EMPLOYMENT TRIBUNALS

Claimant: Mrs A Allen

Respondent: Worcestershire Health and Care NHS Trust

Heard at: Birmingham

On: 13, 14,15,16, 20 and 21 January 2020;
23, 24, and 29 March 2022
plus days in chambers for reading on 21 and 22 March 2022 and deliberations on 30 March 2022.

Before: Employment Judge Miller
Mr N Howard
Mr K Hutchinson

Representation
Claimant: Mr J Horan – counsel
Respondent: Mr J Jarvis – counsel

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is well founded and succeeds
2. The claimant's claim of discrimination because of something arising in consequence of her disability is successful
3. The claimant's claim of harassment related to age is successful
4. The claimant's claim of harassment related to disability is successful
5. The claimant's claim that the respondent made unauthorised deductions from her wages is successful.
6. The claimant's claims of direct age and disability discrimination are unsuccessful and are dismissed
7. The claimant's claims of victimisation are unsuccessful and are dismissed
8. The claimant's claim that the respondent failed to provide her with a written statement of her main terms of employment is unsuccessful and is dismissed
9. Remedy will be determined at a separate hearing

REASONS

Introduction and background

1. The claimant, Mrs Allen, was employed by the respondent and its predecessor organisations from 23 November 1987, until her dismissal with effect from 22 May 2018. Up until at least January 2017, the claimant was employed as a Clinic Manager – Sexual Health Service. The claimant's job at the date of her dismissal is a matter of dispute and will be addressed accordingly.

2. Following a period of early conciliation that started on 20 August 2018 and ended on 20 September 2018, the claimant brought claims in the Employment Tribunal of unfair dismissal, age discrimination, disability discrimination, victimisation and unauthorised deductions from wages. The claimant's claim is about how she says she was treated during and following the respondent's reorganisation from around November 2016 up to her dismissal ostensibly on grounds of ill health capability

3. The respondent denied all the allegations.

4. There was a case management hearing on 8 February 2019 at which Employment Judge Benson identified the claims and issues for this tribunal to decide and made case management orders.

5. The claims were identified as

    a. Direct Discrimination (s 13 Equality Act 2010) because of age

    b. Direct Discrimination (s 13 Equality Act 2010) because of disability (being anxiety and depression)

    c. Discrimination arising form disability (s 15 Equality Act 2010)

    d. Harassment related to age and/or disability (s 26 Equality Act 2010)

    e. Victimisation (s 27 Equality act 2010)

    f. Unauthorised deductions from wages (s 13 Employment Rights Act 1996)

    g. Failure to provide a written statement of main terms of employment (s 38 Employment Act 2002 and s 1 Employment Rights act 1996)

6. The detailed list of issues is set out in the appendix to this judgment and referred to in our conclusions.

The hearing

7. The final hearing in this case started on 13 January 2020. We made some adjustments to the hearing. Particularly, the respondent's witnesses agreed

not to be present while the claimant gave evidence to reduce the impact on the claimant in respect of her disability of anxiety and depression. We took regular breaks as necessary and we record our particular thanks to Mr Jarvis for the considerate way in which he questioned the claimant when putting the respondent's case.

8. We remind ourselves that we must not confuse Mr Jarvis' considerate questioning with a lack of confidence on the part of either Mr Jarvis or the respondent in the respondent's case. We do not assume that just because a particular part of the claimant's evidence was not challenged, or not challenged forcefully, that the respondent agrees with it. Mr Jarvis was clear that he would not subject the claimant to any questioning that was not absolutely necessary so we will, as always, weigh the respective evidence of the parties in respect of each disputed point.

9. We also record that Mr Horan brought to our attention that he is a stroke survivor which provides challenges to him as an advocate. We discussed any adjustments that Mr Horan required which were, effectively, some additional time and, with Mr Horan's agreement, some clarification of questions or references for witnesses in cross examination by the judge when necessary.

10. The respondent's witnesses appeared to demonstrate understanding of the challenges that Mr Horan faces in undertaking his cross examination as, of course and as we would expect, did Mr Jarvis, and we record our appreciation of this. This approach helped the tribunal to run smoothly and efficiently.

11. Unfortunately, despite this there was insufficient time in the original listing to hear all the evidence and by the end of 21 January 2020, we still had two witnesses left to hear. The case was unable to be listed in the immediate period after 21 January 2020 and soon after that, as everybody knows, the UK went into lockdown for a prolonged period because of the Covid-19 pandemic.

12. It was agreed by both the parties that this case was not suitable to be heard remotely. Eventually, there was a further case management hearing in June 2021 and this case was relisted before the same panel on 21 – 29 March 2022 as follows:

Day 1	5 hours	Tribunal reading (parties not required to attend)
Day 2	5 hours	Tribunal reading (parties not required to attend)
Day 3	3 hours	Preliminary matters
	3 hours	Continued evidence
Day 4	5 hours	Continued evidence
Day 5		Parties preparing detailed written submissions (Tribunal does not sit)
Day 6		Parties preparing detailed written submissions (Tribunal does not sit)
Day 7	2 hours	Tribunal reading written submissions

	3 hours	Oral submissions (up to one hour each to address matters arising from written submissions) and any necessary further case management.

13. It is obvious that a gap of two years between two parts of a part heard hearing is not ideal. The parties were invited to state in 2021 whether it would be in the interests of justice to start again with a new panel, but they agreed that it would be preferable for the same panel to complete the hearing. We therefore continued the hearing on that basis. In the intervening period, the employment tribunal had become familiar with remote video hearings and the claimant was, as an alterative adjustment, able to observe the remaining witnesses of the respondent giving their evidence by video on CVP from another tribunal room.

14. We also regret, and apologise for, the delay in producing this reserved judgment. The tribunal required additional deliberation time and the additional delays in writing the judgment are down to the workload of the judge. Given the very long time over which this case has been heard further delay is not ideal, and we recognise that this delay is likely to have had an effect on the parties.

15. We were provided with an agreed bundle comprising 1009 numbered pages (some of which were sub numbered). We had witness statements from the following people:

16. For the claimant

    a. The claimant

    b. Mr Andrew Crooke, Trade Union Representative

    c. Ms Jane Earp – former colleague and friend of the claimant

    d. Ms Lynne Jenkins – ex-employee of the respondent and friend of the claimant

17. For the respondent:

    a. Mrs Tracy Furlow – Clinical Services Manager for the Sexual Health Service and the claimant's former line manager

    b. Mrs Gurdees Watson – Service Lead for Sexual Health Services and claimant's manager from May 2017

    c. Ms Fran Tummey – Deputy Director for Nursing and Therapies

    d. Miss Becky Clarke – Senior HR Manager

    e. Mrs Gillian Harrad – Company Secretary and in-house solicitor

    f. Mr John Bagnall – Associate Director of Human Resources

18. All witnesses attended and gave evidence. Mrs Harrad and Mr Bagnall gave evidence in March 2022, the others in January 2020.

Other preliminary issues

19. The claimant made an application on 18 May 2020 to amend her claim to include a claim for exemplary damages. That application was considered on 23 March 2022 and was refused for reasons given at the hearing.

20. The claimant made an application to admit further medical evidence at the case management hearing in July 2021. That was considered and refused on 23 March 2022 for reasons given at the hearing.

21. There are two early conciliation certificates in the bundle. Only the second is relied on and the respondent has not raised it as an issue. However, Rule 12 (1)(c) Employment Tribunal Rules of Procedure 2013 (as in force at the time this claim was made) requires that a judge shall consider whether to reject a claim form if the claim form does not contain an early conciliation number. It has been established that this refers to a valid early conciliation number (*E.ON Control Solutions Ltd v Caspall* UKEAT/0003/19/JPOJ) and, further, that where more than one early conciliation process takes place, only the first certificate is valid (*Revenue and Customs Commissioners v Serra Garau* [2017] ICR 1121). The judge is obliged to consider this issue whenever it arises.

22. The judge has considered this but is of the view that only the second early conciliation certificate is valid in respect of the claim brought by the claimant. The first conciliation certificate names the respondent as "Worcestershire Health & Care NHS Trust - Sexual Health Service", whereas the respondent named in the claimant's claim form is "Worcestershire Health & Care NHS Trust". The respondent named on the second Early Conciliation Certificate is "Worcestershire Health & Care NHS Trust".

23. By rule 12(1)(f), a claim form falls to be rejected if the name of the respondent on the claimant form does not match the name of the respondent on the early conciliation certificate unless the judge considers that the claimant made a minor error and it is in the interests of justice not to reject the claim.

24. There has been no such judicial consideration of the first Early Conciliation Certificate in relation to a corresponding claim form with the first Early Conciliation Number certificate on it, and it is, because of the difference in the respondent names, *prima facie* invalid as an Early Conciliation Certificate for this claim as it stands. The judge has no power to consider the validity of the first Early Conciliation Certificate in respect of this claim as it has not been referred to on the claim form and it therefore remains invalid. It therefore follows that the second Early Conciliation Certificate is in fact the first valid early conciliation certificate as it applies to this claim.

25. This issue was not raised at the hearing before the parties as the Judge did not recognise it as an issue until deliberations. The obligation to consider

the Early Conciliation provisions under rule 12 does not normally require the input of any parties. In the circumstances, including the resources allocated to this case already by the parties and the Tribunal, the significant period over which the case had been heard and the clear presumption by both parties (it not having been raised and both parties being represented by experienced lawyers) that the claim was in fact valid, we considered that it was proportionate to consider this issue on the information before us.

Findings of fact

26. We make such finding of fact as are necessary to decide the issues in this case. Where facts are disputed, we have made our decision on the balance of probabilities.

Claimant's job and reorganisation in 2016

27. The respondent is an NHS Trust which provides community and mental health services including sexual health services. Since this hearing started it has changed its name to Herefordshire and Worcestershire Health and Care NHS Trust.

28. The claimant worked since 1997 or 1998 as the Clinic Manager based at the Moor Street Clinic, Isaac Maddox House in Worcester. She worked full time for 37.5 hours per week. This was paid at Band 5 (Band 4 being lower and Band 6 being higher) and as at the date of claim, Band 5 attracted a gross monthly salary of £2371.83 per month. The claimant's job required her to manage 19 staff across the county and across different offices as well as undertaking a computer based statistical and data analysis role. The claimant set out as part of the redeployment process a list of the tasks she performed as part of her role [100d]. This included a significant amount of management of staff and premises, as well as liaison with internal and external people and agencies, in addition to undertaking computer based statistical analysis and the preparation of reports.

29. It was agreed that the claimant did a good job and was a valued member of staff. She had been given an "Unsung Hero" award by the respondent in the past.

30. In 2016 the respondent was awarded a contract by Worcestershire County Council for the provision of sexual health services in Worcestershire. [89A]. It is not clear if this was a service that had previously been undertaken by someone else or a renewal of a service already provided by the respondent but one of the results was a reduction in funding of £500,000. Whether or not that was per year or over the life of the contract, we do not know but the Trust decided that because of this reduction they needed to undertake a "Change Management Process". This was a reorganisation or restructuring of parts of the respondent to save money. As Mrs Harrad said, 70% of the respondent's turnover is spent on employing people to do the work.

11 November 2016

31. The claimant attended a staff meeting on 11 November 2016 led by a Dr Spice, and Mrs Furlow. A few days before the meeting on 4 November 2016, the claimant had received some information from the respondent about the proposed changes. [89g]. That indicated that the number of Band 5 posts in the Sexual Health service would reduce by one. The claimant says, and we accept, that she did not at that time think that that necessarily referred to her. In oral evidence the claimant said that there was another person who was paid at Band 5 in the same service but who did not actually still work with the claimant. That person's pay slip came to the claimant's office and the claimant then forwarded it. The claimant's clear explanation was that she did not assume that the reduction on Band 5 roles would automatically mean *her* job was going because the exercise was about saving money and, as far as she was aware, money for a band 5 role was being taken from the Sexual Health service budget for an employee who was not working in that department.

32. However, the claimant recognised that it was possible that her job might be at risk. There was no one to one conversation with the claimant before the meeting on 11 November that her job might be at risk.

33. Four of the claimant's colleagues, including Ms Earp, were also at the staff meeting on 11 November 2016. The claimant says that at this meeting Mrs Furlow told her that there would be no Band 5 posts after the change was implemented and the claimant's position would no longer exist. In her statement, the claimant said she could not believe she was being told this in the presence of her staff. Mrs Furlow does not address this alleged conversation directly in her witness statement. In oral evidence Mrs Furlow said that she did not tell the claimant that her role does not exist, but that she gave staff the opportunity to look at the table that indicated that the number of Band 5 roles was reducing by one. Ms Earp said in her witness statement:

    "I think as the consultation went on that Ann (the claimant) realised that Tracey was talking about a Band 5 role going and it was her role, not the role she thought they had forgotten".

34. This is consistent with Mrs Furlow's evidence. In the meeting, the claimant asked Mrs Furlow about the other Band 5 job, referred to above, and why that was unaffected. Mrs Furlow asked her who she was referring to and the claimant than gave the name of the individual. The claimant says, and we accept, that she was reluctant to disclose the name of the individual in the staff meeting but did so on Mrs Furlow's request and insistence.

35. It was not disputed before the Tribunal that the other Band 5 person did, in fact, no longer work in the Sexual Health team.

36. We find that the claimant's question about the other band 5 post was reasonable in the circumstances, and we prefer the evidence of Ms Earp that Mrs Furlow became angry or, at least, irritated by the claimant's question.

37. We find that in reality, the claimant was only definitely aware at that meeting on 11 November 2016 that her job would no longer be required in the new structure and that there was no individual discussion with the claimant before that meeting about her job potentially no longer being required.

38. The claimant asked at that meeting to be redeployed immediately. Mrs Furlow said in her statement that the proposed removal of the claimant's job was not finalised and the redeployment process could not commence until the consultation process had concluded. That was scheduled for January 2017. We were referred to the respondent's "Change Management" policy [725] which says

    "7.5.1 At the end of the consultation period the lead manager will consider all of the responses before reaching a final decision on the changes to be implemented".

39. There is also a record of a question asked and the answer to it at that meeting which records respectively

    "If I know my post is at risk can redeployment start for me straight away? – No as nobody is currently at risk at this time and the correct process needs to continue. We need to ensure that the other staff are not disadvantaged if they could potentially be at risk too".

40. The claimant was subsequently formally informed in a letter dated 25 January 2017 [95] (below) that she was formally "at risk".

41. We find therefore, that the reason the claimant was not allowed to be redeployed, or considered for redeployment, at that meeting was because the consultation had not concluded and there was no formal decision by the respondent that the proposed new arrangements would be implemented. The reality might well have been that it was likely that the claimant's job would go, but at that date it had not done so and it would not have been in accordance with the respondent's policy to redeploy or start the redeployment process for the claimant at that stage. We find, however, that Mrs Furlow did start to attempt to informally redeploy the claimant quickly thereafter. She sent that claimant two jobs before the formal redeployment process (which are referred to below).

42. We also find that the claimant was told the reason for her non-immediate redeployment at the meeting, but we refer to the fact that she had just found out in front of her colleagues that her job was no longer required. The claimant said in her witness statement "I could not believe what I was being told in the presence of may staff. It felt like something that should have been done privately" and we think the claimant was likely more upset than her witness statement suggests and that, consequently, she potentially did not take in everything that was said. In our view it would have been preferable to have had a discussion with the claimant in private before the staff meeting.

43. It is part of the claimant's case that she was the only employee in December 2016 to be left without a role. Looking at the claimant's claim

form and witness statement we have to conclude that she means following the meeting on 11 November 2016. It is not clear, however, what the claimant means by the only person to be left without a job. We agree that as we have found she was told that subject to the conclusion of the consultation, her role would no longer be required. However, there is a list at page 89b indicating that 3.24 full time equivalent roles were to be deleted (including the claimant's) and the earlier information that the claimant said she received on 4 November 2016 [89h] shows additional administrative and clinical posts potentially at risk.

