed. The Tribunal does not find that there was a PCP requiring the Claimant to work onsite at all time as alleged.

(ii) The requirement to hot desk from April 2016 – September 2016.

102. This issue arises from the office space available. There was an office with two desks and the intention was that the two part-time nurses would share a desk. The Claimant's case is that this is not what happened in practice. The Tribunal notes that the Claimant did not raise this as an issue until September 2016 and when she did she accepted in cross examination that Ms Knell was helpful and supportive.

103. The Tribunal does not find that there was a PCP requiring the Claimant and other staff to hot desk.

(iii) The requirement to work at a minimally equipped work station from April 2016 – September 2016

104. The Tribunal understands this issue to relates to the Claimant's laptop. As set out above, the Claimant's laptop was not working properly. This was first communicated to Ms Knell in a meeting on 6 September 2016 when the Clamant said she would see if it could be fixed. On 26 September 2016 when Ms Knell was told by the Claimant that it was beyond repair, Ms Knell immediately authorised the purchase of an alternative laptop.

105. The Tribunal does not find that there was a PCP requiring the Claimant and staff to work at a minimally equipped work station as suggested. The evidence was that the Claimant had the equipment she needed and when it stopped working it was replaced and when she mentioned difficulties with her workspace a workspace assessment was done.

(iv) The requirement to use a printer which was not located in the same office as her desk from April 2016 – September 2016.

106. The Claimant did not raise any issues about the printer until September 2016 and when she did, Ms Knell immediately told her to log the job for the printer to be moved which the Claimant did. The printer was then moved.

107. The Tribunal does not find there is a PCP to use a printer located in a different office and even if there was, the adjustment was made by the printer being moved.

(v) The requirement for the Claimant to carry out her own administrative work from April 2016 – September 2016.

108. There was no evidence that the Claimant ever informed the Respondent that she had a problem with carrying out her own administrative work when she moved to the Matron role. The evidence was that this was never discussed either with Ms Knell or Occupational Health when the workplace assessment was undertaken.

What is the substantial disadvantage relied on by the Claimant?

109. Given that the Tribunal has found that there was no relevant PCP and even if there was that the Respondent made the adjustments required, the Tribunal has not considered in detail the question of substantial disadvantage. In relation to the PCP's set out above, the Claimant asserts that the way in which the Respondent acted increased her need to be mobile which caused her pain. She also asserts that it exacerbated her stress and consequently the effects of her disability.

If so, did the Respondent take all steps as were reasonable in the circumstances to prevent the PCP having that disadvantageous effect?

110. The Tribunal finds that had there been a PCP as asserted that the Respondent took all steps as were reasonable in the circumstances to *prevent the PCP having the disadvantageous effect asserted.*

Did the Respondent know, or could have reasonably been expected to know, that the Claimant has the disability and that she was likely to be at a substantial disadvantage compared with persons who are not disabled?

111. The Tribunal finds that the Respondent knew or should be reasonably have been expected to know that the Claimant was a disabled person and that her condition was likely to put her at a substantial disadvantage when compared to persons not disabled.

Would the adjustments suggested have been reasonable in the circumstances?

112. The Tribunal finds that given that adjustments were made that they were reasonable in the circumstances.

The Claimant asserts that the Respondent should have made reasonable adjustments under s.20 of the Equality Act 2010.

113. The Tribunal's finding is that the Claimant's claims of failure to make reasonable adjustments are not made out for the reasons set out above. The Tribunal find that the Respondent made the adjustments referred to when they knew of the disadvantage their arrangements had on the Claimant.

114. The Tribunal in coming to its decision had to consider the evidence given and the credibility of it. The Tribunal found all the Respondent's witnesses to be credible and that they gave their account of what they did and why they did what they did, which were logical and largely supported by the documentary evidence. The Tribunal also found the Claimant to be credible and that she believes what she says. However, this does not tie up with the documentary and oral evidence the Tribunal has heard. For example, the Claimant takes a very negative view of everything. The email she refers to having been sent on the morning of her interview she says is inappropriate. It is set out above. The Tribunal's finding is that it is not negative and there are many very positive points set out.

