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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mrs H Ohene-Mpiani	**AND**	University College London Hospitals NHS Foundation Trust

Heard at: London Central **On**: 4-8 June 2018

Before: Employment Judge Glennie
Ms Church
Ms Moreton

Representation'
For the Claimant: Ms N Owen, of Counsel
For the Respondent: Mr T Cordery, of Counsel

REASONS

1. By her claim to the Tribunal the Claimant, Mrs Ohene-Mpiani, makes complaints of unfair dismissal; discrimination arising from something in consequence of disability under section 15 of the Equality Act 2010; failure to make reasonable adjustments contrary to Section 21; victimisation contrary to Section 27; and harassment contrary to Section 26. The Respondent, University College of London Hospitals NHS Foundation Trust, resists those complaints.

2. The hearing at this stage was on the issues as to liability only and these reasons relate to those issues. There is a draft list of issues that the Tribunal has used and a copy of that will be attached to these reasons. There is an issue as to disability, and the evidence on that will be set out in the section of these reasons dealing with the Tribunal's conclusions.

3. The Tribunal is unanimous in the findings that follow.

4. There was an agreed bundle of documents, and page numbers in these reasons refer to that bundle.

Time limits

5. The first issue that we will deal with is that relating to time limits. We do so because when the Claimant's evidence had been completed Mr Cordery asked the Tribunal to determine the jurisdictional issues as to time limits at that stage, and we agreed to do so. We gave our decision but reserved our reasons and in those circumstances, we will address this issue first.

6. Ms Owen conceded that the complaints had been presented outside the relevant primary limitation periods of three months from the effective date of termination in respect of unfair dismissal and three months from the act complained of under the Equality Act. The effective date of termination was agreed as being 17 May 2017 and it was common ground that the extension provided by the ACAS early conciliation period meant that the time limit for the complaint of unfair dismissal expired on 2 September 2017. It was also agreed that the time limit for the discrimination complaints expired on 10 August 2017, the last act being the decision to dismiss, which was made on 25 April 2017.

7. The claim was presented on 4 September 2017. It followed, therefore, that the Tribunal had to consider the test for an extension of time under the relevant legislation. In respect of unfair dismissal, section 111 of the Employment Rights Act provides in sub section 2 that an Employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal (a) before the end of the period of three months beginning with the effective date of termination or (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. In relation to discrimination, section 123 of the Equality Act 2010 provides in sub section 1 that proceedings on a complaint within Section 120 may not be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates or (b) such other period as the Employment Tribunal thinks just and equitable.

8. The Claimant did not address this aspect in her witness statement, but the Tribunal allowed oral evidence in chief on it. The Claimant's evidence on the point was in fact somewhat limited. She said that during the time of the ACAS conciliation process a firm of solicitors named Knapp Law had been assisting her and then on about 4 August 2017 she instructed her current solicitors, Slater and Gordon. She said that she was not very sure about what the position as regards to preparedness of the case was when she left Knapp Law, and it might have been the case that Knapp Law had drafted the ET1 and that she then moved over to Slater and Gordon. Later in cross examination the Claimant confirmed that she had had other solicitors, Dean Manson, advising her in May 2016 and, as we will mention, they drafted the appeal against the employee complaint that arose at that time.

9. The Claimant did not in fact advance an explanation of why the claim was presented out of time, she simply gave an account of which solicitors were instructed at which point. In particular, as we have said, she instructed Slater

and Gordon on about 4 August 2017 which was a little less than a month before the expiry of the primary limitation period for unfair dismissal and about six days before the expiry of the primary period for the complaints under the Equality Act.

10. In submissions Ms Owen referred to further information given in response to the Case Management Orders, that appears at page 52(a) in an email of 20 December 2017. That says that the Claimant became aware of the dismissal when she received the letter from the Respondent confirming the same on or around 20 May 2017, this referring to the letter recording the decision to dismiss the Claimant which is dated 17 May 2017. Ms Owen then referred to a document at page 902(a) which the Respondent had disclosed in the course of the general disclosure of documents. This is a proof of delivery document from the Royal Mail which demonstrates that delivery of the letter was effected on 17 May.

11. So far as the not reasonably practicable test is concerned, Ms Owen submitted that at the time of presenting the claim the Claimant was reasonably ignorant of the correct deadline for doing so, as her recollection was that she had received the dismissal letter on or around 20 May, as stated in the further information, which would have meant that time expired on or around 5 September.

12. The Tribunal found against that submission for the following reasons: -

12.1 There is no evidence that the Claimant or her solicitors had this analysis in mind at the relevant time. The Claimant has not given any evidence about her state of knowledge or belief about time limits.

12.2 Assuming that in August 2017 the Claimant's belief about the date on which she received the letter was as stated in the further information i.e. that it was on or around 20 May, we find that she was not reasonably ignorant of the deadline for presenting a claim of unfair dismissal. She had a letter dated 17 May and no firm evidence about when it was that she received it. Her own belief was uncertain because it was expressed as being "on or around 20 May". We find that it was not reasonable for the Claimant to assume, if she did, that the date of receipt was in fact 20 May, rather than some other date around that time but on or after the date on the letter. On this approach (and we repeat that there is no evidence from the Claimant that this is what actually happened), she chose to delay presenting the claim until a date that was within time if the letter had been received on or after 20 May but was not if it had been received two days or more earlier: and all of this in circumstances where she did not recall the precise date on which she had received it. We find that this does not mean that it was not reasonably practicable to present the claim in time. The Claimant could have done so, but instead took what amounted to a chance in the matter. In those circumstances we find that there is no jurisdiction to hear the complaint of unfair dismissal.