44. We have accepted the respondent's evidence that the decision as to the final structure or reorganisation would not be made (and was not made) until January 2017 so we find that as at November (and in fact December) 2016, the claimant was not the only person whose job was potentially at risk. Mrs Furlow did agree, however, in cross examination that the admin manager role that the claimant occupied was not in the new proposed structure so that the claimant could reasonably perceive that in all likelihood she would be without her job once the structure was approved.

45. We also find that this restructure of the Claimant's department was Mrs Furlow's process. Namely, that she had responsibility for managing it and some decision making responsibility in the process. We refer by way of example to the consultation paper she wrote for the meeting on 21 November 2016 [89g] and the attempt to find early redeployment for the claimant.

January 2017

46. There were further consultation meetings in December 2016 and January 2017 but no particular issues were raised about them. On 16 January 2017, Mrs Furlow sent out the Consultation Outcome paper which identified that 51 people were affected by the proposed changes.

47. On 11 January 2017 the claimant was signed off sick with a chest infection and work related stress for two weeks. It was not disputed that the claimant had a good sickness record. In her 29 years of employment she had had a handful of days off sick. When the claimant went off sick, she was still employed in her role as Clinic Manager on Band 5 working a 37.5 hour week.

48. The claimant returned to work on 25 January 2017 [96a]. The same day, Mrs Furlow wrote to the claimant to confirm that the consultation had concluded. The letter said

    "It is therefore with regret that I have to confirm your substantive post will cease to exist and you are now considered to be formally 'at risk' under the terms of the Trust's Change Management Policy. In practice this means the process to identify suitable alternative employment for you has formally commenced through the Trust's internal vacancies.

The process will be managed in accordance with the Trust's Change Management, Policy and you will be supported throughout by your manager, Human Resources and Staff Side Representatives as necessary".

49. The letter does not say from what date the claimant's job would cease to exist. The letter went on to say that there would be one to one meetings with Mrs Furlow to discuss the redeployment process. Nowhere in this letter is redundancy or the possibility of redundancy mentioned.

50. The claimant sent Mrs Furlow an email on 26 January 2017. In that email the claimant said that she had returned from sick leave to find numerous changes, which she understood, but that she had received no communication, sent during her absence, referring to the changes. She says that she does not know what her staff are doing as changes have been made without informing or consulting her. The claimant concludes:

"I was advised that I had not got a job at a meeting with members of my own staff present. Now I am being told by my own staff what they are doing! I am aware that I am no longer required and surplus to requirements but I still work here and I expect to function and do my job working with and for my colleagues, the service and the Trust – I cannot do this if I am excluded. Exclusion is unprofessional, disrespectful and it hurts!

May I respectfully request that someone updates me with the current situation".

51. Mrs Furlow replied to that email and said that it was not possible to keep the claimant updated or involved as she was on sick leave, and work needed to be done urgently in preparation for the staff changes coming into effect from 30 January 2017. Mrs Furlow told the claimant in that email that she would ask the lead nurse to update the claimant later that day.

52. We find that the claimant was aware, form this date at the latest, that the proposed changes would be implemented from 30 January 2017. This is consistent with the information set out in the consultation documents.

53. We find that the claimant did feel excluded on her return to work. Things were moving quickly and changes needed to be implemented. The claimant had not been involved or updated about those changes. However, on the balance of probabilities, we find that the reason for that was that the respondent did want to meet the deadline it had set of 30 January 2017 to get staff in place and they did not want to contact the claimant while she was off sick. There was no evidence or suggestion that the claimant was not subsequently updated by the lead nurse or that she was not able to continue managing her staff up to 30 January 2017.

54. During this period, and while off sick, the claimant was still responsible for managing 19 employees. It was reasonable for the respondent to avoid adding stress to the claimant by not contacting her while she was off sick. On the other hand, the claimant said that she had received 200 emails and none of them were about the restructure, so it appears that the claimant

was still receiving a great deal of correspondence about work to her email address.

55. At this point, it was very likely from Mrs Furlow's perspective that the claimant would no longer be in her role from 30 January 2018 and would not have management responsibility from that point. In our view, it is likely that the reason that the claimant was not kept informed about the changes while she was off, was that the respondent generally, and Mrs Furlow specifically, had already started to move on to the new structure and had stopped considering the claimant as a manager of staff. To that extent, the claimant was excluded while off sick. We also find that as a result of these communications and previous information provided to the claimant, she was aware that the new structure would be implemented from 30 January 2018.

56. In the meantime, on 26 January 2017, Vivien Osborne, one of the claimant's colleagues who had been at risk had been given the role of "Band 4 IT & Data Lead" ("the Band 4 job") and the claimant found out about this on 27 January 2017. Mrs Furlow said at the time that this was because Ms Osborne was the only person in the ring fence for that job. We find that Ms Osborne was offered the Band 4 job on 26 January 2017 without an interview. We find that, to all intents and purposes, Mrs Furlow did give Ms Osborne the Band 4 job.

57. The Band 4 job was predominantly an IT job that entailed training and supporting staff in the use of specific IT systems. (We refer to the Job Description at page 620). It was not disputed that large parts of this job had been part of the claimant's Band 5 job. The Band 4 job, however, had no direct staff management responsibilities and did not include any of the claimant's wider roles such as procurement and external and internal liaison. We find that it was a job with less responsibility and a narrower focus than the claimant's Band 5 job. It also, obviously, attracted a lower salary. From April 2017 a full time Band 4 Salary was £19,409 – £22,683 per year. That is £6068 per year less at the top of Band 4 than the top of Band 5 on a full time basis.

58. On 30 January 2017, the claimant was unsure what her role was so she spoke to Mrs Furlow who told her that she was no longer responsible for managing her staff. Clearly, this was when the new structure was implemented and this means that the claimant's Band 5 job had, as far as the respondent was concerned, gone from then.

59. However, the claimant was not dismissed on this date and nor was she allocated somewhere else. We find, therefore, that at this time she continued to be employed under her existing contract as a Band 5 Clinic Manager for 37.5 hours per week (i.e. full time). There was nothing to show this had changed. It appears that at this stage the claimant continued to do, *at the very least*, the IT data work she had previously done in her substantive role. We heard no evidence about what the claimant was actually doing at this stage but conclude that she continued to fulfil her role without the management power or responsibilities. We refer to the question

and answers from the consultation on 11 November 2016 at page 89c. That said

"What do I do until I am redeployed? Do I stay at home? – You would attend for work as normal"

60. On 31 January 2017, the claimant sent an email to Mrs Furlow. Although it is quite long, it is important to set out all, or most, of it as we think that this email is the start of a long chain of misunderstanding by the respondent. It says:

"Once again I am writing to draw attention to another situation that reveals to staff the lack of consideration during this tender process. I was Informed yesterday that on Friday afternoon Viv was given the Band 4 role. There were no Invites for expressions of Interest or Interviews for this role.

Jane was informed that the Band 4 IT position had been 'created' for her. Jane's reply was to advise that the IT role could not be covered In 18 hours per week, It was not enough plus she would not consider a part-time position. Now Viv has been 'given' the role!

I trust that I, along with others at risk, will be treated equally without discrimination and afforded the same consideration to retain a position within the service. I am not aware of any other members of staff being offered this position and I certainly wasn't given the opportunity.

Demonstrating transparent, collaborative working Is essential but unfortunately this is not evident and consequently the service leads have lost the trust and respect of the staff. The staff are unsure of their roles and leadership and feel totally unsupported".

61. The "Jane" referred to is Jane Earp. The Band 4 job was in fact for 18.75 hours per week – half of full time. In her witness statement, Mrs Furlow says (and again it is necessary to quote it)

"I received an email from the Claimant on 31st January 2017, expressing her concerns about not being invited to express an interest or have an interview for the Band 4 IT and Data Lead role. She stated that her colleague, Viv Osborne, had been given the role and the Claimant hadn't been given the opportunity to be considered for the vacancy which she did not think was fair".

62. In oral evidence the claimant said that the email was not about her. She said that other people should have been included generally. When asked by Mr Jarvis if Mrs Furlow reading it might have mistakenly thought the claimant wanted the Band 4 job the claimant said "I don't know why she thinks that" and that it was clear that she said that the vacancy was not open to *anyone* else. The claimant said in cross examination that if she had been offered the job she would have refused it. It was for 18.75 hours a week only, and the claimant wanted full time.

63. Mrs Furlow's response on 3 February 2017 [97] is to explain that as there was only one staff member in the ring fence for the Band 4 job, expressions of interest and interviews were not necessary. She does not address any complaint that the claimant was personally disgruntled by not having the opportunity to apply for the job and refers to making arrangements for the claimant's redeployment meetings.

64. In our view, Mrs Furlow has, latterly, misread this and her evidence in her witness statement does not necessarily accord directly with her response at the time. The email is clearly setting out a general complaint about the perception the claimant had at the time of the unfairness of the process. That can be seen by her reference to other staff. It might be inferred that the claimant was upset about not being offered the job, but this is not completely clear and, in any event, that is not that same as wanting the job. It is a clear expression (whether justified or not) of frustration at the way the claimant perceives the reorganisation to have been handled and Mrs Furlow's response at the time seems to recognise that. We therefore prefer the claimant's evidence about this as set out in her witness statement and we find that the claimant was not asking for the Band 4 job specifically, but raising this as an example of the way she perceived the restructure process as having been handled incorrectly.

February 2017

65. On 3 February 2017, Mrs Furlow sent the claimant details of a Band 4 Job in Malvern: Single Point of access Administrative Lead (37.5 hours). This was 4 minutes after Ms Furlow's email response referred to above. This was a quick response, and we find that Mrs Furlow was genuinely trying to help the claimant quickly secure alternative employment at this stage.

66. On 6 February 2017, Mrs Furlow referred the claimant to occupational health. We find that this was because the claimant's fit note for her period of absence in January 2017 recorded "work related stress" as part of the reason for her absence and the respondent's policy requires or suggests an occupational health referral where this is a feature of someone's absence. In general we think that such proactive early intervention is a good policy.

67. The claimant did not see the occupational health referral form before it was sent. She was supposed to see it under the respondent's policies. The form, amongst other things, offers 11 tick box options for the occupational health adviser to consider. One of those is "If permanently incapable of doing the job, would Occupational Health support ill health retirement?" and Mrs Furlow had ticked that box. Five other boxes were also ticked and five of them were not.

68. At this date, the claimant was aged 70 and had had very little sickness absence over the course of her long career with the respondent.

69. The claimant attended a meeting with the occupational health adviser on 19 February 2017 who brought this ticked box to the claimant's attention. The claimant says she was shocked and upset by this and it made her feel old.

She said that this must have related to her age and she could think of no other explanation.

70. We have heard a number of explanations for Mrs Furlow's decision to tick the box. The claimant first raised this at the meeting on 2 March 2017 and we address it below.

71. On 20 February 2018, Mrs Furlow sent the claimant another potential job. This was a Band 4 Senior Administrator role for 30 hours per week. We did not hear any detailed evidence about the role but the claimant did not apply as it was based in Redditch, which is up to about half an hour away from Worcester where the claimant wanted to work.

72. On the same day, the claimant was asked to train Ms Osborne on aspects of the Band 4 role. It is apparent from the list of tasks that Mrs Furlow asked the claimant to train Ms Osborne on, that the Band 4 role was part of the claimant's substantive Band 5 role (without the management responsibility as discussed above). We find that the Band 4 role comprised substantially (if not entirely) of parts of the claimant's Band 5 job role in so far as it related to IT and in fact Mrs Furlow told the claimant subsequently that she could do the Band 4 role "standing on her head".

73. On 21 February 2018, the occupational health advisor produced the first occupational health report.

74. The relevant findings (which are not challenged) are:

    a. [The claimant] is able to undertake her full duties.

    b. [The claimant] does not have an underlying medical condition affecting her attendance at work. However, [the claimant] continues to experience symptoms, which are associated with the cumulative impact of work related stressors. These stressors are around the management of [the claimant]'s redeployment and the continued uncertainty regarding her future employment. I understand that these issues have been on- going for over a year and in my opinion, until they are effectively addressed they will have a sustained and detrimental impact upon [the claimant]'s health and wellbeing.

       We find that the reference to a year is a reference to the proposed and ongoing re-organisation, not the impact on the claimant's health per se.

    c. I would suggest that a stress risk assessment in order to allow [the claimant] to articulate her specific, perceived work related stressors and management could implement a robust management action plan to address them.

    d. **Is this person permanently incapable of doing their job as outlined in their job description? (Please supply job description).**

> There is nothing to suggest that Ann is incapable of undertaking her role and continue to provide reliable attendance and service. This question was not discussed with Ann, and she did not have access to a copy of her referral prior to her appointment with Occupational Health.

75. The stress risk assessment was not undertaken at any point. Mrs Furlow could not recall, in oral evidence, why she did not do a stress risk assessment.

March 2017

76. On 2 March 2017, there was an individual consultation meeting between the claimant and Mrs Furlow. Ms Nikki Pilgrim (HR Adviser) was also in attendance.

77. At this meeting, the claimant said that she wanted to work in Worcester City Centre and she wanted to retain her same hours and working pattern (which was a 9 day fortnight). This is consistent with the redeployment agreement completed at that meeting [114] and we find that this is what the claimant said.

78. The claimant said that she "complained about the Occupational Health referral and the reference to ill-health retirement". The claimant said in her witness statement "TF did not apologise for the Occupational Health referral. It was not her style. She did not ever accept that she was in the wrong or apologise. I became upset so I signed the redeployment form and left".

79. Mrs Furlow said in her witness statement "I do not specifically recall ticking the box; the incorrect box was ticked in error. I apologised to the claimant as soon as I realised she was upset by this mistake. I do not accept that I was discriminating against the claimant's age". Mrs Furlow adds "I also apologised again on tape at the grievance hearing to which the claimant acknowledged the apology".

80. There is no reference to this issue at all in the subsequent letter of 17 March 2017.

81. We prefer the claimant's evidence as to the alleged apology and we find that Mrs Furlow did not apologise at that meeting. We think that if she had, it would have been in the letter. We also refer to our findings about the January 2018 grievance hearing (below) where Mrs Furlow is said to have apologised but in fact did not do so in any meaningful way and specifically not about ticking the ill health retirement box.

82. In her witness statement, Mrs Furlow does not record giving any explanation at this meeting. She says "It was not meant to upset her in any way". This is consistent with the claimant's witness statement which says that Ms Furlow did not admit she was in the wrong at all. We conclude, therefore, that as at 2 March 2017, Mrs Furlow was of the view that she had

taken a deliberate decision to tick the box for Ill Health Retirement in the Occupational Health referral form.

83. We also find that the claimant is more likely than not to have referred to "age discrimination" in this meeting when talking about the Ill Health Retirement box being ticked. The claimant describes later in her letter to Mrs Furlow (below) that both she and the occupational health advisor saw this as age discrimination. It is not disputed that the claimant was upset by it. The claimant also refers to referring to age discrimination in this meeting in her submissions to the Long Term Absence Hearing in April 2018. Overall, therefore, it seems unlikely that the claimant would not have used the same words to Mrs Furlow in 2 March 2017.

84. The other matters that were discussed were the Band 4 role. The claimant said in her witness statement "I complained again about the Band 4 IT Lead role that had been ringfenced and given to an employee. I informed NP that in my opinion the position was not ringfenced and therefore other members of staff should have been allowed to express an interest and apply". Mrs Furlow does not explicitly refer to this part of the conversation in her witness statement but in the letter (of 17 March 2018) about this meeting, she says (in the context of the claimant not applying for the jobs sent on 3 and 20 February 2017)

"You advised that you had not applied for either post as you feel that you should have been included in the 'ring-fence' for the band 4 IT & Data Lead post within the new sexual health structure. I advised you that I took advice around the 'ring-fencing' arrangements when you initially raised your concern and was advised that you did not meet the criteria to be included in that 'ring-fence'. You questioned whether it was discriminatory not to allow you to be considered for the role and Nikki explained that in a change management process applications for 'ring-fenced' posts are restricted.