115. Although this was a claim encompassing discrimination on the grounds of disability, race and sex, the only matters referred to was disability. For the avoidance of doubt the Tribunal does not find that the Respondent discriminated against the Claimant on the grounds of her disability, sex or race and the Claimant's claim is dismissed.

____

Employment Judge Martin

Date: 15 September 2017

APPENDIX

AGREED LIST OF ISSUES

References to paragraphs are to paragraphs within the Claimant's Amended Further and Better Particulars dated 4 December 16 [page 40 – 54 of the bundle].

1. **INTRODUCTION**

1.1 The Claimant is pursuing the following claims:

1.1.1 Direct discrimination because of disability, race and sex (Section 13 Equality Act 2010)

1.1.2 Harassment related to disability, race and sex (s26 Equality Act 2010)

1.1.3 Discrimination arising from disability (Section 15 Equality Act 2010)

1.1.4 Failure to make reasonable adjustments (Section 21 Equality Act 2010)

2. **JURISDICTION**

2.1 Were the Claimant's claims under the Equality Act 2010 presented to the Tribunal before the end of the period of three months beginning when the act complained of was done (Section 123(1) Equality Act 2010)?

The Respondent asserts that any act or omission which took place before 22 March 2016 is out of time.

2.2 Did the matters complained of amount to conduct extending over a period (Section 123(3) Equality Act 2010)?

2.3 To the extent that any of the Claimant's complaints are out of time, would it be just and equitable for the Tribunal to extend time for the bringing of the complaint (Section 123(1) (b) Equality Act 2010)?

3. **DISABILITY**

3.1 The Respondent accepts that the Claimant was disabled at all relevant times (Section 6 Equality Act 2010).

The Claimant relies on Endometriosis as her disability.

3.2 Was the Respondent aware, or ought reasonably to have been aware, that the Claimant was so disabled?

DIRECT DISCRIMINATION

4. **DISCRIMINATION BECAUSE OF DISABILITY, SEX or RACE**

4.1 Did the Claimant suffer direct discrimination in that she was subjected to less favourable treatment because of her disability, sex or race, contrary to section 13 of the Equality Act 2010?

4.2 The relevant comparators are Kris Teelwah, Lorraine Green, Susan Simmons and Shaun McGrath (para 5)

4.3 In the alternative, the Claimant relies on a hypothetical non-disabled employee in the same position as her in all respects save only that he/she was not a member of the protected class.

4.4 The Claimant alleges the following acts were acts of less favourable treatment:

- (i) Subject of an unreasonably prolonged consultation from 2013 – 2016 (paras 2, 3 & 4)
- (ii) Failure to make reasonable adjustments (paras 2.2, 3.2 & 4.2)

4.5 In so far as the Claimant has proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, what is the Respondent’s explanation?

4.6 Has the Respondent established a non-discriminatory reason for any proven treatment?

5. **HARASSMENT - DISABILITY, RACE OR SEX** (para 1.1 – 1.10 and copied and pasted under other headings)

5.1 Did the Respondent engage in unwanted conduct related to the Claimant’s disability, sex or race?

5.2 The Claimant relies on the following acts of alleged harassment:

- (i) Kathy Wocial circulating the 2013 consultation paper broadcasting that the Claimant had been demoted (para 1.8, 2.7 & 3.7).
- (ii) Kathy Wocial’s failure to confirm that the Claimant was not being demoted when the consultation was suspended (para 1.8, 2.7 & 3.7).
- (iii) Dr Priyadharshini Thayaparan dumping an unreasonable amount of work on the Claimant on 22 December 15 with a deadline for completion by 4 January 16 (particularised in ET1).
- (iv) Kathy Wocial breaching Trust Policy in respect of the suitable alternative role (Gyanecological Matron) in March 16 (para 1.1, 2 & 3).
- (v) Kathy Wocial requiring the Claimant to attend a meeting at very short notice on 1 April 16 (para 1.2, 2.1 & 3.1).
- (vi) Kathy Wocial widely circulating criticism of the Claimant’s failure to attend the meeting on 1 April 16 (para 1.2, 2.1 & 3.1).
- (vii) Kathy Wocial criticising the Claimant by e-mail on 4 April 16 (para 1.2, 2.1 & 3.1).