13. The test is different in relation to the complaints under the Equality Act. We were referred to the case of **British Coal Corporation v Keeble [1997] IRLR 336** which directs the Tribunal to consider all the circumstances of the case

and to have regard to the prejudice each party would suffer as a result of the decision either way. It is suggested that guidance can be found in the particular factors listed in Section 33 of the Limitation Act 1980. In **Robertson v Bexley Community Centre [2003] IRLR 434** the Court of Appeal stated that the burden is on a claimant to convince the Tribunal that it would be just and equitable to extend time.

14. We have already set out the length of and (to the extent given) the reason for the delay. The length of the delay was, we found, not a particularly significant factor either way. The reason, or rather the lack of explanation of the reason, would be a factor going in to the balance against exercising the discretion to extend time. The cogency of the evidence was unaffected by the delay, as was conceded by Mr Cordery, and that is a factor that goes in to the balance in favour of exercising the discretion.

15. As to the relative prejudice to the parties, the Tribunal accepted Ms Owen's submission that the position in that regard was somewhat different from what it might have been if this aspect were being considered at a Preliminary Hearing. All the trial preparations had self-evidently been completed and the Tribunal had heard the Claimant's evidence. It is true that the Respondent's witnesses would still have to be heard and submissions on liability would have to be made but that would involve, it was thought, (and proved to be correct) about a further one and a half days or so of hearing, rather than the full amount of the trial. It seemed to the Tribunal that there would be some prejudice to the Respondent in continuing at this stage because there would be some further days of hearing, but that this was limited. On the other hand, the prejudice to the Claimant in not extending time would be that she would be deprived of a trial of her claim when the Respondent was ready and able to give evidence in respect of her complaints and where she herself had already done so. We found that the relative prejudice to the Claimant would be greater than that to the Respondent. Looking at the matter overall, the Tribunal concluded that it would be just and equitable to continue to hear the Equality Act complaints.

16. We turn, then, to the substantive issues in respect of those complaints.

The Evidence and Findings of Facts

17. We heard evidence from the Claimant on her own behalf, and on behalf of the Respondent we heard evidence from Mr Sam Abdul, Miss Memuna Adam, Mr Lee Brown, Miss Grace Chiku, Mr Frimpong Fosu-Nyame and Miss Vanessa Sweeney.

18. By way of background, the Claimant has had in her employment with the Respondent a history of sickness absence. We will explain the relevance of that in due course. But in particular there were three substantial blocks of sickness absence, one from 12 September 2013 – 3 February 2014, the second from 3 September 2014 – 2 June 2015, and the third from 9 December 2015 – 26 May 2016.

19. There were various Occupational Health (OH) assessments over the years but we consider that we can begin really with that at page 308 which was made during the third period of sickness absence. That OH report, addressed to Mr Abdul, says that the Claimant had suffered from health issues, and raises work related stress and other conditions which were being managed, including musculoskeletal problems and others. The report stated that the Claimant was currently signed off work due to work related stress following the acute onset of physical and emotional symptoms, which her GP attributed to stress. There were specific questions that were answered about matters which included when the Claimant was likely to return to work. The OH advisor said that the Claimant was temporarily unfit to return pending further advice from her GP, and the advisor continued stating that she did not think that the disability discrimination provisions of the Equality Act applied to the Claimant's condition. That is a feature that appeared throughout the OH assessments when that aspect was mentioned.

20. Meanwhile, on 6 March 2016 at page 318 the Claimant raised a grievance (in lay terms) but in the terms of the process that the Respondent operates an employee led complaint (ELC). That raised seven points at pages 319-320. These were complaints against the Claimant's line manager, the Ward Manager Miss Adams, involving matters such as micromanagement and controlling behaviour, unrealistic work schedules, complaints about annual leave and complaints about what had been said in respect of the Claimant's sickness absence, saying that this had been recorded as having no reason. There was a complaint about interference with her shoes and a complaint about being initiating a ward transfer without the Claimant's consent or knowledge.

21. That was followed on 28 April 2016 at page 414 by another OH report, again addressed to Mr Abdul. This referred to the Claimant's health problems and at page 415 recorded "in terms of work Helena informs me that her sick note will end on 30 April 2016. She is keen to return to work but not in the current department where the work-related issues started as she perceives that returning to this environment will affect her health again when she eventually returns. She has met with Human Resources recently and I understand that the work-related issue is currently under investigation". Then on page 416 the advisor said that there might be a discussion about temporary redeployment.

22. Then on 1 May 2016 at page 324 there was further advice from OH stating that the Claimant was fit for a phased return to normal clinical duties. That advice included a recommendation for a stress risk management.

23. There was then some uncertainty in the evidence about whether a meeting took place on 10 May 2016. Mr Abdul's recollection was that although there had been a meeting timetabled for that date, it did not take place and that the relevant meeting occurred on 27 May. In the course of our deliberations we noted a document that we had not been taken to in the course of the hearing at page 474. This was an email from the Claimant to, it seems, a member of the Respondent's HR department referring to a return to work meeting on 10 May, so

perhaps indicating that the meeting did take place and Mr Abdul's recollection may be wrong. But nothing really turns on this point.

24. In the event the Claimant was invited to a meeting on 27 May 2016. That meeting certainly took place, and it gave rise to a letter of the same date at page 543 from Mr Abdul. What had been discussed was the possibility of using annual leave to prolong the Claimant's phased return, which she had declined, and that what was intended was that there would be a temporary redeployment to gynaecology outpatients at University College Hospital (UCH). That is a separate location from the one at which the Claimant worked which was at the Royal National Throat Nose and Ear Hospital (RNTNEH). The letter gave details of the phased return over a period of four weeks. The reason that was given for the redeployment to UCH was that the Claimant, it was said, did not want to be at her usual location which was identified as C ward at RNTNEH, while her complaint was ongoing in respect of Miss Adams.