You questioned why you were being sent details for band 4 posts and Nikki advised that in accordance with the change management policy suitable alternative employment opportunities will be sought at your current pay band and a band below. If you are appointed to a band 4 role you will be eligible to receive long-term pay protection for a period of 2 years".

85. In our view, these two statements appear inconsistent. It does not make sense that the claimant would be insisting that she should have been ringfenced for a Band 4 job, but then questioning why she was being considered for Band 4 jobs. We prefer the claimant's evidence about this issue: that she was continuing to complain about the process by which Ms Osborne had been appointed generally, rather than complaining that Ms Osborne had the job (the claimant was pleased for her) or complaining that <u>she</u> ought to have been given the job. The claimant was in our view continuing to complain about the process. The claimant explained that the reason she did not apply for the two jobs was because the location and/or hours did not accord with her requirements. We find that this was the reason for her decision not to apply, rather than that, as Ms Furlow says in

her letter, the claimant believed she should have been included in the ring fence for the Band 4 job.

86. After the meeting Mrs Furlow discussed the Band 4 job with Ms Pilgrim who advised that in fact the Claimant ought to have been included in the ring fence for the Band 4 role instead of it being given to Ms Osborne. Ms Pilgrim subsequently agreed with Mr Bagnall that there should be a competitive process between the claimant and Ms Osborne for the Band 4 job.

87. We find that Mrs Furlow listened to the claimant's complaints about the original ring fencing arrangements and responded to that complaint by changing the arrangements. We agree with the claimant that her complaint was not explicitly about <u>her</u> not being included in the ring fencing arrangements, rather that the ring fencing had not been done fairly for all staff, but Mrs Furlow did take steps that she perceived, albeit incorrectly, would address the claimant's complaints as they affected the claimant.

88. There was a further individual consultation meeting on 9 March 2017 with Mrs Furlow and Ms Pilgrim. The claimant brought a friend with her for support to this meeting.

89. At this meeting, the claimant was told that Ms Furlow and Ms Pilgrim had considered the ring fencing arrangements and it had been agreed between HR and staff side representatives (although we heard no evidence that Ms Osborne had agreed to this at this stage specifically) that the claimant and Ms Osborne would now be invited to submit applications for the Band 4 post.

90. The claimant was unhappy with this turn of events – Mrs Furlow notes that the claimant was "visibly upset" by her proposal. The claimant said that she thought it would be unfair on Ms Osborne, that she would not be party to any coverup of the respondent's mistakes (as she perceived it) and that it would damage her relationship with Ms Osborne. Ms Pilgrim said in reply "I knew you would say that".

91. We find that the claimant made it perfectly clear at that meeting that she did not want the Band 4 role. We also find that the respondent knew at that meeting that the claimant did not want the Band 4 role and that Ms Pilgrim, at least, anticipated in advance of that meeting that the claimant would be unlikely to want the Band 4 role in those circumstances.

92. The claimant also said in her witness statement that she told Ms Pilgrim and Mrs Furlow that she would not change her mind. Mrs Furlow said that she invited the claimant to think about it over the weekend. We think it likely that the claimant probably said at this point that she would not change her mind.

93. We find that at the end of the meeting on 9 March 2017, the claimant had clearly stated that she did not want the Band 4 job and Mrs Furlow and Ms Pilgrim were both aware of that and had each acknowledged that that was the claimant's position at that time.

94. The occupational health/ill health retirement issue was also discussed at this meeting. We prefer the evidence of the claimant and Ms Jenkins (who was also there) that Ms Pilgrim accepted mistakes had been made in respect of both the referral and the ringfencing, but that Mrs Furlow did not accept that mistakes had been made and nor did Mrs Furlow apologise.

95. After the meeting on 9 March, Ms Osborne agreed to take a different Band 3 job, rather than the Band 4 job. There was some dispute as to whether Ms Osborne had taken a positive decision to apply for a Band 3 job or whether she had felt pressure of some kind (real or perceived) to free the Band 4 job for the claimant. It is not necessary for us to determine that and, either way, one of the outcomes of that was that from the respondent's perspective they were now free to give the Band 4 job to the claimant without any competitive process. Mrs Furlow spoke to the claimant by telephone on 13 March 2017 and told her that as Ms Osborne had expressed a strong interest in the Band 3 role the claimant was eligible to be slotted into the Band 4 role. Mrs Furlow's evidence was that the claimant replied that she could still not do it to her colleague. Mrs Furlow asked the claimant to think about it. We find therefore, that the claimant rejected the offer of the Band 4 job in that telephone conversation and Mrs Furlow knew that she had.

96. In our view, the claimant's position – that she was unhappy with the process, even of being overlooked personally (although we do not think that is a significant part of her complaint) – is not inconsistent with her not wanting the job. The claimant had been responsible for 19 staff and appeared to have a strong view on fairness. It was not inherently unreasonable for her to raise this issue while still not wanting the Band 4 job herself.

97. On 17 March 2017, Mrs Furlow wrote to the claimant. The letter [118] summarised the meetings on 2 and 9 March, and said:

    "Further to our conversation, I now write to advise you that I am offering you the role of Data Lead (band 4) working 18.75 hours per week, based at Isaac Maddox House commencing on Monday 27 March 2017. I will arrange to have a discussion with you on the 27th to discuss the expectations of the role".

98. The letter also set out the pay protection arrangements which were

    a. Pay protected for one year at Band 5 for 37.5 hours per week

    b. Pay protected for a further year at Band 5 for 18.75 hours per week.

99. There were some important exceptions and caveats:

    a. Any agreed change, which is at the request of you, such as voluntary change of post reduction in hours, will remove your right to pay protection.

    b. <u>Employee's (sic) in receipt of any recurring pay elements (i.e. short or long term protection of pay, recruitment and Retention Premium, On-</u>

call payment) should be aware that this will be automatically suspended during a period of sickness absence. (Our emphasis)

c. If an employee is in receipt of long term pay protection they may be asked to undertake duties commensurate with the pay band that they are protected on.

d. Where the maximum of the pay band applicable to the new post increases to more than the protected salary the employee will move onto the new maximum pay spine point and the period of protection ends.

e. Undertaking an additional post, increasing your hours or working hours that attract enhancements may also affect the pay protection.

100. We find that Mrs Furlow had no reasonable basis on 17 March 2017 to assume, as she appears to have done, that the claimant would start the Band 4 job on 27 March 2017. The claimant had been clear that she did not accept the job.

101. On 22 March 2018 [122], Ms Pilgrim invited the claimant to apply for the job of Clinical Studies Support Officer, a 15 hour post at Band 4 based in Worcester. The intention from the email was clearly to combine the two jobs – the Band 4 Job and this one to give the claimant 33.75 hours a week at Band 4. The claimant did not apply for this job. She said in her statement that it was not suitable and in oral evidence that she could not do it in addition to the Band 4 job as there was too much work to do in the Band 4 job to do it in 18.75 hours. The combined roles would have attracted pay protection at Band 5 for two years including 3.75 hours pay protection for the first year (to top the claimant's hours up to 37.5).

102. On 23 March 2018 the claimant wrote to Mrs Furlow (page 141) setting out a coherent account of the issues to date. In that letter, the claimant says "You are now offering me the [Band 4] position again and I cannot see a way forward for either party". We find that the claimant was restating her refusal of the offer. The claimant also raises, again, the occupation health/ill health retirement issues and the letter concludes:

"I was then sent an appointment to attend Occupational Health following my 2 weeks sickness. I was aware that this would happen because I had been absent with work related stress…[The OH Advisor] then asked me what my thoughts were on the request for retirement on health grounds following 2 weeks sick. It was seen by us both as age discrimination. I was upset because this came to me as a total surprise.

I have never regarded myself as being old but now feel I have been labelled 'old'. I feel marginalised and worthless. I am sorry but I am having difficulty moving on from this".

103. We find that the claimant was stating clearly to Mrs Furlow that she considered that she had been subjected to age discrimination by her in the occupational health referral and that this had caused her to feel old,

marginalised and worthless. We think that this reflects the conversation the claimant had on 2 March as the letter deal with both meetings, and supports our conclusions about what was said as set out above.

104. The meeting of 27 March 2017 that had been planned was rearranged at the claimant's request to 29 March 2017. In the meantime, on 28 March 2017, Mrs Furlow responded [144] to the claimant's letter of 23 March 2017.

105. In that letter, Mrs Furlow recognised that the claimant did not want a job that involved daily travel, and that the claimant had said in the two meetings in March that she had, and wanted to remain in, a Band 5 post. Mrs Furlow also records that the claimant said she "didn't see why [she] should apply for posts outside the sexual health service when there was a band 4 vacancy in the service that [she] felt [she] should have had the opportunity to apply for". We have already made findings about this last sentence and do not repeat them.

106. In respect of the claimant's refusal of the Band 4 job because of the impact on her relationship with Ms Osborne, Mrs Furlow suggested relationship therapy. We do not discount this as a way of addressing relationship issues in the workplace, but Mrs Furlow failed at this point to engage with the actual issues in issue, which is that the claimant did not want and had not accepted the Band 4 post. The letter includes a warning that by not applying for jobs that were deemed suitable by the respondent the claimant could be jeopardising her employment rights. What those rights or the actual consequences might be is not explained and mention of "redundancy" is again conspicuous by its absence.

107. Mrs Furlow also says

"You refer in your letter to you questioning in the consultation meeting why 'the other admin band 5 was not present at the meeting' and in response to being informed that there was no admin band 5 in sexual health you stated in the consultation meeting that 'there was another band 5 on the payroll'. I am disappointed that you disclosed confidential information you had seen on the turnaround document in an open forum. The band 5 staff member that you refer to is not an employee of the sexual health service and has not been for a considerable amount of time. I referred to this as a mistake in the meeting as I was shocked that you had shared private information. The sexual health management team is fully aware of the presence of this staff member's details on the turnaround document, her presence on that document is for internal accounting purposes only and I would expect you to ask me in a confidential environment if you needed to query the validity of the role appearing on that document"

108. In our view, this was an unnecessary and unreasonable response from Mrs Furlow. The claimant had given the information in the meeting in response to a direct question from Mrs Furlow. To then criticise the claimant for that is unfair. Further, Mrs Furlow was the claimant's manager. If anyone had an obligation to arrange a private meeting to discuss the fact that the claimant's role, and all roles at the same band in that team, were likely to be deleted it was Mrs Furlow. We recognise that there was a misunderstanding

about the one or two Band 5 roles in the team between Mrs Furlow and the claimant – each thinking something different. Mrs Furlow obviously did not realise until the meeting on 11 November that the claimant did not realise her role was likely to be going. It is not fair, however, to blame the claimant and then criticise her, as she did in this letter, for that misunderstanding when it arose on both sides.

109. In our view, it seems likely that Mrs Furlow was becoming frustrated with how she perceived the claimant to be responding to the restructure issues at this time. We think that this misguided response appears defensive and irritated and that the likely reason for it was that that is how Ms Furlow was feeling – irritated and defensive. We suspect that Mrs Furlow was trying to reassert her authority to regain control of the situation.

110. The letter concludes “I hope that over the next few months you will settle into the role of IT & Data Lead and continue to provide much valued support and skills to the sexual health service”. Mrs Furlow had no reasonable basis for concluding, at this time, that the claimant had accepted and would be doing the Band 4 role. In our view, Mrs Furlow must have been pressing forward with the fiction that the claimant was now in this role in the hope that the claimant would eventually come to accept the position she was in.

111. On 29 March 2018 there was a meeting between the claimant and Mrs Furlow. Mrs Furlow said in her witness statement that the purpose of the job was to discuss handing over the duties from her previous role, although the previous letters seem to suggest that this would be about the new Band 4 role. At this meeting, Mrs Furlow suggested that claimant apply for another full time Band 5 role as contracts officer and if she was interested, the claimant needed to let her know by the end of that day. The claimant did not say that she was interested in the job – she says she was not given a copy of the job description, but neither did she ask for it. Mrs Furlow said she provided the claimant with details of the Band 5 role. The claimant was adamant that she had not seen the job description in the bundle before disclosure in the tribunal process.

112. We find that Mrs Furlow did discuss the job with the claimant and, on the balance of probabilities, that the job description was available to the claimant if she wanted it – either by Mrs Furlow giving it to her which the claimant has forgotten, or she could have asked for a copy to take away which she agrees she did not do.

113. The claimant said at that meeting that she would by that time prefer a job outside the sexual health service which this job appears to be.

114. In any event, the clamant did not apply for that job and it was released for open recruitment. In our view, the claimant was given a very short time in which to make a decision. Mrs Furlow was not the recruiting manager so could not alter the timescale, but we did not hear any suggestion that Mrs Furlow had considered approaching the recruiting manager or HR to discuss if that might be a possibility. Conversely, there is no suggestion that the claimant asked for more time.

115. By this time, the relationship between the claimant and Mrs Furlow appears strained – they were communicating through formal letters. A few days later the claimant went off sick and did not return. It seems likely that the claimant was not in a good place with her mental health by this point and that this formed part of the reason for her not applying for the Band 5 Contracts Officer job.

116. We find that the claimant did not express acceptance of the Band 4 role in this meeting. She was still requesting a different job, thereby demonstrating that she was dissatisfied with the Band 4 position. Mrs Furlow said the claimant "had never declined the Band 4 IT and Data Lead role. She expressed her concerns about the impact on Viv Osborne, however, if she had declined that offer of the role with the new Sexual Health structure, she would have effectively resigned". Not declining a role is not the same as accepting a role and it is clear from the careful language used by Mrs Furlow that the claimant did not accept the Band 4 role.

117. It was suggested that the claimant accepted the role by implication or by her conduct by turning up to the meeting to discuss the Band 4 role. We did not hear any evidence of anything alleged to have been said in that meeting that could amount to the claimant agreeing to start doing the Band 4 role. The fact that the claimant turned up to a meeting that she had been asked to attend by her manager is not evidence of anything except the claimant complying with her general obligations as an employee of the respondent.

118. Finally, on this point, the letter recording aspects of this meeting dated 5 April 2017 (below) refers to the claimant moving into Isaac Maddox House by 10 April. This, in our view, was further evidence that even on the respondent's view the claimant had not started doing any work under the Band 4 IT role by that time – it appears to have been anticipated to start properly on 10 April 2018.

April 2017

119. On 2 April 2017, the claimant sent a further letter [146] in response to Mrs Furlow's letter of 28 March. It is not necessary to address that in detail but the claimant refers to Ms Osborne being pleased at getting the Band 4 job, that she was pleased for her, that the claimant had not breached confidentiality (as alleged), that the claimant's issues with the Occupational Health referral were effectively being ignored and she concludes:

"I feel I am being penalised for pointing out an error and speaking out for equality and justice. Certainly not what I had expected in my 30th year with the Trust!

I am finding the whole situation very stressful. However, I do have principles that I have lived and led by and this will not change. I shall also continue to remain professional throughout this process however difficult it may become".

120. Again, it is very clear that the claimant's position about the Band 4 job had not changed, adding weight to our conclusions that the claimant had not

explicitly or impliedly accepted the Band 4 job at the meeting on 29 March 2017.

121. The next day, 3 April 2017, the claimant was sent home sick with high blood pressure. The claimant expected to return to work the next day as she emailed Mrs Furlow saying she would pick up payroll tomorrow. Mrs Furlow also therefore expected the claimant to return to work. The same day Ms Watson was appointed and she had responsibility for managing the Band 4 job.