(viii) The Claimant being strongly pressured by members of her new team to attend work on a Friday (para 1.3, 2.2 & 3.2).

(ix) Kathy Wocial putting the Claimant's name on a weekend working rota on/around 1 April 16 following the conclusion of the 15/16 consultation without the development of objectives or prior discussion (para 1.4, 2.3 & 3.3).

(x) Kathy Wocial sending an inappropriate e-mail to C two hours before her interview for the Business Manger role on 9 March 16 (para 1.5, 2.4 and 3.4).

(xi) Kathy Wocial making inappropriate comments to the Claimant about her health condition during regular managerial meetings (para 1.6, 2.5 & 3.5).

(a) At a sickness absence meeting in 2015 Kathy Wocial commenting that "given [the Claimant's] health perhaps it would be better for [her] if [she] took the band 7 role" and "at least then [she] wouldn't have to worry about pesky management responsibilities" (para 10.15).

(b) On 2 December 15 after the Claimant suffered an acute migraine following the launch of the revised consultation, Kathy Wocial patting the consultation document and saying "this cannot have helped" (para 10.15).

(c) On 7 December 15 Kathy Wocial saying that she was surprised to hear that [the Claimant] needed to attend hospital for an MRI after her migraine the week before and going on to comment "I thought you had become less delicate, you seemed stronger over the last few months. However, I can see that I spoke too soon." (para 10.15).

(xii) Delay in dealing with the grievance (para 1.9, 2.8 & 3.8).

(xiii) Feeling under threat when she needed to have time off for operations related to her condition (para 1.10, 2.9 & 3.9).

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

In determining whether the conduct have the effect referred to above the Tribunal is invited to have regard to the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. **DISCRIMINATION ARISING (as detailed in ET Order following the PH in November 16)**

6.1 Was the Claimant treated unfavourably because of something arising in consequence of her disability?

6.2 The Claimant asserts that the "*something arising in consequence of her disability*" is her absence from work.

6.3 The Claimant asserts that the detriment was the adverse impact of her absence on the consultation process and the outcome of it.

6.4 Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

The Respondent denies that it subjected the Claimant to a detriment as alleged. In the alternative, it asserts that it was a proportionate means of effectively managing the consultation process and that it ultimately selected the best candidate for the role.

7. **REASONABLE ADJUSTMENTS**

7.1 What is the PCP relied on by the Claimant?

The Claimant relies on the following PCPs:

(i) The requirement to work onsite from April 2016 – September 2016.

(ii) The requirement to hot desk from April 2016 – September 2016.

(iii) The requirement to work at a minimally equipped work station from April 2016 – September 2016

(iv) The requirement to use a printer which was not located in the same office as her desk from April 2016 – September 2016.

(v) The requirement for the Claimant to carry out her own administrative work from April 2016 – September 2016.

8.2 What is the substantial disadvantage relied on by the Claimant?

In relation to [8.1] above, the Claimant assets that the way in which the Respondent acted increased her need to be mobile which caused her pain. She also asserts that it exacerbated her stress and consequently the effects of her disability.

8.3 If so, did the Respondent take all steps as were reasonable in the circumstances to prevent the PCP having that disadvantageous effect?

7.4 Did the Respondent know, or could have reasonably been expected to know, that the Claimant has the disability and that she was likely to be at a substantial disadvantage compared with persons who are not disabled?

7.5 Would the adjustments suggested at paragraph [7.6] have been reasonable in the circumstances?

7.6 The Claimant asserts that the Respondent should have made the following reasonable adjustments under s.20 of the Equality Act 2010:

(i) To facilitate her working from home

(ii) Not require her to hot desk.

(iii) To provide her with a well-equipped desk.

(iv) To provide her with a desk close to a printer.

(v) Provide her with a personal assistant/ dedicated administrative support.