25. That complaint was then considered by the Senior ER advisor Ms Moore and the outcome of that was given on 24 June 2016 at pages 561 onwards. Essentially the outcome was that the Claimant's complaints were not upheld, and it is evident from the content of that letter they were essentially not upheld as a matter of fact, Ms Moore stating that the things complained about had not in fact taken place in the way that the Claimant said they had.

26. This then is during the period that the Claimant was working at UCH, and still within that period on 30 June 2016 at page 570 the Claimant sent an email to Mr Abdul which read as follows: -

> "You had always mentioned in our meetings that I am returning to RNTNE after may phase return but haven't written to confirm that I am coming back to RNTNE. I am not happy to come to RNTNE under you as I have been a victim of harassment and bullying from MA [Ms Adams]. Since I have been accused inaccurately of being under informal performance management by you as MA has confirmed, with my current diagnosis I don't think I would want to come to RNTNE at the moment. Can you please ask .....for the recommendation Occupation Health made for my redeployment which is six months and more."

The recommendation referred to is the one that can be seen at page 462 in an email from the OH advisor which did indeed refer to a potential long term six months or longer redeployment until the work issue was resolved.

27 Mr Abdul subsequently sent an email at page 571 which read

> "I have been given formal confirmation that your employee led complaint has been successfully concluded and feedback has been provided to you.....therefore I am very keen to make sure we bring you back to RNTNEH. I would like to meet with you on 1 July 2016 at 10am to discuss the next step and support required to bring you back to RNTNEH.

28 This was timed later than the Claimant's email of the same date, but the terms of it do not read like a reply and it is not clear to us what the exact sequence of those emails was. But in any event the Claimant replied on the same day saying that she was unable to attend the meeting as she could not arrange for representation on such short notice. Following that, Mr Abdul observed that his view was that the meeting did not require representation and at this point that he sent an email to an HR advisor saying that he found this unacceptable. The advisor suggested that this might be a conduct issue and could be addressed via Employee Relations.

29 Then on 1 July 2016 at page 578 the Claimant sent another email to Mr Abdul about the proposed return to the RNTNEH. She said that he had telephoned and intimidated and bullied her to come straight to RNTNE to a meeting. She said that she was not refusing to come to the meeting, she wanted a third person with her because, as she put it, he always gave inaccurate information about her. The Claimant concluded saying "may I take this opportunity to tell you again that none of my issues are resolved". Mr Abdul also wrote about the telephone conversation that had taken place. At pages 579-580 he said that the Claimant had failed to attend the meeting and he said, "it is the expectation that you turn up for work as advised from Monday 4 July 2016 at 9am." He said that failure to attend would be deemed to be unauthorised absence and might lead to disciplinary action.

30 Mr Abdul and the Claimant met on 4 July and that gave rise to a letter from Mr Abdul at pages 586-587. This recorded that the Claimant was intending to Appeal against the ELC outcome. Mr Abdul wrote that he could confirm that the Claimant would be returning to B and C ward at the RNTNEH and he referred to the expectation that the behaviour that had been complained about on the Claimant's part should not be repeated. He said that there would be support for the Claimant and that she would have a mentor and regular supportive meetings with her line manager. Over the page Mr Abdul recorded that the Claimant had requested her full entitlement of annual leave and that she would therefore take three weeks leave between 5 July and 25 July.

31 The next matter that arose was that the Claimant did indeed raise an appeal against the ELC outcome at page 590 on 7 July 2016. This, as we have mentioned, was drafted by solicitors that were then acting for her, Dean Manson. On 22 July the Claimant's GP wrote a letter at page 629 saying that she had been diagnosed with hyperventilation syndrome following a referral because of persistent chest pain and breathlessness on exertion. The GP wrote: "I believe her condition was likely caused by the stress she has been going through at work, for that matter I should be most grateful if she could be redeployed until the issues at work have been resolved".

32 Following this the Claimant as of 25 July 2016 moved to agreed unpaid leave. A further OH report was produced on 28 July at page 647 referring to the hyperventilation syndrome. This recorded that hyperventilation tended to occur when the Claimant was more anxious and in particular when she was working on C ward. It recorded that during the three weeks that she was temporarily redeployed to gynaecology she was symptom free at work, and that the only

other precipitating factor that seemed to be when she was climbing stairs, which could occur either at home or at work. The advisor said that this was a difficult situation from the OH perspective: relationships and any concerns about work performance needed to be openly addressed and resolved for the Claimant to make a successful return to C ward, and if that was not possible then the Claimant would like to be redeployed. The advisor said that provided that the Claimant was successful and happy in an alternative working environment then it was likely that her hyperventilation symptoms would reduce. The advisor added that if an alternative work area were found then the Claimant would be fit to undertake all work duties apart from night shifts, that being a problem in relation to the Claimant's tinnitus.

33 Then on 5 August at page 656 Mr Abdul agreed to extend the Claimant's unpaid leave until 31 August 2016. That was following an email exchange at page 653 where the Claimant pointed out that she was taking unpaid leave until 5 August, then referring to the need for treatment and hence the extension to 31 August.