122. The claimant did not in fact return to work again. On 5 April 2017 Mrs Furlow sent the claimant a letter summarising briefly some of the discussions on 29 March 2017 and explaining the proposed move to Isaac Maddox House from 10 April 2017. Mrs Furlow also said that Ms Watson would be the claimant's new line manager and she would introduce them.

123. The claimant did not receive this letter. Mrs Furlow sent it to the claimant's work email before she received the claimant's fit note on 6 April 2018 saying she was absent. She did not send a further copy to the claimant at home. Mrs Furlow said that the claimant had asked to receive correspondence to her work email, but in fact this only applied to redeployment information. We heard no good reason for not sending a copy of this letter to the claimant at home once Mrs Furlow realised the claimant would be off sick for at least 2 weeks as the fit note indicated.

124. On 25 April 2017, Mrs Furlow sent a notification of change form to the relevant department stating that the claimant's role had changed to the 18.75 hour Band 4 Data Lead position from 27 March 2017. It is unclear why, at this time, Mrs Furlow said that the role had started from 27 March 2017. Even disregarding the fact that the claimant had not accepted this role, Mrs Furlow says in her witness statement "I did not sign the form until the 19th April 2017 because this was the first opportunity in the office I had to complete the form following the date of 10th April when I had requested that the Claimant move desk/office space for the IT and Data Lead role".

125. This tends to suggest that even on Mrs Furlow's own account she did not think the claimant would actually start the new role until 10 April which again adds further weight to our conclusions that the claimant had not impliedly accepted the Band 4 role by 29 March 2017.

126. We further find that Mrs Furlow did not believe the claimant would start in her new role until 10 April 2017.

May 2017

127. On 10 May 2017, Mrs Furlow tried to call the claimant but could not get hold of her. The claimant phoned back but did not leave a message. On 15 May 2017, Mrs Furlow did speak to the claimant. Mrs Furlow says there was a long discussion about how she could help the claimant return to work and offered her the opportunity to meet with Terry Gibbs "to receive a face to face apology about the error made with the ring fencing of the Band 4 IT and Data Lead role". The claimant's recollection of that conversation was

that Mrs Furlow told her she was about to go or had gone on to half pay. The claimant said in oral evidence that she understood that to mean that she had been given the Band 4 part time job without her knowledge. Mrs Furlow's evidence was that she reminded the claimant that employees off sick do not receive pay protection.

128. We conclude that the change to the claimant's job was not implemented by payroll (or the relevant department) until 10 May 2017 by reference to the writing on the change form.

129. We find that Mrs Furlow did tell the claimant that her pay would reduce to the Band 4 rate in this telephone call. However, the claimant said, and we accept, that she did not take the conversation in. She was unwell at this stage.

130. It is apparent, and we find, from Mrs Furlow's witness statement that the claimant was expressing reluctance to do that job even at this stage because Mrs Furlow was trying to persuade her that she would be able to do it easily.

131. On 24 May 2017, Ms Watson wrote to the claimant [168] to invite her to a long term sickness absence meeting on 8 June at Isaac Maddox House. This was a formal letter and the first contact the claimant had had from Ms Watson. Ms Watson said that she did not want to phone the claimant as she did not know her and it would be easier to establish a rapport at a face to face meeting. The claimant says that she was upset by the letter – that she believed she had become a faceless nuisance. We accept the claimant's evidence that the letter left her feeling unvalued.

132. There is no address for Ms Watson on that letter.

133. On 26 May 2017, the claimant submitted a grievance [169] to Mr John Bagnall. In her grievance, the claimant refers to the occupational health referral in February 2017 and that she believed it to be age related, and that she felt as though she had been labelled old. She also complained about finding out her job was going in a group meeting, about the allegation that she had breached confidentiality, about being excluded from changes in January 2017 and about the way the Band 4 job had been allocated without a fair process and then removed from that person.

ACAS

134. Around the same time – from 19 May 2017 – the claimant contacted ACAS to start the first period of early conciliation. She intended to make a claim to the Employment Tribunal at that point. We heard evidence from Mrs Harrad about this period. It is clear that Ms Harrad became aware in the course of these negotiations that the claimant considered that she had been discriminated against on the grounds of her age.

135. At that time the claimant appeared to be asking to be made redundant as her Band 5 role had gone and the Band 4 role was not suitable. The respondent rejected this suggestion on the basis that they considered that

the Band 4 role was suitable. The claimant was represented by an employment solicitor at that time.

136. We had access to some of Mrs Harrad's file notes about the discussions with ACAS, but not all her correspondence on the basis, she said, that they were privileged. Mrs Harrad wrote to Mr Bagnall, Ms Pilgrim and Mrs Furlow about some of those conversations. Mrs Harrad met with Ms Pilgrim who she said was providing her with instructions. We find, on the balance of probabilities, that she only met with Ms Pilgrim and not Mr Bagnall or Mrs Furlow at this stage.

137. There is clearly some miscommunication going on at this time – Mrs Harrad records, for example that the claimant's absence in January 2017 was the third related period of absence. This was not correct. The oral evidence was at times confusing but we think that Mrs Harrad was consistent and reasonably clear in her evidence. We were invited to infer that Mrs Harrad was conspiring with Mr Bagnall, Mrs Furlow and Ms Pilgrim about the claimant's grievance – to influence the outcome. We reject that. There was no evidence to support such an inference at all. It is wholly reasonable for Mrs Harrad – who was the respondent's in house solicitor – to keep relevant people updated. We certainly cannot infer a conspiracy from that.

138. We do find, however, that by that time the claimant had submitted a grievance about what had happened so far since the consultation meeting, she had raised those issues with ACAS and had referred explicitly to age discrimination.

139. We also find that the claimant believed that she was effectively redundant at that time and had requested that she be allowed to leave work and receive a redundancy payment. The respondent had rejected that proposal on the basis that Mrs Harrad believed the appropriate approvals would not be forthcoming.

140. Mrs Harrad's evidence about that was that she believed that the Band 4 job was suitable alternative employment because of the pay protection and the possibility of the claimant finding alternative or additional work to make her hours up to full time.

141. The respondent's redundancy scheme provided for the payment of 2 full year's salary for someone in the claimant's position.

June 2017

142. On 7 June 2017, Mr Allen, the claimant's husband, called Ms Watson to inform her that the claimant was not well enough to attend the sickness meeting on 8 June so the meeting was rescheduled for 13 July 2017 in a letter dated 26 June 2017 .

143. On 9 June, Mr Bagnall responded to the claimant's grievance of 26 May 2017 [175]. He said that he was keen to try to resolve matters and asked what outcome the claimant required. Mr Bagnall's evidence was that grievances are often resolved informally if he could meet and discuss what

the employee wanted. We find that this was the reason for this letter – Mr Bagnall took a reasonable approach to try to find out what the claimant wanted.

144. On 19 June 2017, the claimant wrote to Mrs Furlow [182] with a further fit note and to ask for payment of time off in lieu accrued as she had now gone onto half pay as notified. Mrs Furlow replied to the claimant by a letter dated 19 June 2017 [184] in which she offered further support, informed the claimant that she would make a further occupational health referral and said she had tried to phone the claimant on several occasions. The claimant said she had had one missed call from Mrs Furlow on 6 June 2017. Mrs Furlow said that she had tried to call the claimant maybe 10 times – although she could not recall precisely – up to 19 June. In her witness statement, Mrs Furlow refers to 5 attempts to talk to the claimant on the phone between 3 April 2017 and 19 June 2017.

145. As discussed below under "**Disability**" the claimant was very unwell at this time. We think it likely that Mrs Furlow did try to contact the claimant on a number of occasions without success including additional times to those set out in her witness statement. It is clear, however, that she only managed to speak to the claimant directly once in that period,

146. On 26 June 2017, Ms Watson wrote to the claimant [188] to rearrange the long term absence meeting to 13 July 2017 at Isaac Maddox House. Again, Ms Watson did not include a correspondence address in her letter. The claimant was referred to occupational health the same day.

July 2017

147. The claimant attended an occupational health meeting on 5 July 2017 and the report was produced on 17 July 2017. The referral form [185] did not ask any questions about whether the claimant was disabled or if adjustments might be required. The report [197] says:

    a. In response to a question about fulfilling her role: Ann has not been confirmed in a new role and is therefore unaware what her duties will be

    b. That the claimant does not have an underlying condition but is experiencing significant symptoms of anxiety and depression

    c. The advisor was unable to say when the claimant would be able to return to work.

148. It is clear that the claimant was adamant at this stage that the Band 4 job was not her role.

149. On 6 July 2017 the claimant wrote to Ms Watson to ask her to rearrange the long term sickness absence meeting. This letter was hand delivered but did not reach Ms Watson until 25 July, after the scheduled date of the meeting. This delay would have been avoided had Ms Watson put her postal address

on her letters. Ms Watson wrote to the claimant about her non-attendance on 21 July 2017 rearranging the meeting to 10 August 2017

150. There is a second occupational health report dated 17 July 2017 [201] which refers to the same meeting on 5 July 2017. This additionally says that the claimant was not fit to return to work in any capacity and that "The impact of the redeployment process, the duration of the process and the way Ann perceives it has been managed, has had a sustained and detrimental impact on her mental health and wellbeing."

151. On 17 July 2017, the claimant wrote to Mr Bagnall [200] to say that she is not well enough to go through with the grievance and she will contact him when she does feel well enough.

152. During this period, the parties were continuing to engage with ACAS and we note that in an email dated 18 July 2017, an ACAS officer confirms that the potential claims the claimant was thinking about bringing at that time were age discrimination and disability discrimination.

August 2017

153. The claimant did not attend the long term absence meeting on 10 August 2017. Mr Allen phoned to say that the claimant was too ill to attend. Ms Watson then wrote to the claimant on 25 August 2017 [211] setting out the chronology of the claimant's sickness absence. Ms Watson asked the claimant to call or email her by 4 September 2017 to arrange a meeting to discuss the claimant's absence and potential return to work. Ms Watson made a further referral to occupational health.

September 2017

154. On 4 September the claimant was notified [217] of an overpayment of her wages of £1348.47 and stating that it would be recovered at the rate of £223.46 per month. This overpayment arose as a result of the respondent backdating the claimant's job to the Band 4, and then the pay protection ending when the claimant went off sick. There was no discussion with the claimant about the alleged overpayment or recovery rates in advance of this letter.

155. This reduced the claimant's wages substantially from what she had been earning full time at Band 5 to a fraction of a Band 4 salary.

156. On 6 September, the claimant wrote to Ms Watson and suggested 22 September 2017 to meet, despite Ms Watson very clearly asking the claimant to suggest a number of days if she could not call her to arrange the meeting. Ms Watson was unable to attend on this day. Ms Watson sent a letter on 7 September 2017 [219], before she received the claimant's letter of 6 September stating that she would now need to attend a long term absence decision hearing. In the meantime, however, Ms Watson received the claimant's letter of 6 September and eventually a long term absence meeting was rearranged for 3 October 2017.

157. We find that the delays in this process arose a result of the claimant being too unwell to attend meetings and Ms Watson failing to put her address on her letters until 25 August 2017.

158. On 14 September 2017 the claimant attended a further occupational health review. The relevant findings from this report [222] are:

    a. The claimant was assessed as experiencing mild depression and moderate anxiety and a right hand tremor

    b. It would be helpful to the claimant to attend the forthcoming meeting on 3 October 2017 at her usual work place, rather than Isaac Maddox House as it would be less daunting. Until she attends that meeting, a return to work is unlikely.

    c. That it was hoped that after the meeting and at the expiry of her fit note, the claimant might be able to return to work on a phased return. Redeployment might need to be explored.

159. On 18 September the claimant received a letter [224] from Ms Pilgrim stating that her sick pay would reduce to half from 14 September 2017 and would reduce to nil from 15 March 2018 if she remained on sick.

160. At this point, the claimant started receiving advice and assistance from her union representative, Mr Crooke. He wrote to Mrs Furlow and Ms Pilgrim on 15 September 2017 saying, amongst other things, that the claimant's grievance for Age Discrimination had not been dealt with.

161. He then wrote to the claimant and Mr Bagnall on 19 September 2017 setting out the issues with the pay and Band 4 job and stating that the claimant felt the changes to pay should not have been backdated. This was forwarded to Ms Watson who acknowledged it on 19 September 2017 [227] and in the same response refused to meet the claimant at her usual work place because it was "more convenient" (presumably for Ms Watson, rather than the claimant) to hold the meeting at Isaac Maddox House. We did not hear any evidence from Ms Watson about why she had disregarded the occupational health suggestion to not hold the meeting at Isaac Maddox House and we conclude that it was more convenient for Ms Watson to do so.

October 2017

162. The Long Term Absence discussion between Ms Watson and the claimant was held on 3 October 2017. The claimant was accompanied by Mr Crooke. The outcome of that meeting is recorded in a letter dated 20 October 2017 [272] which the claimant agreed was broadly accurate.

163. In the meeting, the claimant restated that she had never accepted the Band 4 job and that she was not willing to undertake that role. The letter records that the claimant said that the reduction in salary because of the claimant's absence (although, in fact, because of the respondent's policy) was causing additional anxiety. The claimant was at that point taking home less than

£300 per month rather than £1800 when she had been working in her Band 5 role. Ms Watson said that as far as the respondent was concerned the Band 4 role was the claimant's substantive role and the matter was now closed.

164. We find that the claimant, again, made it clear at this meeting that she had not accepted and did not accept the Band 4 role.

165. When the claimant made it clear that she would not do the Band 4 job, redeployment was discussed. It is clear that Ms Watson and Ms Morgan (who was attending from HR) considered that redeployment would be from the Band 4 role, and not for redundancy related reasons but either ill-health or because of the claimant's choice. Ms Watson said in the letter:

"You were then advised that in choosing to explore suitable alternative redeployment there was a risk that If no suitable vacancies are found within the 4 - 6 week search period that this would mean that a hearing would be convened in order for an objective panel to review the situation".

166. In cross examination. Ms Watson said that this redeployment was in fact under the sickness policy. We find that that is the policy she was relying on at the time.

167. The claimant was also told that pay protection would not apply to any job she obtained through redeployment in those circumstances. As she was, in the respondent's view, seeking to be redeployed from a Band 4 role, she would be eligible for Band 3 or Band 4 roles.

168. A further meeting was arranged for 9 November 2017 to review the redeployment.

169. After this, the claimant was sent a number of alternative roles. Between 16 October 2017 and 4 April 2018, the claimant was sent around 17 vacancies. 4 were at Band 4 full time, one was Band 4/5 full time, 9 were Band 3 (a lower grade than Band 4) full and part time and the remainder were Band 4 part time. The claimant's view was that if she took anything below Band 5, she would lose her pay protection. There was only one Band 5 job which was sent to the claimant in January 2018. The claimant said and we accept for reasons that are set out below that she was too ill to apply for it.

170. On 30 October 2017, the claimant wrote [299] to Ms Watson. She said that at the meeting she had told Ms Watson that her illness had been caused by the Respondent. She explained that her right hand tremor made every day tasks difficult and that "following months of deep depression she was now able to finally meet with friends".

171. The claimant sets out again that she did not accept and has not accepted the Band 4 role. The claimant also said that her complaints of age discrimination and bullying had not yet been addressed.

172. We find that on receipt of this letter on 6 November 2017, Ms Watson could be in no doubt that the claimant believed she had not accepted the Band 4

job and that the claimant had been having difficulties with her daily life from some months. We also find that, although the claimant was clearly stating that she had been having problems with her day to day life, she was starting to feel slightly better or, at least, the beginning of some level of improvement.