34 There then took place on 1 September 2016 another meeting attended by the Claimant and Mr Abdul and an employee relations advisor, Ms Mahadiq. That gave rise to a letter of the same date at pages 664-666. In this letter Mr Abdul recorded the Claimant's current state of health and the OH advice to date. He recorded that the Claimant said that she was currently fit to return to work, but that this depended on the work environment. Then on page 665 Mr Abdul wrote the following:

> "I advised you that as you are currently not fit to return to RNTNEH we will take further advice on your fitness to work from Occupational Health following the Appeal Hearing. I also said that the Appeals panel might recommend mediation, you said that you did not want to opt for any mediation. I asked you how we could support you in returning to work, you said you wanted to be redeployed to any nursing role, I advised you to approach Natalie Shomash [an advisor]. I encouraged you to look for opportunities with the support of Human Resources Business Partner whilst we wait for the Appeal Hearing".

35 There was then discussion about whether the Claimant should be recorded as continuing with sickness absence or unpaid leave, but subsequently Mr Abdul recorded that he was able to agree to the Claimant taking some of her forthcoming annual leave, and he had therefore allowed two weeks annual leave effective from 1 September. He said there would be an effort to find a temporary redeployed post, and then he recorded: "you confirmed with me that you were able to work in any department but could not work nights as it has an impact on your tinnitus". He concluded by referring to the staff counselling service that was available.

36 Moving to 14 and 15 September 2016, there was an exchange of emails again between the Claimant and Mr Abdul. On 14 September, Mr Abdul wrote that the Claimant's annual leave would come to an end on Friday 16 September and he added: "Can you confirm you are still fit and are happy to return to work.

If you want, I would be agreeable to extending your leave until 20 September, can you let me know either way". Then on 15 September he referred to that email, said that he tried three times to contact the Claimant by telephone without success, and that in the absence of contact that he had organised for the Claimant to work with the RNTNEH out-patients department admissions on 16 and 19 September. He said this was an interim placement whilst the outcome of the ELC Appeal was awaited.

37 On 19 September, Mr Abdul sent another email to the Claimant recording that she had not attended work on 16 September and that it was not acceptable for her to email non-attendance half way through the day. He said this because at 1.30pm on that day the Claimant had sent an email saying that she had just seen Mr Abdul's email, that she was fit to come to work and that he could extend her annual leave if it was all right with him. Mr Abdul continued that he had arranged a temporary redeployment, again with the admissions team at the out-patients' department, and that the Claimant should report for work on 21 September. He said that once the outcome of the Appeal was known he would arrange a further 1:1 to discuss her work options.

38 The Appeal Hearing in fact took place on 20 September, conducted by Mr Brown. Then on 21 September, which was the date on which the Claimant was due to attend the out-patients' department according to the arrangement made by Mr Abdul, she did not do so, and at about 1.30pm on that day Mr Abdul sent an email asking what had happened. The terms in which he put this were that it was expected that the Claimant would attend work, that she had not arrived or made contact, and he said, "could you kindly make contact to confirm you are ok." With that email there was sent as an attachment, and also sent by post, a letter at pages 808-809. In this Mr Abdul repeated that the Claimant had not attended work and that he tried to make contact three times but there was no answer. He asked her to let him know that she was safe and to advise of the reasons for her absence. He said that if he had not heard from the Claimant by 23 September he would be recording her absence as unauthorised and unpaid from the first date of absence.

39 On 23 September the Claimant sent an email to Mr Abdul at page 723 which read: "I am very well thank you, I had so many appointments yesterday, got home very late yesterday, started reading my emails this morning. I had requested for six months career break when we went for the ELC meeting, I am still waiting for an outcome". In her witness statement at paragraph 164 the Claimant's evidence was that she asked for redeployment and/or a career break at the meeting with Mr Brown. Her evidence was that he said that he would think about it. Mr Brown's evidence was that he did not say that, the matters were raised, but that he said that it was not up to him and he told the Claimant how she could apply for either or both of those according to the Respondent's processes.

40 Ultimately, and although we will refer in due course to the letter that followed with the Appeal outcome, the Tribunal concluded that it was not necessary to decide as between those differing accounts. The significant point was that either way as at 23 September the Claimant had not been told that she

would be getting a career break. Furthermore, the Tribunal agreed with the point that was put to the Claimant that, in any event, awaiting the outcome of a question about a career break, if that was what she was doing, would not be a reason for failing to attend work and especially not for failing to attend without giving any notice on 21 September.

41 Mr Abdul sent a further email on 26 September 2016 that referred to the Claimant's non-attendance and said that he had not been given a justifiable reason for absence. He repeated that there was a temporary redeployment at the out-patients department and said that the Claimant was expected to attend on 27 September. He also repeated that he would plan a 1:1 meeting once the Appeal outcome was known and said that this was currently absence without authorisation for which the Claimant would not be paid. This was followed at page 725 by another letter from Mr Abdul to the Claimant. This recorded that there had still not been any communication regarding the Claimant's absence and this was classified as unauthorised. The letter continued: -

> "I must warn you that if you fail to contact me by 6 October 2016 I will have no option but to commence an investigation and disciplinary action under the Trust's Disciplinary Policy and Procedure. This will require a statement in writing from you explaining the reasons for your unauthorised absence. I must advice you that if this procedure is invoked it may result in disciplinary action leading to sanctions up to and including dismissal on the grounds that you have failed to fulfil the terms and conditions of your contract of employment".

Then Mr Abdul referred again to the staff Psychological and Welfare Service.

41 When the Claimant was asked about this letter in cross-examination she confirmed that she had received it, at least by email, that she understood it, and that she effectively decided not to reply to it. There was another letter on 2 October at page 732, where Mr Abdul said that he was concerned that he had not heard from the Claimant since 16 September (that was a mistake, he had heard from her on 23 September) and he referred to the efforts to contact the Claimant by phone and by letter. He again expressed the hope that the Claimant was well and referred to the Staff Welfare Service, but then he continued that he considered that he had no option but to request an investigation under the Performance and Conduct Procedure, and he said that this would be carried out by Ms Lorna Pettigrew as Senior Employee Relations Advisor.

42 Ms Pettigrew then sent at page 735 on 11 October a letter notifying that the investigation would be carried out. This contained an error in that it said that the Claimant had been absent without authorisation since 21 December 2016; it was of course September. That error was subsequently corrected in another letter on 20 October 2016 at page 749. Between the two, however, the Claimant at page 835 sent a reply to Ms Pettigrew. She made substantially two points which were in the following terms: -

> 42.1 That she had written several emails to the matron, that is Mr Abdul, as far back as the start of the year and had not received a reply to

date. The Claimant wrote: "In those communications I highlighted several aspects regarding the behaviour of two staff personnel that had been harassing and bullying me with no just cause. This behaviour has had an extremely detrimental effect on my health and wellbeing". And then she said more about those matters. She queried whether the investigation would be provided with impartial and unbiased information.

42.2 Secondly, the Claimant wrote: "….I find it inconceivable that I would be able to recover my health and wellbeing given that the redeployment request suggests that I would be working in administration as opposed to what I am professionally trained for".

That is a reference to the out-patients' department role, and the Claimant explained in her evidence that it was her perception that this would involve administrative rather than nursing duties, a point that was disputed by the Respondent although clearly the duties would be different in out-patients from what they would be on a ward.

43 Ms Pettigrew replied on 18 October at page 745, saying that the Claimant's response had not addressed the allegation in the original letter. She attached to her letter a list of questions which are at page 822 and which were designed to elicit the information that she sought. The Claimant then replied on 20 October at page 823 with an email in which she said that there were two main reasons why she found it almost impossible to respond to that letter of 18 October. The first point that she made was really the same as the first point made previously about the communications to Mr Abdul and her line manager, and she said that she thought it only fair that responses be provided in order to alleviate the sources that were causing her stressful existence. The second was effectively about the error in the date, because she said it was impossible to respond because the central allegation was completely wrong and impossible to sustain as it referred to a future event. That prompted the revised letter that we have already mentioned.

44 There then followed on 3 November 2016 Mr Brown's outcome from the Appeal in the ELC, at pages 753-758. The Appeal was not upheld. In addition to explaining why that was, Mr Brown concluded his letter in the following terms: -

"As we discussed in the Hearing I have some concerns in terms of your perceived issues regarding where you are currently working and I asked you what outcome you were seeking to this process. You advised me that you do not wish to return to RNTNEH and that you request a six-month career break to recover from the stress that this process has caused you. As stated in the meeting I am not in a position to action your request, furthermore I do not believe that the best course of action is to completely remove a staff member from their department and am therefore recommending that mediation is carried out and that you try and work with Sister Adams to agree and best course of action. Should you wish to request a transfer I would advise you to contact Natalie Shamash…….and she will be able to advise you on the correct process. Should you wish to apply for a career break you will need to complete the application form

> within the career break policy for RNTNE and provide this to your manager for their consideration".

45 The Claimant sent an email to Ms Pettigrew on 14 November at page 759 dealing with the revised investigation letter, correcting the date and saying that the letter had been promised by first class post and that she was still waiting to receive that. On 15 November 2016 at page 827 Ms Pettigrew responded to this, she repeated in her email the error about the date referring to December but attached a copy of the corrected letter and she said in the email that if the Claimant wished to respond to the allegation, would she do so by 21 November. The Claimant did not respond further to that allegation and some time later, on 15 March 2017, Miss Pettigrew produced an investigation report at pages 763-768 which set out the matters to which we have already referred.

46 The practical effect of that report was that there was then generated on 10 April 2017 at page 765 an email to the Claimant from the Employee Relations Department, with a letter attached inviting her to a Formal Disciplinary Hearing on 25 April 2017 to be conducted by Ms Sweeney. That invitation letter, the Respondent says, should have been dated 31 March and indeed that is the date given for the attachment, although the date on the letter is 6 March. Be that as it may, it was emailed to the Claimant on 10 April and by this time the Claimant was en route to Ghana where she would be spending a month. She in fact left for Ghana on 10 April itself. She had not informed the Respondent that she was intending to do that or that she would be away from her home or not available for communication.

47 The Claimant told the Tribunal that she had made no arrangements for checking her emails while she was away. She further said that at this point in the history of the matter she thought that she was being pushed out by the Respondent, and that was really the reason why she did not inform them of her whereabouts or take any steps in that connection.

48 Ms Sweeney then proceeded with the disciplinary meeting on 25 April in the Claimant's absence. She gave her outcome at page 899 onwards in a letter of 16 May 2017, by which time the Claimant had returned from Ghana, having arrived back in the UK on 10 May. Ms Sweeney referred to the efforts that had been made to contact the Claimant, which included attempting to call her on 20 and 24 April to confirm her attendance and saying that those calls had not been successful. Ms Sweeney set out the management case and at page 901 said that the panel – effectively meaning herself - had asked the following questions of management (i.e. Mr Abdul): -

> 1. "In the Management Pack there is reference to a long term sickness absence meeting on 1 September 2016. Was Helena off sick before 30 June 2016? Sam [Mr Abdul] explained that you were on long term sickness absence from 9 December 2015. Sam informed the panel that you had requested six weeks annual leave on either 7 or 8 December 2015 and that this request was denied due to lack of available annual leave, you were given the option of unpaid leave but declined. The long-term sickness absence started 9 December 2015 and continued until

> mid-April 2016. The reason for sickness was stress related to your employee led complaint. Occupational Health advised that you were fit to return to work, however you did not wish to return to RNTNE due to your ELC. Sam explained that you were offered temporary redeployment at UCH gynaecology out-patients, however after this period the Matron did not wish for you to return, therefore a temporary position had to be found elsewhere within RNTNE.
>
> 2. "I noted that the ELC Appeal Hearing was on 20 September 2016. You did not return to work on 21 September and the outcome letter from the ELC was sent to you on 3 November 2016. I have to acknowledge the delay in sending you the outcome, did you Sam have the outcome, Sam confirmed that he did not have the outcome in the interim period".