November 2107

173. The meeting arranged for 9 November 2017 to review the claimant's redeployment was postponed. Ms Watson had not informed Mr Crooke of the meeting and neither, it appears, had the claimant until the last minute. Mr Crooke had asked Ms Watson to keep him informed of meetings. Ms Watson wrote to the claimant on 14 November about this rescheduling the meeting for 22 November 2017, again at Isaac Maddox House, rather than the alternative venue suggested by Occupational Health.

174. On 20 November 2017, the claimant raised a further grievance to the Chief Executive of the respondent [319] and attaching a copy of her previous grievance to Mr Bagnall. The claimant set out a summary of what she believed had happened and again made it explicit that she believed she had been discriminated against – this time both in respect of her age and on the grounds of disability. The claimant said in that letter that around that time she had been able to attend a social event for the first time since April.

175. That grievance was referred to Mr Bagnall who replied on 29 November 2017 to inform the claimant that Karen Clifford in HR would make the arrangements for the grievance to be dealt with under the policy.

176. It was put to Mr Bagnall that he had control over the constitution of the grievance panel, the implication being that he could influence the outcome. We prefer the evidence of Mr Bagnall that the panel was made up of whoever happened to be available with appropriate experience and seniority, and that in reality the task was delegated to an HR assistant. We find that he did not have any input in this case into who the panel comprised.

177. On 22 November 2017, the claimant attended, with Mr Crooke, the redeployment review meeting which was combined with the second long term absence meeting with Ms Watson and Ms Skelding (HR).

178. In that meeting, the claimant described some of the symptoms of her depression: that she was in a bad place, she struggled to go out on her own or in crowds, she was having trouble sleeping and she said that she had planned to take her own life. We find that Ms Watson was aware at that meeting that the claimant was continuing to have significant difficulties with her every day life.

179. The following issues were also discussed and recorded in the outcome letter of 27 November 2017 [331]:

    a. That the claimant felt bullied into taking the Band 4 job, but had never accepted it;

b. That until the work issues are resolved, the claimant will be unable to return to work;

c. A further referral to the respondent's counselling service was offered and accepted;

d. The issue of the overpayment was agreed to be put on hold by Ms Watson;

e. That the claimant was not well enough to make any decisions about redeployment at that time and was too ill to attend any interviews. The claimant had been sent details of 7 jobs by that meeting;

f. That the claimant would not return to the Band 4 role, but would not relinquish it for readvertising;

g. That there would be a long term sickness absence hearing to consider the claimant's employment.

180. The claimant and Mr Crooke gave evidence, which we accept, that Ms Watson and Ms Skelding read out a preprepared statement stating that the claimant would be referred to a hearing. The implication was that the decision to refer the claimant was pre-determined. We find that a decision had in all likelihood been made before the meeting that the claimant would *probably* be referred to the hearing at that meeting. In our experience, however, it is not unusual or inappropriate for people to prepare for meetings with an expectation of what the likely outcome would be. The claimant had by this stage been off sick for 7 months with limited contact and an occupational health report indicating that the claimant was unlikely to return to work in the near future. A referral to a hearing was, from the respondent's perspective, a realistic possibility.

181. Ms Watson's evidence, which we accept, was that in the claimant's absence the work of the Band 4 role had not been done and this was having an impact on the service.

182. In respect of the claimant not agreeing to relinquish the role that she continued to maintain she did not have, we find that there is no inconsistency. The claimant's position was entirely understandable. She had been told if she did not take it she would be treated as having resigned and would lose her employment rights. The claimant also said it was not her role to relinquish. The claimant was left in an impossible position by the respondent. By agreeing to relinquish it she would be both impliedly agreeing that it was hers to relinquish while at the same time losing any rights she might have to, for example, pay protection.

183. The claimant was also referred to occupational health again from this meeting.

December 2017

184. On 12 December 2017, the claimant was invited to a grievance hearing on 16 January 2018 at 9.30am and the Long Term Absence Hearing at 2pm in front of the same panel at Isaac Maddox House. The claimant said that this decision demonstrated a lack of consideration for the claimant's wellbeing and we are inclined to agree. At the very least, the respondent ought to have asked the claimant and/or occupational health if the claimant would be up to two difficult and emotional meetings in one day in light of the what the claimant had told Ms Watson about her mental health at the Meeting on 22 November 2017.

January 2018

185. On 3 January 2018, the claimant wrote to Ms Clifford in HR [360] requesting some documents to prepare for the hearing and said that she had been unwell over Christmas and New Year. The claimant had been sent some further job information in December and we conclude that she was too unwell at that time to apply for the jobs. In that letter, the claimant explicitly says "It should be noted/recorded that once again. There has been total disregard for my health and wellbeing by arranging these two gruelling meetings on one day".

186. There was no evidence that the respondent gave any consideration to this at all.

187. The claimant had a further occupational health review on 5 January 2018. The relevant findings of that report are:

    a. The claimant had noticeable symptoms of depression

    b. The claimant was not fit to attend work in any capacity

    c. The claimant's perception of the way the redeployment process had been handled had had a detrimental impact on her mental health and wellbeing.

188. On 8 January 2018, the claimant expressed an interest in a Band 4/5 post. However, when the form was sent for the claimant to complete, she was unable to do so. The claimant said, in her email to HR on 12 January 2018,

    "I am not coping, I have had to have my antidepressants increased again. At the last meeting on 22 November, Gurdees said they would arrange counselling for me, I have not heard anything. I need someone to talk to. Can you please help me?"

189. The claimant spoke to a counsellor on that day who subsequently emailed Ms Morgan on 15 January 2018 explaining that the claimant had been distressed and provisions had been made available for someone for the claimant to talk to over the weekend if necessary. The claimant explained more in her witness statement about what she was going through which we do not need to set out here. In our view, it was obvious from the tone and content of the emails from the claimant and her counsellor that the claimant was not well at all at this time.

The grievance hearing

190. The grievance hearing took place on 16 January 2018. It was chaired by Ms Fran Tummey, a deputy Director with Ms Liz Faulkner, Head of Workforce Transformation (HR) and Jane Cahill, Lead for Starting Well Service, Reach for Wellbeing and the Looked After Children's Team. Mrs Furlow attended for the "management side" accompanied by Ms Pilgrim. The claimant attended with Mr Crooke.

191. The claimant's complaint about the grievance is that the outcome was predetermined. In her witness statement, the claimant said that the meeting was "horrible and biased" and the panel led management with answers. She said "My grievance was not upheld. I was not at all surprised I had felt that the panel were led and directed by [Mrs Furlow and Ms Pilgrim] throughout it did not seem like a new assessment at all".

192. The grievance process that was applied was that each side (the claimant and the management) presented written information in advance, they would then present their cases, the claimant going first, and then be questioned by the panel and the other side. There was no independent investigation in advance of the hearing.

193. The claimant presented her case assisted by Mr Crooke, Mrs Furlow presented the management case assisted by Ms Pilgrim. The issues that were dealt with were:

    a. To be reinstated into your band 5 role on full time hours

    b. To be compensated for any lost salary

    c. Acknowledgement that the Change Management process has not been followed and that something is done to rectify the situation

    d. To acknowledge that your post was redundant within Sexual Health

    e. To acknowledge that the tone of some of the letters and emails sent to you made you feel told off

    f. That you were treated unfairly and there was no acknowledgement of your depression

    g. That you were slotted into a 18.75 hours per week band 4 IT and Data Lead post which you do not feel is appropriate

    h. There was no negotiation, discussion or detailed notification from NHS Shared Business Services (SBS) in relation to your overpayment.

194. In reality, the first 4 points a – d and g were part and parcel of the same thing and arose from the claimant's view that her job was redundant, but she had not accepted the new Band 4 job. In our view, the panel's approach is reflected in their outcome to point 1.The claimant could not be reinstated because no Band 5 post existed. We conclude that there was nothing the claimant could have said in this grievance process that would have resulted

in the panel properly addressing the complaints she was making in points a – d and g. The panel's view was that the policies had been applied, based on an assurance from Mrs Furlow and Ms Pilgrim that they had been, and so that claimant's complaints would not be upheld. The claimant was clear that she had not accepted the Band 4 job, the panel did not make a decision as to whether the claimant had or had not accepted the role and so fundamentally failed to address the underlying issue in this part of the claimant's grievance.

195. We find that in the absence of a proper independent investigation into what had actually happened, the panel were unable to make a proper determination of the claimant's grievances as they applied to the questions in a – d and g.

196. In respect of h, specifically, Mrs Furlow and Ms Pilgrim told that panel that they did not know about the process for recovering overpayments, so were not able to answer questions about that aspect. Again, this would have been addressed by an independent investigation before the hearing. The panel did consider the overpayments policy, but did not have sufficient information to properly address it. For example, it is clear from the chronology that recovery started without giving the claimant an opportunity to agree a repayment plan in advance, in breach of the policy.

197. In respect of e and f, these matters were suitable to be addressed in the grievance in the way that they were. These are questions of perception and an investigation is unlikely to have made much difference to the matters before the panel.

198. However, the panel failed to engage properly with the allegation of age discrimination arising from the occupational health referral. In respect of the reasons for ticking the ill health retirement box, we find that the panel appeared predisposed to prefer the management case. We refer specifically to paragraph 651 of the notes in which Jane Cahill asks a very leading question, demonstrating a predetermined view of the reasons for Mrs Furlow ticking the ill health retirement box.

199. Mrs Furlow said about the Occupational Health referral "Much emphasis has been placed on Ann feeling that she is being discriminated against and labelled old. This seems to have originated from her visit to Occupational Health on the 20th February when Ann claims that her Occupational Health advisor was concerned by the referral I submitted. There was no malice intended in the referral and no ulterior motive I was simply concerned about Ann's health at that point in time and being able to support her through the process. I am disappointed that my intensions have been misinterpreted".

200. This is inconsistent with the explanation given to the Tribunal that was said to have been given at the meeting on 2 March; that it was an error. There is a clear assumption by Ms Cahill that the box was ticked in error. Similarly, the evidence of Mrs Harrad to the tribunal was that there was nothing to investigate because it was an error was based on what Ms Pilgrim had told her. This assumption seems to have arisen from the fact that the claimant would be ineligible for ill health retirement at the age of 70, but no one

questioned whether Mrs Furlow knew that to be the case when she ticked the box and in fact the information Mrs Furlow gave to the grievance panel suggests it was an intentional, if misguided, act.

201. There was, in our view, an obvious need for an independent investigation into the reasons for Mrs Furlow ticking the ill-health retirement box. This was, by this time, a large issue for the claimant and one that warranted addressing properly. It was not done so and in our view that is because Ms Pilgrim, Mrs Harrad and Ms Cahill had made an assumption that Mrs Furlow had mistakenly ticked the box.

202. We recognise that Mrs Harrad had no part to play in the grievance process, but she was aware of the case. She was the lawyer talking to ACAS about potential discrimination claims and she was in touch with Mr Bagnall and Ms Pilgrim. If Mrs Harrad had applied her mind to the question, she would have realised that there was a question to be asked and could have proposed an investigation. The same thing applied to Ms Pilgrim who was an HR professional.

203. These assumptions operated, we find, on the decision of the grievance panel who also assumed it was just a mistake and in our view the panel were never going to make a finding that the claimant had been subject to age discrimination in these circumstances.

204. In a subsequent letter, Mr Bagnall asserts that Mr Crooke agreed to the grievance process. We have seen nothing in the grievance minutes to indicate that but, in any event, even if he did it was still up to the grievance panel to ensure that they were able to consider and properly decide the matters in issue. This included considering whether they had enough information about Mrs Furlow's reasoning and the overpayment issues and it was clear that in the format of the hearing as it was arranged they did not.

205. Finally, in respect of this meeting, Mrs Furlow said in her witness statement "I certainly have not called the Claimant old and she confirmed this herself during the grievance hearing [and we note that it has transparently never been the claimant's case that she was *called* old].I also apologised again on tape at the grievance hearing to which the claimant acknowledged the apology".

206. Having read the transcript, we find that Mrs Furlow did not apologise for ticking the ill health retirement box. What she in fact said was:

"In fact I not only apologise for the issue of the ring fencing but also would like to take this opportunity Ann of the impact (sic) that the process has had on you".

207. This apology is not related to the occupational heath referral generally or the decision of Mrs Furlow to tick the ill health retirement box specifically, at all.

208. The grievance hearing ran over, and the Long Term Absence hearing was consequently postponed. The claimant was not, by that stage, well enough to engage in a second hearing on the same day.

209. The outcome of the grievance was sent to the claimant on 18 January 2018 [437], which we have already discussed, and the claimant appealed against it on or around 31 January 2018.

February 2018

210. On 13 February 2018, the Long Term Absence Hearing was rearranged for 7 March 2018 at Isaac Maddox House.

211. Then, on 15 February 2018, Mrs Furlow wrote to the claimant [487] with a copy of a contract for the Band 4 role which had been produced by the respondent on or around 9 February 2018. In that letter, Mrs Furlow also said that the claimant had been very clear that even if she were fit for work, she would not be returning to the Band 4 job. She then said:

"You have previously been advised that the impact on the service cannot continue of this role being vacant without the option of recruiting to it. I write to advise you that the service cannot function effectively without this role being undertaken. I would therefore ask you, for the final time, to consider the following options if you were fit for work:

a. Return to the role of IT and Data Lead (band 4) 18.75 hours per week

b. Return to the role of IT and Data Lead (band 4) and explore redeployment options to increase your working hours up to 37.5 per week

If I do not hear from you by Friday 23 February 2018 I have no other option than to initiate the recruitment process for this post. Please be assured that the search for suitable alternative employment for you will continue up to and including the date of the scheduled long term absence hearing at which point all decisions will be reviewed".

212. The claimant said, and we accept, that this letter had a detrimental impact on the claimant's health. The claimant had made it clear, from the outset, that she did not want this role and consequently it was not being done. The respondent did in reality have no choice but to advertise it. However, in our view this problem was very much of the respondent's own making. The claimant's role had clearly gone in January 2017. The claimant had asked to be considered for redundancy as part of the ACAS proceedings in 2017 and, on the face of it, the claimant was facing a redundancy situation. Yet the respondent in this letter gives a clear impression that the claimant was somehow responsible for the position she was in.

213. The respondent's position is wholly inconsistent at this point. In the same letter Mrs Furlow says that the claimant has been offered 13 jobs which she has failed to express an interest in (which the claimant disputes). It is very hard to understand why the respondent would continue to seek

redeployment for the claimant if they genuinely believed that she had accepted the Band 4 role.

214. We conclude that, in fact, the respondent knew very well that the claimant had never accepted the Band 4 role. This is very clearly reflected in the answers Mrs Furlow and Ms Pilgrim gave to the grievance panel: that the claimant had not rejected it; and, effectively, the same answers all the witnesses gave to the tribunal. This letter was the latest attempt to force the claimant to just accept the job.

215. The claimant's health deteriorated around this time, and we deal with that below under "disability".

216. The respondent continued to send the claimant job opportunities, and she expressed an interest in one Band 4 full time job initially, but shortly after told the respondent that she was too unwell to pursue it [508]. Mr Crooke continued to correspond on the claimant's behalf and arrange the grievance appeal meeting and long term sickness absence hearings.

217. The claimant had been referred for a further occupational health appointment on 22 February 2018, but she was too ill to attend.

March 2018

218. In March, the claimant's husband took over corresponding with the respondent on behalf of the claimant. The claimant said she was too unwell to manage this herself. On 8 March, Mr Crooke heard, and informed the respondent's HR team, that the claimant had become very unwell and was referred to a Crisis Team. The long term absence hearing was therefore postponed.

219. The claimant received a letter dated 14 March 2018 [524] stating that her pay would stop from 15 March 2018 because her sick pay would run out and her pay did stop then.

220. On 15 March 2018, the long term absence hearing was rearranged for 18 April 2018 at 12 noon, again at Isaac Maddox House.