49 Ms Sweeney then said she was upholding the allegation that the Claimant had been absent without authorisation since 21 September 2016. She said that the Claimant had been due to return to work on 26 September but had not done so, the last contact from her was on 14 November and the Respondent had had no communication from her since that date. She said that it was clear that management had followed a fair process and made every reasonable effort to communicate with the Claimant. Ms Sweeney said that she recognised that the ELC Appeal Hearing had taken place on 20 September but the outcome letter was not sent until 3 November, and she said it would be a reasonable expectation that it would have been sent sooner. She noted the point about the incorrect date in the initial letters of allegation. Ms Sweeney recorded that the mitigation that had been identified in the management case referred to the Claimant's concerns that she was being bullied and that this reflected the correspondence earlier on from the Claimant. Ms Sweeney said that those concerns were in her view addressed fairly and appropriately through the ELC investigation and Appeal. She then wrote this: -

> "I have found that your conduct is a severe breach of trust and confidence between you and the Trust and as such we cannot continue to employ you. You are therefore dismissed from the Trust with immediate effect. I carefully considered whether or not a different sanction could be imposed and having considered all the alternatives I felt that sorry, dismissal was the only option".

The letter stated that there was a right of appeal: the Claimant did not raise an appeal.

The applicable law and conclusions

50 The first issue that the Tribunal has considered is whether the Claimant was a disabled person within the meaning of the Equality Act. Section 6 of the Act provides as follows:

> *(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 effect on P's ability to carry out normal day-to-day activities.

51 Paragraph 2 of Schedule 1 to the Equality Act makes the following provision about 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 concerned.

(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.

52 Section 212(1) of the Act defines "substantial as meaning "more than minor or trivial".

53 The Claimant relies on two conditions as giving rise to disability, namely tinnitus and work related stress.

54 As we have already observed, we have noted that the advice that the Respondent received from the OH advisors was that the disability provisions in the Equality Act appeared not to be engaged. It seems to us that this was primarily addressed to the condition of work related stress; but in any event, whatever advice was given by the OH advisors or medical advisors generally, that does not bind the Tribunal and we have to consider the issue on the evidence that we have heard.

55 Turning first to the condition of tinnitus, the Claimant produced an impact statement, the relevant part of which is at page 57. She said the following about her condition of tinnitus. This was diagnosed when the Claimant was aged 35, in 1997, and she said that tinnitus is an incurable condition, is characterised by unbearable noises in the affected ear, is worsened by stress and tiredness. The Claimant said that the effect for her was a constant "shushing" noise and dull earache and itchy ears on a daily basis, that tinnitus could make it difficult for her to sleep, and that she could also have some imbalance. The Claimant continued:

"I have been referred to the Royal National Throat and Ear Hospital……I have been given several treatments such as MRI scans, investigations, a sound ball to help me sleep and hearing therapy. I have also tried Bio-energy treatment……"

"My tinnitus will continue for the rest of my life. I manage it with the tinnitus retraining techniques given to me by medical professionals and I also use sound therapy."

56 In her oral evidence the Claimant said that, because she does not sleep well, her concentration is affected, as are her memory and relations with her

family. Sometimes she does not follow what is said because of lack of concentration. She said that the tinnitus never goes.

57 So far as other medical evidence is concerned, in her skeleton argument Ms Owen highlighted extracts from the medical evidence, the OH records, and others, including in particular the following:

57.1 On 30 June 2014 the Claimant's consultant audiological physician said that she had considerable sleeping difficulty because of her tinnitus.

57.2 On 17 July 2014 OH said that the Claimant had been unable to sleep most of the time, and that this left her feeling tired, fatigued and exhausted.

57.3 On 17 June 2015, the Claimant continued to be unfit for nights due to longstanding tinnitus disturbing her sleep.

57.4 On 28 July 2016, it was recorded that the Claimant struggled with night shifts because she found her tinnitus increases.

58 The Tribunal found that the condition of tinnitus has and had at the material time a substantial adverse impact on the Claimant's ability to carry out the normal day-to-day activities of sleeping and participating in conversations. This is a lifetime condition and we find that it gives rise to a physical impairment which has a substantial adverse impact on the Claimant's ability to carry out normal day-to-day activities. Therefore, we find that the tinnitus does give rise to disability within the statutory definition.

59 Turning to the condition of work related stress, it has been recognised in the decided cases that this can be a difficult area for a tribunal to judge. In **J v DLA Piper UK LLP [2010] ICR 1052** Underhill J made some observations about this area of the law. These were repeated by HHJ Richardson in paragraph 54 of the report of **Herry v Dudley MPBC [2017] ICR 610.** In summary, when considering the question of impairment in cases of alleged depression, the Tribunal should be aware of the distinction between clinical depression and reaction to adverse circumstances. While both can produce symptoms of low mood and anxiety, only the first should be recognised as giving rise to disability

60 In relation to work-related stress, the Claimant said the following in total in her impact statement:

"7. As mentioned at paragraph 6, I was told I was going to be closely monitored. I began to suffer from work-related stress in 2012. This revelation made me extremely anxious as the idea of being constantly watched whilst working as a full time permanent member of staff filled me with constant dread when working on my ward. This consequently affected my sleep and overall well-being. The symptoms of work-related stress are that I worried all the time and started having trouble breathing and concentrating. I was subsequently

diagnosed with hyperventilating syndrome. This causes spasms in my arm and chest pain.

"8. I was absent from work for the periods 2013-2016 because of the work-related stress."

61 In submissions, Ms Owen referred to extracts from the medical records in relation to work-related stress. The following are all from OH reports.

61.1 23.1.2014: It is recorded that the Claimant attributed her stress to work-related issues.

61.2 1.5.2015: There appeared to be workplace issues affecting the Claimant and her GP had mentioned work stress on the fit note.

61.3 13.1.2016: The Claimant was currently signed off work due to WRS following acute onset of physical and emotional symptoms, which her GP attributed to stress. The Claimant continued to exhibit emotional and physical symptoms and reported her perceived WRS issues continued to affect her mood, appetite, concentration and sleeping pattern. The adviser said that there was evident difficulty concentrating in the conversation and that the Claimant was too upset when talking about the work issues.

61.4 28.4.2016: The Claimant had been experiencing WRS, which she perceived had aggravated her health issues. She manifested physical and emotional symptoms related to anxiety included altered sleep, mood, appetite and concentration levels when seen in January.

61.5 28.7.2016: Her hyperventilation tended to occur when she was more anxious, and in particular when she was working on C Ward.

62 The Tribunal observed that these notes refer to physical and mental symptoms related to anxiety without any specific reference to the impact on normal day-to-day activities, save for the stated effect on the Claimant's sleeping pattern. The Tribunal also noted that the evidence was that the Claimant did not suffer from work-related stress when she was away from C Ward. In particular, she had no such problems when she was working at the UCH gynaecology ward.

63 Taking all of this into account, we find that the Claimant has not established a mental impairment in relation to work-related stress, and that what she experienced falls within what has been characterised in the authorities that we have referred to as a reaction to adverse circumstances. This was a reaction to the circumstances that she encountered when working on C Ward.

64 We therefore find that the Claimant was not subject to a disability in relation to the work-related stress. We do so in part because there was no mental impairment demonstrated and in part because the evidence that we have quoted, although referring to an effect on sleeping pattern, does not show that there was a substantial adverse effect on the day-to-day activity of sleeping.

65 The Tribunal has nonetheless gone on to deal with all the other issues arising in respect of the various complaints. These conclusions, which we will set out, hold good even if, contrary to our decision, the work-related stress gave rise to disability. So, in the relevant parts of our reasons that follow, we will express our conclusions by reference to the Claimant's conditions and disabilities, in the plural. We emphasise, however, that is not in any way intended to derogate from the conclusion we have reached that there was not a disability arising from work-related stress, but rather that our conclusions would apply were there such a disability.

66 We turn then to the substantive complaints under the Equality Act. With regard to the burden of proof, section 136 provides as follows:

> *(2) If there are facts from which 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.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

67 We have reminded ourselves of the two stage test that appears in authorities such as **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura International Ltd [2007] IRLR 246**. At the first stage, the Tribunal considers whether its findings are such that, in the absence of an explanation, it could properly find that discrimination occurred. The requirement that this be a finding that could properly be made means that a difference in treatment and in protected characteristic will not, without something more, be sufficient. The "something more" need not be very significant in itself, but there must be something to form the basis of a proper finding of discrimination.

68 We have also referred to the words of Lord Hope in the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** in the following terms, because we find that they are applicable here. "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."

69 The first complaint identified arises under section 15 of the Act, which and provides in subsection 1 that:

"*A person (A) discriminates against a disabled person (B) if (A) treats (B) unfavourably because of something arising in consequence of B's disability*……"

70 The first issue that arises here is, did the Respondent have knowledge of the Claimant's disability or disabilities? We repeat that we are approaching this on the contingent basis that there were in fact disabilities in both respects relied

upon. The Respondent clearly did have knowledge of both conditions through the Occupational Health reports.

71 The second issue was, was there unfavourable treatment of the Claimant. Here the Claimant relies on her dismissal, and we find that this was unfavourable treatment.

72 Was that treatment because of something arising in consequence of the Claimant's disability? The "something arising" that the Claimant identifies is her sickness absence record. This does not mean the same as the question of what was the reason or the principal reason for the dismissal as would arise in relation to an unfair dismissal complaint. The "something arising" must be a significant or at least a more than trivial reason for the treatment – see **Secretary of State for Justice v Dunn Employment Appeal Tribunal 0234/2016.** This issue involve considering Ms Sweeney's reason or reasons for dismissing the Claimant, which may in themselves be conscious or sub-conscious.

73 Ms Sweeney's evidence was that her reason for dismissing the Claimant was her absence without leave without from 21 September 2016 onwards, and that the Claimant's sickness absence record was wholly irrelevant to that decision. The Tribunal noted that the Claimant had not been absent sick after May 2016. The Tribunal accepted Ms Sweeney's evidence, and we find that neither consciously nor sub-consciously did the Claimant's sickness absence record affect the decision that she made in any way. Our reasons for so finding are as follows: -

73.1 Ms Sweeney's stated reason for dismissing the Claimant is, we find, clear and compelling. The Claimant had been absent without leave for around seven months. By the time of the disciplinary hearing she had made no contact with the Respondent for around five months. She did not attend the disciplinary hearing and after her initial reply to Ms Pettigrew, in which she did not address the relevant issues, she had not engaged with the process. As it turned out, the Claimant had left the country for a substantial period without informing the Respondent. In those circumstances a decision to dismiss the Claimant because of her conduct, being her absence without leave, was entirely understandable. There was no need for any other consideration to come in to play in order to explain that decision.