April 2018

221. The claimant wrote to the respondent to say that she would not be attending the Long Term Absence meeting that had been rearranged to 18 April 2018 as she was too unwell. This was postponed again, on 17 April 2018 to 2 May 2018 so that the grievance appeal and Long Term Sickness Absence Hearing could be heard on the same day on 2 May 2018. The claimant was informed of this in a letter dated 18 April 2018.

222. We are surprised at the respondent's decision to convene two difficult meetings in one day. The claimant had made it clear that she was unwell and she was manifestly unable to cope with two hearings previously. She had recently taken a turn for the worse and been referred to the Crisis

Team. There was really no good reason to arrange both meetings on one day again.

223. In April, the claimant's husband discovered that the Band 4 role had been advertised. He wrote to Mr Bagnall on 25 April 2018 [561] as follows:

"Further to my e-mail of the 23rd April 2018, it would appear that my wife HAS BEEN dismissed without her knowledge. I enclose a copy of the Job Description and person specification that is advertised on NHS Jobs. This indicates that the Trust had already decided to dismiss Ann prior to the Long-Term Absence Meeting that did not go ahead on the 18th April 2018. The request for the advert would have needed to be submitted before/by that date to be included in the current NHS Jobs online".

224. We refer to our findings above about the inconsistent position of the respondent. Notwithstanding the claimant's clear view that that was not her job, the respondent did purport to say that it was the claimant's job. Mr Bagnall responded to say that the claimant had not been dismissed, but that redeployment opportunities would continue to be offered and explored until a change in the claimant's employment status (presumably, either she was dismissed or found a new role).

225. In our view, the decision to advertise the Band 4 job further demonstrates that the respondent did not genuinely believe that the claimant had ever accepted that role and we find that the respondent knew that the claimant had never accepted the Band 4 role. No reasonable employer would advertise someone's job in these circumstances if they genuinely believed it was their job. We also find that the reason they advertised the Band 4 job was because they knew that nether the claimant nor anyone else had the job, and they needed someone to fulfil the role.

226. In the same letter from Mr Allen to Mr Bagnall dated 25 April 2018, the claimant's husband requested that the hearings of 2 May 2018 be postponed as the claimant was still very unwell. Mr Allen said that the decision to advertise the Band 4 job had set her further back.

227. Mr Bagnall replied on 27 April 2018 stating that the Trust did not believe the claimant had been dismissed but that the claimant had indicated that she would not return to the Band 4 job if she were well enough to return to work. This is why, he said, the respondent was continuing to explore redeployment. He concluded:

"You will be aware that the Trust made a referral to our Occupational Health provider for her to be assessed on 22 February 2018. I understand that you cancelled this meeting and have not subsequently rebooked the appointment. The purpose of the appointment was for the Trust to receive up to date medical information about Ann's health, as well as asking if there was any additional support that could be identified to support Ann. Without this information, the Trust may make decisions without the benefit of up to date medical advice. If you are able to identify specific support that you believe will support Ann, kindly let me know.

The Trust has previously postponed the sickness hearing on a number of occasions in response to requests from or on behalf of Ann. Whilst the Trust does not have the benefit of up to date medical advice, as she did not attend the appointment, Ann did previously indicate in her written submission that she could not anticipate when she would be well enough to return to work…[there is further information about union attendance which is not material]

…Ann has been absent from work since April 2017 and it is important that we hold a long term sickness review meeting to make decisions about the future. If you or Ann wish to make any written representations, or can suggest any other way to contribute to the process, the Trust will consider these.

As always if you believe there are other ways in which the Trust can support Ann kindly let me know".

228. The hearings were not, therefore, postponed for the reasons set out in the letter and the claimant was invited to make written representations, which she did.

229. In those representations, the claimant explained very clearly the issues, from her perspective, that we have set out above. She also said that at that point she did not know when she would be well enough to return to work, or even if she would ever recover from how she felt she had been treated.

230. There is further correspondence between Mr Bagnall and Mr Allen in which Mr Allen re-iterates that the claimant has never accepted the Band 4 role and that she has been made unwell by the actions of the respondent, particularly that the correspondence of 15 February 2018 from Mrs Furlow causes an exacerbation of the claimant's problems. He says that the claimant wants to return to work, but not in the Band 4 job and restates some of the previous problems the claimant has had. He requests again that the meetings on 2 May 2018 are cancelled.

May 2018

231. On 1 May Mr Bagnall replied to Mr Allen. He said that the contemporaneous documentation did not support the assertion that the Band 4 job had not been offered to or accepted by the claimant. The narrative he then sets out to apparently demonstrate this clearly fails, again, to identify anything that might amount by the claimant to acceptance of the role. Mr Bagnall sets out the roles that the claimant has been offered, including one Band 5 role which is referred to above and some Band 3 and Band 4 roles. He again declined to cancel or postpone the hearings on 2 May, but invited the claimant to present information in writing and again reiterated that the panel would decide whether they had enough information to make the decisions on the day.

232. On 2 May 2018 at 10.15am, the claimant's grievance appeal was heard by Mr David Thomas (Chair), Ms Becky Clarke (HR) and Ms Emma Webber. On the same day at 1.40 pm, the same panel heard the Long Term

Absence Decision Hearing. It was implied in cross examination of Ms Clarke that Mr Bagnall had changed the composition of the appeal (and sickness absence) panel deliberately, it previously being allocated to a Ms Buckley. We do not agree – we prefer Ms Clarke's and Mr Bagnall's evidence that the panel was made up of suitably experienced people selected by a junior HR person because of their availability.

233. The claimant did not attend either hearing and was not represented at either. In the circumstances. Mr Crooke said he had been advised by the Union that it was not appropriate to represent the claimant without her being there and we do not make any criticism of him for that.

Grievance appeal

234. Present at the grievance appeal meeting, in addition to the panel, was Ms Tummey and Ms Liz Faulkner (Head of Workforce) who had heard the grievance. Mr Thomas did not attend to give evidence to the Tribunal. He no longer works for the Respondent and has moved away. The respondent called Ms Clarke to give evidence about this.

235. The panel did not uphold the grievance appeal. Have considered the transcript of the hearing, it is difficult to see why the claimant's appeal was wholly unsuccessful. There were 18 appeal points. We do not address them all, but address the ones put in cross examination to Ms Clarke.

236. Point 4 "I feel it is most inappropriate for the Panel to have ignored my plea to be reinstated to My Band 5, Full Time status. I am aware that my job/role had been made redundant but there is absolutely no reason whatsoever for the Trust to have down banded me and reduced my hours. The Change Management Policy allows for a staff member to be offered 2 or more positions to protect their status. This was not applied to me. I did not expect my previous job back, but I did expect and ask for adequate protection and this was not offered or considered".

237. Point 7 deals with substantially the same issue.

238. Ms Clarke agreed in cross examination that she knew agreement was required from the claimant before she could be said to be in the Band 4 job. The grievance appeal outcome says "We do understand that the offer made to you as part of the change management/redeployment/slot in process was undesirable to you for a number of reasons, but, in our view, it was reasonable, and the grievance panel were right to conclude that you could not be reinstated to your old role as it no longer existed".

239. This fundamentally fails to address the point in issue, and that has been in issue throughout, that the claimant had never agreed to the Band 4 job. The grievance outcome says

"You said a number of times during the hearing, that you had not accepted the position however management side assert that you did not decline the position. The panel heard that one to one meetings were scheduled with

you to discuss alternative positions and identify alternative posts to make up your working hours to full time.

On 22nd March 2017 Nikki Pilgrim sent you details of a band 4 role working 15 hours per week which combined with the part time IT and Data role would almost make up your working hours to 37.5 hours per week. The panel heard and saw evidence of a number of potentially suitable alternative positions which were highlighted and discussed with you during February and March 2017. Communications were sent to you regarding these positions".

240. The appeal panel transparently avoided addressing the issue in precisely the same way that the grievance panel did. In our view, this is because both panels must have known that the claimant could not be forced into a role she did not want, and thus skirted round the issue by seeking to rely on the respondent's view that the claimant had not explicitly refused the job (although, she had made her views about it clear on many occasions).

241. Point 6: "My grievance contained numerous allegations of bullying. These have never been investigated. Both Tracy Furlow and Nikki Pilgrim commented that they had been unaware of any allegations of bullying. There should have been an investigation into this".

242. Ms Tummey told the appeal panel that because the claimant had been made aware of the Acceptable Behaviour policy, the respondent's bullying policy, and had not formally raised a complaint, there had been no separate investigation under that policy and the grievance panel did not deal with it.

243. The grievance appeal outcome is that

"In our view, this was an error. We feel it would have been appropriate to consider this, as the allegations of bullying appear to consist in the events outlined in your grievance, the tone of letters, and the discussions had – all of which were being reviewed as part of your grievance.

The appeal panel acknowledges that the impact of the process you have experienced has been considerable. However, we did not see evidence that you had been bullied, and did not judge that you had been disadvantaged by the absence of a further, formal, separate investigation into this".

244. Ms Clarke's evidence was that the panel concluded this because they saw no evidence of bullying so that a second investigation was not required. Mr Horan asked Ms Clarke on what basis the panel could have possibly concluded that it would have made no difference that an investigation had not been done. Ms Clarke said "we considered the grievance concerns were around the application of Change Management policy and we reviewed that as part of grievance process. We reviewed the evidence in front of us and the evidence in the grievance and appeal hearing was able to be used to make that judgement".

245. In our view, this fails to engage with the fact that the claimant felt she had been excluded at work and discriminated against as set out in her grievance

submissions, including specifically the ill health retirement occupational health referral.

246. The appeal panel's conclusions on this point are not reasonable in light of the evidence they had and we are inclined to agree with the proposition put by Mr Horan to Ms Clarke in cross examination that management evidence was preferred and the appeal panel wanted, consciously or sub-consciously, to tie up any loose ends outstanding from the grievance so that they could get on with considering the Long Term Absence Decision Hearing in the afternoon.

Long Term Absence Hearing

247. The Long Term Absence Hearing was held the same afternoon in front of the same panel. Again, the claimant did not attend and nor was she represented at the hearing. At this hearing, the management case was presented by Ms Watson and Ms Morgan (HR). We make the following findings in respect of this hearing:

248. Ms Watson told the panel that the claimant considered that the Band 4 job was not her job, albeit that neither she nor Ms Morgan were involved in the change management process. She set out the history of the claimant's absence including that initially the claimant was off with work related stress and from 31 July 2017 the reason for the claimant's absence was depression. Ms Watson set out her attempts to meet with the claimant and said "The impact of the redeployment process, the duration of the process and the way Ann proceeds (sic) it was managed has had a sustained and detrimental impact on her mental health and wellbeing".

249. Ms Watson told the panel that from 3 October 2017, the claimant had sought redeployment and a number of vacancies at Band 4 and Band 3 (as already discussed above) had been sent to the claimant at that time and by the time of the hearing a total of 18 vacancies had been sent. She said that the claimant had not applied for any vacancies and we have already made findings about that as far as is relevant.

250. Ms Watson referred to the most recent Occupational Health report of 18 January 2018 as saying that at that time the claimant was not fit to return to work in any capacity.

251. Ms Watson summarised the position as follows:

"Ann has been absent from work for 394 days. Ann has not engaged in the search for redeployment opportunities. No return to work date has been identified. Ann has been on nil-pay since the 15th March. Ann and her representatives have also stated they are unable to provide a return to work date and it is unclear what further support we can offer to facilitate her return to work having already been in contact with, Ann has already been in contact with occupational health, NOSS, seek support from the Trust health and wellbeing lead, and has also been offered Healthy Minds as well".

252. The panel did challenge some aspects:

253. They asked why Ms Watson had not phoned the claimant and she gave the same answer that she did the Tribunal – that she wanted to establish a rapport face to face.

254. There was a discussion about the redeployment from October and Ms Watson said, again, that that was under the sickness process rather than change management. Ms Watson said that this was because the claimant was distressed by the respondent's view that her job was the Band 4 job.

255. The panel also raised with Ms Watson the apparent delays in contacting the claimant while she was off sick, the failure to ensure the claimant received the additional counselling sessions that had been agreed to by the respondent. Ms Morgan confirmed that no one had informed the claimant that she could have more counselling sessions.

256. Ms Watson confirmed that there was at that point no-one doing the Band 4 job and this was having an adverse impact on the respondent's service.

257. Ms Watson summarised at the end – by this point the claimant had been absent for over a year – 394 days, and no one had been doing the Band 4 role. Ms Watson in fact said it had been vacant throughout that period. She said that the claimant had failed to engage with the redeployment process, she had been offered support, but had cancelled her most recent occupational health appointment and no return to work date had been identified.

258. The claimant says, in her witness statement, that not all relevant information was provided to the panel by Ms Watson about the matters leading up to her sickness absence, and the redeployment. The panel did have however, all of the written information that the claimant provided to them so that that information was available to them.

259. It is apparent from the notes, and we find, that Mr Thomas gave genuine consideration at this meeting to the balance between the impact of the claimant's absence on her and on the respondent. The conclusion of that meeting was that the claimant would be referred for a further up to date occupational health report. In our view, the panel at this hearing approached the matter with an open mind and did their best, in the circumstances, to consider both sides of the issues.

260. Mr Thomas then made an occupational health appointment for the claimant on 8 May 2018 and wrote to her to that effect including explaining the question that occupational health would be requested to answer. The claimant, in her witness statement, says that she believes that the panel made the decision to dismiss her on 2 May. We do not agree. The panel might well have thought that there was little chance that things would change, but we think that it was reasonable and appropriate for the respondent to obtain a further occupational health report and we find that they had not made the decision to dismiss the claimant on 2 May 2018.

261. The claimant attended the Occupational Health appointment on 11 May 2018. The relevant findings of that report [594] are as follows:

a. The claimant had been making good progress but believes the grievance outcome contributed to a relapse in her symptoms

b. The claimant was continuing to receive treatment, including secondary care

c. The if the claimant continues to make good progress she may be fit to return to work in 3 months plus

d. That she was having difficulty coming to terms with her redeployment experience

e. Recommendations were made to support a return to work including a phased return, not working alone, a period to update her training and having a colleague or friend accompany her into work initially.

262. On 18 May 2018 the panel reconvened by themselves to consider the updated occupational health report. Their decision was to dismiss the claimant. The reasons set out in the letter form Mr Thomas dated 22 May 2018 [596] are:

a. That the claimant remained unfit for work in any capacity

b. That occupational health said that the claimant's absence may extend a further 3 month plus and any return to work is dependent on the success of any treatment

c. No reasonable adjustments had been proposed that would help facilitate an earlier return to work

d. That the panel was concerned with the impact of ongoing interactions with the respondent on her health

e. That the panel did not have a high degree of confidence that the claimant would return to work in any capacity at least 16 months after the start of the claimant's absence.

263. Dismissal was with immediate effect and the claimant was paid 12 weeks' pay in lieu of notice.

264. We find that the panel who dismissed the claimant, being the same panel who had heard her grievance appeal, were very well aware that the claimant had never accepted the Band 4 role and that, in fact, there was no job for the claimant to return to if and when she was fit for work.

265. An issue arose at the end of submissions in the Tribunal hearing as to whether the claimant had been paid her notice at Band 4 or Band 5 and the parties wrote in afterwards. That claimant produced payslips showing that she had been paid her notice pay at Band 4 for part time hours only, and the respondent replied as follows:

"The Respondent accepts that they did not pay the Claimant correctly her notice pay and outstanding annual leave, and are seeking to clarify with our

payroll provider the exact amount that should have been paid (taking into account taxation etc). The Respondent proposes to pay to the Claimant within the next 7 days the difference between what she was paid and what she should have been paid and is today writing to the Claimant's Solicitor to confirm that her bank account details remain the same so that a BACS payment can be made".

266. We therefore find that the claimant was paid for her notice at Band 4 on the basis of working only 18.75 hours per week.