73.2 Ms Sweeney did not have detailed knowledge of the Claimant's sickness absence record. We accept her evidence that she knew from the papers supplied to her that the Claimant had had a lengthy period of sickness absence up to June 2016 and had then been cleared fit to return to work. She had seen the Occupational Health report of 28 July 2016 but she was certainly not informed in any detail of the earlier history.

73.3 We have already referred to the words on page 901 in the outcome letter which showed that Ms Sweeney asked Mr Abdul about

the Claimant's sickness absence. We find that this does not in any way suggest that sickness absence was a factor in the decision. It was logical that Ms Sweeney would ask about this in order to understand the background to the Claimant's absence without leave. The letter informing the Claimant of her dismissal made no reference to the earlier history of absence.

73.4 We find that, overall, there is ultimately nothing that suggests that sickness absence had any influence on Ms Sweeney's decision and no reason to doubt her evidence in that regard. It follows that the question of proportionate means of achieving a legitimate aim does not arise.

74 We turn then to the complaint under Section 21, namely failure to make reasonable adjustments. Section 20(3) provides for a requirement, where a provision criteria or practice of A's [the Respondent] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

75 We have reminded ourselves that the test is that of taking such steps as it is reasonable to have to take. This should not be confused with any different questions such as taking reasonable steps or anything of that nature.

76 So far as the issues are concerned, the PCP of requiring consistent attendance was said to be "broadly accepted" by the Respondent. We took this as meaning that, subject to any points about the exact language used, the principle concerned was accepted. The question then arises whether that PCP placed the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This was put in terms of the Claimant being at a greater risk of being subject to disciplinary sanctions as compared to non-disabled persons.

77 It appears to the Tribunal that there could only be such a greater risk if the Claimant had been disciplined in connection with her sickness absence, but she was not, she was disciplined in relation to her absence without leave. We found no reason to hold that a non-disabled person would have been treated differently in the same circumstances in relation to absence without leave.

78 If we are wrong about that and the Claimant was at a substantial disadvantage in that regard, then we find that with regard to the questions of transfer and career break, the Respondent did what it was reasonable to have to do. Mr Abdul and Mr Brown both informed the Claimant that she could apply for a transfer and/or a career break and told her how she could apply. The Claimant's case is that the Respondent should have taken the initiative and gone further than that and presumably either transferred her or offered her a transfer, or given her or offered her a career break. We find that it was not reasonable for the Respondent to have to take such steps. Generally, career breaks and transfers are consensual matters and it would be sufficient to indicate, as the

Respondent did, how a request could be made. Further to that, in the particular circumstances of the case we find these factors to be material:

78.1 The Claimant had not made an application for either of these.

78.2 The Claimant did not take up the temporary redeployment that Mr Abdul arranged. She did not even try it, but failed to attend altogether.

78.3 It is not obvious to the Tribunal what a career break would achieve in the long term given the nature of the Claimant's concerns about returning to C ward.

78.4 In any event, by the time of the Disciplinary Hearing the Claimant had not attended work for nearly ten months. Therefore, we find that the complaint of failure to make reasonable adjustments also fails.

79 The Tribunal therefore finds that the complaint of failure to make reasonable adjustments fails.

80 Turning then to victimisation, this complaint has not been withdrawn, but the Claimant said in evidence that she was not alleging that her grievance played any part in the decision to dismiss her and that suggestion was not pursued in cross examination or in submissions. We find that there is no basis on which it could succeed.

81 Turning to the complaint of harassment, section 26 of the Equality Act 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 and in sub section 4 provides that in deciding whether conduct has the effect referred to in sub section 1(b) each of the following must be taken in to account (a) the perception of (b) and (b) the other circumstances of the case (c) whether it is reasonable for the conduct to have that effect.
(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.

82 The Tribunal considered that it was debatable whether any failure to offer a career break or alternative employment could be regarded as unwanted given the Claimant's failure to apply for either of those. We would take it that the dismissal was unwanted. However, on the findings that we have made, none of these were related to the Claimant's disability. In particular, Mr Abdul and Mr Brown both told the Claimant that she could apply for a transfer and/or career break and how she could do it. They were not discouraging her from doing this or placing obstacles in her way, and we find there is nothing to suggest that their going no further and taking the initiative was related to her disability. Indeed, as we have observed, Mr Abdul did in fact offer temporary redeployment and therefore temporary alternative employment.

83 We have found that the decision to dismiss was not influenced in any way by the Claimant's sickness record and the same reasons that we have given in that regard lead us to conclude that this decision was not related to the Claimant's disability.

84 We also find that none of these matters were done or omitted with the purpose of violating the Claimant's dignity or creating a harassing environment for her. They were done or not done, as we have found, for the reasons that were given by the individuals concerned.

85 Finally, the Tribunal found that the Claimant's evidence fell short of showing that these matters had the relevant effect on her. In her oral evidence she complained about being harassed by the emails from Mr Abdul, which is not the complaint of harassment that is made in the issues. She said that she had lost faith in Mr Abdul and did not want to work in a hospital managed by him. But this, we find, does not amount to a violation of the Claimant's dignity or to the creation of a harassing environment. Nor would it be reasonable for the failure to offer a career break or alternative employment, or the dismissal, to have such an effect on the Claimant, because: -

85.1 The Claimant failed to communicate with the Respondent or to engage with the disciplinary process.

85.2 She also failed to apply for a career break or a transfer using the means that had been indicated to her.

86 So, the Tribunals conclusion is the following: -

86.1 It does not have jurisdiction to hear the complaint of unfair dismissal.

86.2 That the various complaints under the Equality Act are all dismissed.

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Employment Judge Glennie

Dated:. 1 November 2018

Judgment and Reasons sent to the parties on:

2 November 2018

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For the Tribunal Office