267. Mr Horan put it to Ms Clarke that as the claimant's length of service and almost unblemished absence record (until 2017) was not referred to anywhere in the notes of the disciplinary hearing or the decision letter, the panel had failed to take it into account. Ms Clarke said that they did consider it and in her witness statement she referred to the claimant's written submissions. They do refer to the claimant's length of service. On balance, we prefer the evidence of Ms Clarke that the panel did give some consideration to the claimant's length of service, but decided that it was not a significant enough factor to override the other matters that they considered.

268. Ms Clarke said in her witness statement and in oral evidence that one of the main barriers to the claimant returning to work was "the symptoms she was experiencing, in particular the redeployment process had on her mental health and the difficulty with her coming to terms and moving forward from this."

269. She also agreed with Mr Horan that that issues the claimant had with the respondent needed to be addressed before the barriers could be removed. Ms Clarke said that the grievance process had been the attempt to address those issues but they remained unresolved.

270. We agree that that was the process by which the respondent could have addressed the real underling problems for the claimant; which were that she had been given a job she had not accepted, had had her pay reduced in consequence and, from her perspective, been subjected to age discrimination. For the reasons we have set out at some length above, the trust failed in the grievance process to deal properly with those three issues. In respect of the issue about the claimant's job, they maintained the position that the claimant was legitimately occupying the Band 4 job in the face of clear evidence that the claimant had not accepted the job. It is hardly surprising that the claimant reacted adversely to this belligerent, persistent denial in the face of common sense by the respondent. Then, on top of that, her pay was reduced and an overpayment created in consequence of this stance taken by the respondent.

271. Finally, in respect of the decision to dismiss the claimant, Mr Horan put to Ms Clarke that in the following context:

    a. after 29 years flawless attendance save for 2017;

b. Occupational Health recommending that in a time longer than 3 months the claimant could return to work with reasonable adjustment;

c. the claimant saying that she had been discriminated against and that had lead to mental illness;

d. that allegation of discrimination can be meaningfully resolved only after investigation;

e. with minimum support, or no support at all from the beginning of her sickness absence;

f. receiving only a letter from her manager after 6 weeks and waiting 5 months to a first meeting;

g. the claimant cost no money to keep on as her pay had stopped in March 2018

no reasonable panel could have thought that it was appropriate to dismiss the claimant at that time.

272. Ms Clarke said “as a panel we considered length of absence and ongoing impact the overall process was having on the claimant’s health including any contact from the Trust to the point we were communicating with claimant’s husband, we did deem it as reasonable to consider that at that time”.

273. We accept Ms Clarke’s evidence that the panel considered it reasonable. It is, of course, a question for the tribunal whether that decision was within the band of reasonable decisions of a reasonable employer and we address that below in our conclusions.

274. We heard no direct evidence about the effect of that decision on the claimant. In fact, in her appeal against dismissal, the claimant says that she understood she had already been dismissed (by reason of the advertisement of the band 4 job previously). We conclude, therefore, that the decision to dismiss the claimant while unwelcome did not come as a great surprise to her.

The pension form

275. We address briefly the issue that the respondent failed to complete a form AW8 to cover the claimant’s pension contributions. Mr Bagnall’s evidence was that the form is one which is completed initially by a separate part of the respondent when requested by the claimant, and the claimant would complete the second part. There was no evidence that the claimant had requested such a form. We find, on the balance of probabilities, that the reason the form was not provided or completed was because the claimant did not request one. It was suggested that the claimant should have been informed of the need to make the request. However, we think on the balance of probabilities that the claimant would have been aware – both as a long term employee and a manager – of the need to contact the pension

provider for information about accessing her pension whether or not she was reminded of that by Mr Bagnall or Ms Pilgrim. Overall, we conclude that any delay in providing the form was as a result of an oversight – whether by the claimant or Ms Pilgrim – and was not a deliberate act by the respondent.

Statement of main terms of employment

276. It is one of the allegations that the claimant has not been provided with a written statement of her main terms of employment. The dispute appeared to relate to the late provision of the terms for the Band 4 job. This was not the claimant's job, but terms were sent in any event in or around February 2018.

277. In oral evidence, Mr Bagnall said that a written statement would have been issued in respect of the commencement of the claimant's employment. The claimant offered no evidence about not receiving an original statement or one relating to any changes before January 2017.

278. We prefer Mr Bagnall's evidence and find that, on the balance of probabilities, the claimant was sent at some point in her employment a written statement of her main terms of employment.

Disability

279. It was agreed by the respondent that the claimant was disabled within the meaning of the Equality Act 2010 by reason of anxiety and depression from the date of her dismissal, being 22 May 2018. It is necessary to consider whether the claimant was disabled before then and, if so, from what date. We therefore make the following findings of fact about this issue.

280. We wish to record that we have had to make findings about deeply personal and upsetting aspects of the claimant's life. We regret having to do this, and have tried to limit the amount of information we have published, while having regard to the principles of open justice. The purpose of these findings is to show why we have made the decision we have about the date from which the claimant was, as a matter of law, disabled. We absolutely do not intend to cause the claimant any further distress in our findings, but we understand that this aspect of our judgment is likely to be difficult for the claimant to read.

281. The claimant was first absent in January 2017. The reason for this absence is recorded in her fit note as "Chest infection and Work Related Stress". The claimant was off for 2 weeks and returned to work. The relevant conclusions in the occupational health report are set out above at paragraph 74. That says the claimant had at that time no underlying health conditions. In her impact statement dated 3 December 2018, [42] the claimant says that she had suffered with depression for more than 18 months. This means from at least the middle of 2017.

282. The claimant started her period of long term sickness absence on 3 April 2017. The claimant submitted a number of fit notes through her period of

absence. The date of the fit note and the reason for absence are set out in the table below

Date of assessment	Reason for absence
4 April 2017	Stress at work
20 April 2017	Stress at work
28 April 2017	Stress at work
15 May 2017	Stress at work
15 June 2017	Stress at work
31 July 2017	Depression NOS
30 August 2017	Depression
23 November 2017	Depression
7 December 2017	Depression NOS
8 January 2018	Depression NOS
8 February 2018	Depression
8 March 2018	Depression NOS
17 May 2018	Depression NOS (this is the last fit note we have, and it runs to 13 August 2018)

283. There is a letter from the claimant's doctor date 27 November 2018. This sets out a history of the claimant's medical problems. It is not necessary to set that out in detail but the relevant things it says are:

    a. The claimant was formally diagnosed with a clinical depressive illness on 15 May 2017, having first started to show signs of this by 28 April 2017;

    b. The claimant was prescribed medication for depression in May and started counselling. Her medication was increased in June;

    c. The claimant started to show signs of anxiety by 31 July 2017 and additional medication was prescribed for this;

    d. In August 2017 the claimant disclosed to her doctor that she had had suicidal ideation, and had gone so far as to make plans about this.

    e. Importantly, the letter says "She was reviewed regularly through the winter and remained fragile but better than she had been initially". In January 2018, the claimant's medication for depression was increased to its maximum dose;

f. As at 8 March 2018, the claimant's mood had deteriorated, she spent days in bed refusing to get up and talked openly about suicide. She was referred to psychiatric services and their involvement continued to August 2018. There was then some improvement, but the claimant's condition deteriorated by November 2018.

284. In her impact statement, the claimant says that she has and has had the following difficulties:

a. Without medication, she would slip into a deep depression and have suicidal thoughts;

b. The medication caused a right hand tremor that causes her difficulty in writing and carrying things like a kettle or cup of tea;

c. The claimant has difficulty arranging and attending social commitments as she does not know if she will be well enough to attend and relies on others for support and transport;

285. In oral evidence, the claimant said that in May 2017 she attempted suicide when she had been left by herself.

286. In June 2017, the claimant was not well enough to attend a sickness meeting or inform the respondent of that – her husband contacted them. By March 2018, the claimant's husband was conducting all communication for the claimant.

287. The occupational health report of 6 July 2017 says "Ann continues to experiences significant symptoms of anxiety and depression which are due to the cumulative impact of work related stressors. She remains under the care of her GP and is receiving appropriate treatment and support". It also said, in contradiction to the GP letter above, that "Ann does not have an underlying medical condition affecting her attendance at work; her current ill health is due to the impact of work related stressors".

288. The occupational health report of 14 September 2017 says that the claimant had mild depression and moderate anxiety and was not it for work, although could be in the near future.

289. In November 2017, the claimant was not well enough to make decisions about redeployment or apply for jobs that were sent. In January 2018, the claimant was pleased to receive details of a job that she considered suitable, but ultimately we too unwell to make the application. On 12 January 2018, the claimant wrote to Ms Morgan and said "I am sorry I have not got back to you, I am not coping. I have had to have my anti depressants increased again. At the last meeting on 22 November, Gurdees said they would arrange counselling for me. I have not heard anything. I need someone to talk to. Can you please help me".

290. This was in the context of the claimant having a serious deterioration and serious thoughts of suicide. She was ultimately able to speak to a counsellor over the weekend. The claimant was referred for psychiatric help

shortly after this as set out above in the doctor's letter. We find that despite the signs of improvement in the claimant's health in late 2017, the claimant's condition significantly deteriorated from this date.

291. The final occupational health report of 14 May 2018 says "Ann explained that over the past couple of months she had been making good progress, and was in fact thinking she was fit enough to return to work in the near future. She has then explained she received a letter from her manager regarding the outcome of her grievance, and she found this distressing, she feels this contributed to a relapse in symptoms, resulting in a call out to the Mental health Crisis Team for support". It says that the claimant is not currently (at that time) well enough to return to work but may be in 3 months or more.

292. Having considered this evidence, we make the following findings.

293. The claimant was, from May 2017, diagnosed with the impairment of depression and from 31 July 2017 also with anxiety.

294. From May 2017, the claimant was experiencing difficulties with her day to day activities because of depression (and latterly anxiety) in that she was struggling to get out of bed and/or engage in any tasks on a reasonably regular basis. She was not safe to be left alone as demonstrated by her attempt(s) at harming herself. This improved with medication and counselling but we think, on the balance of probabilities, had the claimant not had her medication she would have been at substantial risk to herself and would have been unable, very often, to properly care for herself. It is apparent that the claimant was starting to feel slightly better, or cope slightly better, by the end of 2017.

295. At that point we think, on the basis of all the evidence we have seen and heard – particularly the doctor's letter and the occupational health report of September 2017 - that there was a real possibility of the claimant recovering sufficiently to return to work in the near future. In our view, this is necessarily bound up with the claimant's ability to self care so that by the end of 2017 it was at least quite possible that the claimant would return to work before May 2018 and the impact of her depression and anxiety on her day to day life would reduce.

296. However, from 12 January 2018, it was readily apparent that the claimant's condition had deteriorated to the point where she was once again at a significant risk to herself, even with medication, and was thereafter referred for further help. By this date, we find that on the balance of probabilities, the claimant was likely to continue experiencing the same or similar levels of difficulties with her day to day activities that she had been doing since May 2017 until at least May 2018.

297. This did not necessarily preclude a return to work during that period, as we have also found that the medication the claimant had been prescribed appeared to have had a positive effect on the claimant's ability to cope with her depression and anxiety towards the end of 2017. However, the claimant's evidence, which we accept, was that when she received the

letter from the Mrs Furlow dated 15 February 2018 telling the claimant that the Band 4 job was to be advertised, this set her mental health back even further so that any chance of the claimant's difficulties with day to day activities (such as getting up out of bed and being able to be left alone safely) completely abating without medication by May 2018 was further reduced.

Law

Unfair dismissal

298. A person has the right, under s 94 Employment Rights Act 1996, not to be unfairly dismissed.

299. Section 95 of the Employment Rights act 1998 says, as far as is relevant:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice)…

300. In *Surrey County Council v Lewis* 1987 ICR 982, HL, Lord Ackner said "I agree with the judgment of the Employment Appeal Tribunal that at the heart of the right to claim that a dismissal has been unfair or to make the corresponding claim in redundancy lies the loss of employment under the particular contract of employment in relation to which the complaint of termination is made. The relevant provisions all focus upon that particular contract. In the case of unfair dismissal, dismissal occurs when the contract in respect of which complaint is made is terminated…"

301. Although that case dealt with employment under a succession of contracts, the interpretation is clear – dismissal under (now) section 95 must mean termination of the *particular* contract under which the employee is employed, rather than the ending of the employment relationship generally (see also *Hogg v Dover College* [1990] ICR 39 for circumstances where an employee is dismissed from one contract but the employment relationship thereafter continues).

302. Section 98 Employment Rights Act 1996 provides (as far as is relevant) that

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

…

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) …

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

303. The burden is on the respondent employer to show that the reason for dismissal was a potentially fair one.

''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.' *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323.

304. In submissions, Mr Horan said, and Mr Jarvis effectively agreed, that if the real reason for dismissal is for a different one from the one pleaded or relied on by the respondent, the dismissal is unfair. The Tribunal does not have to consider the matter further than that. We were initially referred to *Screene v Seatwave Ltd* [2011] 5 WLUK 767 as authority for the idea that a different fair reason could be relied on at the Tribunal than the one originally relied on. Mr Jarvis fairly and properly agreed that that was not relevant to the question we have to decide. In that case, the substantial underlying facts of the dismissal did not change, only the label, and the parties had in any event preceded on the basis that the real reason for dismissal was conduct, rather than capability as pleaded by the respondent. In this case, the first question is, in reality, whether the real reason for dismissal was capability

by reason of the claimant's long term sickness absence or something else (including possibly redundancy) by reason of the fact that the claimant's job had been removed from the respondent's structure.

305. In *Maund v Penwith District Council* [1984] ICR 143, (cited in *Associated Society of Locomotive Engineers and Firemen (ASLEF) v Brady* UKEAT/0130/06/DA) Griffiths LJ said

"If an employer produces evidence to the Tribunal that appears to show that the reason for the dismissal is redundancy, as they undoubtedly did in this case, then the burden passes to the employee to show that there is a real issue as to whether that was the true reason. The employee cannot do this by merely asserting in argument that it was not the true reason; an evidential burden rests upon him to produce some evidence that casts doubts upon the employer's reason. The graver the allegation, the heavier will be the burden. Allegations of fraud or malice should not be lightly cast about without evidence to support them.

But this burden is a lighter burden than the legal burden placed upon the employer; it is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal".

306. In *Brady*, the EAT confirmed that the Tribunal is not required to identify the real reason if evidence is not produced – it is sufficient for the Tribunal to find that the Respondent has not discharged the burden that the real reason for the dismissal is not a fair reason.

307. In our view, subject to the type of circumstances as set out in *Screene v Seatwave Ltd*, the dismissal will be unfair if the respondent does not show that the real reason was for the *factual* reason relied on by the respondent as the basis for its decision, even if the real reason is a potentially fair one.

308. The respondent relies on capability as the reason for dismissal and in respect of ill health/capability dismissals, the leading case is *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373, [1977] ICR 301. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

309. And he added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'. (Our emphasis).

310. In *McAdie v Royal Bank of Scotland* [2007] EWCA Civ 806, [2007] IRLR 895 the Court of Appeal upheld the decision of the EAT (Underhill J presiding) which held:

"It seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable. … However, we accept, as did Bell J and Judge Reid, that much of what Morison P said in Betty was important and plainly correct. Thus, it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work".

311. It is trite law that if the claimant was dismissed for the fair reason relied on by the respondent, but the process by which that decision was arrived at was defective, compensation for unfair dismissal may be reduced if a fair process would ultimately not have changed the outcome, or the same outcome would have been reached at a different time (*Polkey v A. E. Dayton Services Limited* [1988] ICR 142). Similarly, if the claimant contributed to the dismissal in any way by her actions, any compensation may be reduced.

Disability

312. The legal issues are as follows:

313. Section 6 of the equality act 2010 says, as far as is relevant,

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

314. This question comprises of four separate tests as set out by the employment appeal Tribunal in the case of *Goodwin v the Patent office* [1999] IRLR 4, EAT

(1) The impairment condition

Does the applicant have an impairment which is either mental or physical?

(2) The adverse effect condition

Does the impairment affect the applicant's ability to carry out normal day to day activities…., and does it have an adverse effect?

(3) The substantial condition

Is the adverse effect (upon the applicant's ability) substantial?

(4) The long-term condition

Is the adverse effect (upon the applicant's ability) long-term?

315. In *Tesco Stores Ltd v Tennant* [2020] IRLR 363, it was held that when considering the question of disability, the tribunal must assess whether the “long-term” condition is met at the date of each alleged incident of discrimination.

316. In that case the EAT also confirmed that the onus is on the claimant to show that they are disabled and put forward the basis for that finding.

317. The main contested issue for us to determine in this case is whether at any time before 22 May 2018, the claimant’s impairments of depression and anxiety had substantial adverse effects that were long term.

318. Substantial means more than minor or trivial (section 212 Equality Act 2010).

319. Long-term means at least 12 months and likely means “could well happen”. This is a different test and does not mean more likely than not. This definition was confirmed by the House of Lords in *Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)* 2009 ICR 1056, HL. When considering whether, at any point, it was likely that any adverse effects were likely to last more than 12 months, we must only consider the information available at the relevant time – we are not permitted to take into account anything that actually, subsequently, transpired.

320. In respect of normal day to day activities, the EHRC code of practice on employment refers to activities that are carried out by most men or women on a fairly regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships. It says, at paragraph 14 of Appendix 1: ‘The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition’

321. Regard must also be had to the impact on the person of undertaking such activities – for example pain or discomfort arising from them.

Direct discrimination age and disability (s 13 Equality Act 2010) (Including the burden of proof)

322. Section 13 of the Equality Act 2010 provides:

(1) 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.

323. By virtue of section 4 of the Equality Act 2010, age and disability are each a protected characteristic. Age includes a particular age group, by reference to a particular age or range of ages (section 5 Equality Act 2010).

324. Section 23 (1) provides

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

325. Section 136 provides

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

326. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation. We are entitled to draw inferences form such primary facts that we find at that stage.

327. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her disability or age (as the case may be).

Interaction between harassment and direct discrimination

328. Section 212 Equality Act 2010 says as far as is relevant,

(1) In this Act—

…

"detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

(2) A reference (however expressed) to an act includes a reference to an omission.

(3) A reference (however expressed) to an omission includes (unless there is express provision to the contrary) a reference to—

(a) a deliberate omission to do something;

(b) a refusal to do it;

(c) a failure to do it.

(4) A reference (however expressed) to providing or affording access to a benefit, facility or service includes a reference to facilitating access to the benefit, facility or service.

(5) Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic.

329. In our judgement, this means that where a claimant is relying on an alleged detriment as the basis for a claim of both direct discrimination and harassment, it cannot be both. If it is found to amount to an act of harassment, it cannot also be a detriment amounting to direct discrimination. If the conduct is found to fall short of harassment, however, it is still possible that it could amount to an act of direct discrimination based on allegedly detrimental treatment. (*Unite the Union v Nailard* UKEAT/0300/15/BA).

Discrimination arising from disability (s 15 Equality Act 2010)

330. Section 15 Equality Act 2010 says:

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

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

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

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

331. Paragraph (1)(a) includes the following elements.

332. The respondent must have treated the claimant unfavourably. There is no need for any comparison with another person – it is simply a question of whether the claimant was treated unfavourably. Unfavourable treatment is anything which the disabled person could reasonably consider to be disadvantageous. The EHRC Code of Practice on Employment says that unfavourable treatment

“means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably”

333. The unfavourable treatment must be because of something arising in consequence of the claimant's disability. This part comprises of two elements – there must be 'something arising', and that something must be 'in consequence of' the claimant's disability. The test in *York City Council v Grossett* [2018] IRLR 746 is to the effect that the approach to be taken is that the tribunal must ask 2 questions:

    a. Did the respondent treat the claimant because of an identified "something"?

    b. Did that something arise in consequence of the claimant's disability?

334. The second question is an objective one – did the something *actually* arise in consequence of the claimant's disability (namely her anxiety and depression in this case)?

335. There must actually be an objective link, even if not a direct link (*York City Council v Grossett* [2018] IRLR 746), between the disability and the something arising. The test we are required to apply is whether the claimant's disability was an *effective cause of* the "something". Even if there was an additional cause, the actions will be in consequence of the claimant's disability if her disability had a significant influence on the unfavourable treatment.

336. Even if all these elements are present, the actions of the respondent will not amount to discrimination under this section if they can show that the treatment of the claimant was for a legitimate aim and that treatment was a proportionate means of achieving that aim.

337. For an aim to be legitimate it must be real, lawful and not discriminatory. We address the aims, such as they are, in our conclusions below.

338. In DWP v Boyers UKEAT/0282/19/AT, the EAT said:

    "When considering whether a discriminatory measure is objectively justified, the ET must balance the needs of the employer, as represented by the legitimate aims being pursued, against the discriminatory effect of the measure on the individual concerned. This involves consideration of the way in which the legitimate aims being pursued represent the needs of the business, and a balancing of those needs against the discriminatory effect of the measure concerned".

339. This necessarily involves considering whether there was alternative, less discriminatory step that could have been taken

340. Finally, the actions of the respondent will not amount to discrimination if it did not know and could not reasonably have been expected to know that the claimant had the disability on which the claim is based.

Harassment related to age/disability (s 26 Equality Act 2010)

341. S 26 Equality Act 2010 says, as far as is relevant,

(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.

Subsection 5 lists the relevant protected characteristics, and they include race.

342. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, the EAT analysed this provision. There are a number of elements to this provision

(1) The unwanted conduct. Did the respondent engage in unwanted conduct? This is a subjective test. Mr Jarvis said that conduct does not extend to inaction – he referred to *Conteh v Parking Partners Ltd* [2011] ICR 341 which relates to a failure by an employer to protect an employee against harassment by a third party. We do not agree. In *Conteh*, The EAT said at para 30 *"The "unwanted conduct", as it seems to us, therefore can (but not necessarily will) include inaction: but that conduct has to be taken on the grounds of race or ethnic or national origins if it is to create the hostile environment and thereby come within the heading of harassment. Thus, if inaction occurs because, for instance, the relevant person in the employment of the employer is ill, or for instance because the office is so completely inefficient as to fail to deal with something, or for various other reasons which can easily be imagined which have nothing to do in themselves with race or ethnic or national origin, then the inaction, however regrettable it may be, is not on the grounds of race or ethnic or national origin"*. The test is whether the action or inaction of the employer contributed to the proscribed circumstances. The case then goes on to discus the extent to which the inactivity was attributable to the protected characteristic. In our view this aspect of the case is no longer directly relevant under the Equality Act 2010 which refers to conduct "related to " the protected act, rather than "on the grounds of" as was the case under the Race Relations act 1976.

(2) The purpose or effect of that conduct: Did the conduct in question either:

(a) have the purpose *or*

(b) have the effect

of either

(i) violating the claimant's dignity or

(ii) creating an adverse environment for her 2 ? (We will refer to (i) and (ii) as 'the proscribed consequences'.)

(3) The grounds for the conduct. Was that conduct on the grounds of the claimant's age or disability?

343. If the conduct had the effect of violating the claimant’s conduct or creating an adverse environment, was it reasonable for the claimant to have felt that way. It is clear from subsection 4 that all the circumstances must be considered. In *Richmond Pharmacology*, it was said that

“…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if [she] did genuinely feel [her] dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt [her] dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt”.

344. The EAT cautioned against encouraging a culture of hypersensitivity. It will also be necessary to consider the purpose of the comments or actions to determine the context. In *Thomas Sanderson Blinds Ltd v English* UKEAT/0316/10/JOJ, UKEAT/0317/10/JOJ it was held that

“[40] There is, in our judgment, no general rule applicable to answer the question whether, when fellow workers use homophobic or sexist language to each other (or language relating to any other protected characteristic), both commit unlawful harassment; one commits unlawful harassment; or neither does. The answer lies in an application of the statutory test now contained in s 26 of the Equality Act 2010. We think in many cases both employees will have committed unlawful harassment; each will commit conduct having the effect of violating the dignity, or creating an adverse environment, for the other. Also in many cases the conduct will have had this purpose, and the other form of harassment (“purpose harassment”) will be in play.

[41] In [that] case, where the fellow workers engaged in similar conduct toward each other while remaining genuinely good friends, the tribunal was entitled to reach the conclusion it did, so long as it applied the correct statutory test. We think that in substance it did”.

345. Clearly, this requires the tribunal to consider the surrounding circumstances and take a view on the nature of the relationship between the alleged perpetrator of the harassment and their alleged victim.

346. In respect of whether the conduct was related to a protected characteristic, where overtly derogatory terms are used, little, if any, further enquiry is required. However, in less clear cut cases, whether conduct is related to the relevant protected characteristic is a matter for the Tribunal to decide on the facts, having regard to the surrounding context. In our judgment, related to is a broad test and does not require a *causal* link between the acts complained of and the relevant protected characteristic.

Victimisation (s 27 Equality Act 2010)

347. Section 27 Equality Act says, as far as relevant,

    (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

    (a) B does a protected act, or

    (b) A believes that B has done, or may do, a protected act.

    (2) Each of the following is a protected act—

    (a) bringing proceedings under this Act;

    (b) giving evidence or information in connection with proceedings under this Act;

    (c) doing any other thing for the purposes of or in connection with this Act;

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

348. The claimant relies on an alleged conversation with Ms Furlow and Ms Pilgrim at the meeting on 2 March 2017 as a protected act. This can only fall within section 27(2)(d) or (c) – namely making an allegation that a person has breached the act or doing any other thing for the purposes of, or in connection with, the Equality Act. It is not necessary to refer explicitly to the Equality Act in making the allegation under subsection (d), but the asserted facts must be capable of amounting to a breach of the Equality Act if found to be true. The test under subsection (c) is much broader and any act done <u>in connection with</u> the Equality Act in a broad sense will be covered.

349. In respect of detriments, in *MOD v Jeremiah* [1979] IRLR 436 the court of appeal held that a detriment exists if a reasonable worker would take the view that the treatment was to his detriment. In many cases it is obvious. In *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, Lord Nicholls said : *"while an unjustified sense of grievance about an allegedly*

discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".

350. The question of identifying the reasons for any detriments is summarised by the Court of Appeal in *Chief Constable of Greater Manchester Police v Paul Bailey* [2017] EWCA Civ 425 as follows:

"[section 27 uses] the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in *Nagarajan v London Regional Transport [1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome…*

…the claim is subject to the provisions of section 136 of the 2010 Act relating to the burden of proof, which read (so far as material):

"(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

(4)-(5) …"

The effect of section 136 (or, strictly, the cognate provisions in the predecessor legislation) has been authoritatively expounded in a line of decisions culminating in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931, and Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867. In brief, a tribunal must first decide whether a claimant has established a prima facie case of unlawful discrimination (or victimisation) in the sense elucidated in Madarassy at paras. 56-57; if he has, the burden shifts to the respondent to prove a non-discriminatory explanation".

351. This means that the reason for the detriment, if any, must be the reason why the decision to subject the claimant to any detriments was made. If the claimant can show facts from which we could conclude that the protected act was the reason for the detriment, it will be for the respondent to show that in fact the detriment was in no way because of the protected act. It is not enough to show a detriment and a protected act, there must be at least

something which connects the two. However, if the claimant shows that something from which we could conclude that the protected act was the reason for the detriment, the burden of proof will be reversed.

Time limits (s 123 Equality Act 2010)

352. Section 123 Equality Act 2010 says, as far as is relevant,

(1) [Subject to [[section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

353. In *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT* it was held that when considering whether it is just and equitable to extend time for the presentation of a case the tribunal is required to consider the prejudice which each party would suffer as a result of the decision reached; and to have regard to all the circumstances of the case, in particular:

a. the length of, and reasons for, the delay;

b. the extent to which the cogency of the evidence is likely to be affected by the delay;

c. the extent to which the party sued has cooperated with any requests for information;

d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

e. the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

354. In *Department of Constitutional Affairs v Jones* 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases.

355. The burden of showing that it is just and equitable to extend time falls on the claimant. There is no absolute rule that the claimant must provide an explanation, but it would be an unusual case where there was no explanation for the delay.

356. In respect of conduct extending over a period, Mr Jarvis referred us to *Hendricks v Metroplitan Police Commissioner* [2002] EWCA Civ 1686 which was followed in *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548.

357. In *Hendricks*, Mummery LJ said, in respect of a course of conduct:

"The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be sidetracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed".

358. It is, therefore, a question of fact for us to determine whether any acts of discrimination occurring before the primary time limit were part of an ongoing situation or state of affairs. The acts do not have to be the same type of discrimination – whether in respect of the legal basis for it or the protected characteristic in respect of which the discrimination occurs. It is simply whether it is part of an ongoing state of affairs.

Unauthorised deductions from wages

359. In respect of the claimant's claim of unlawful deduction from wages, the relevant provisions of the Employment Rights Act 1996 are

360. Section 13 - Right not to suffer unauthorised deductions which says

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(*a*) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(*b*) the worker has previously signified in writing his agreement or consent to the making of the deduction.

361. Section 27 – meaning of ‘wages’ etc which says

> (1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> > (*a*) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise…

362. In *Agarwal v Cardiff University and Another* [2018] EWCA Civ 1434 the Court of Appeal confirmed that the tribunal does have the power to construe a contract with the purposes of determining whether any amount is properly payable. Wages includes notice pay.

363. The tribunal must therefore construe the contractual provisions to determine whether the claimant was entitled to be paid commission for the relevant periods and if so, how much he should have been paid.

364. Section 23 of the Employment Rights Act 1996 provides that a worker may bring a claim that their employer has made an unauthorised deduction from wages to the Employment Tribunal. Subsections 23(2) to 23 (4B) say:

> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
>
> (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
>
> (3) Where a complaint is brought under this section in respect of—
>
> (a) a series of deductions or payments, or
>
> (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
>
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
>
> (3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).
>
> (4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
>
> (4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.
>
> (4B) Subsection (4A) does not apply so far as a complaint relates to a

deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

365. A series of deductions is linked if the deductions are of a similar kind and occur in sufficient frequency of repetition to form a series.

Failure to provide a statement of main terms and conditions of employment (S1 Employment Rights Act 1996)

366. Sections 1 Employment Rights Act 1996 provides that

(1) Where [a worker] begins employment with an employer, the employer shall give to [the worker] a written statement of particulars of employment.

367. Those particulars must include specified details which, for reasons that will become clear, it is not necessary to set out here.

368. Section 4 Employment Rights Act 1996 says

(1) If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to [the worker] a written statement containing particulars of the change.

369. This means that if material particulars of the employees employment change, the respondent is obliged to provide a written statement of those changes. Again, for reasons that will become clear, it is not necessary to set those out in detail.

370. Section 38 of the Employment Act 2002 provides that, if at the date a claim is issued in the Employment Tribunal sections 1 and/or 4 of the Employment Rights Act 1996 have not been complied with, the Tribunal must make an award of two weeks pay and may make an award of 4 week's pay if it is just and equitable to do so.

Conclusions

371. We address each of the issues:

Unfair dismissal

372. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")'? The respondent asserts that it was a reason relating to the claimant's capability.

373. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

374. In our judgement, the respondent has not shown that the real reason for the claimant's dismissal was capability. The question is, as discussed above, what was the reason for terminating the particular contract under which the claimant was employed. In the course of submissions, we asked Mr Jarvis

what job the claimant was incapable of performing and his answer was “any job”. With respect, and although we understand the point he was making, that is not the test.

375. The contract under which the claimant continued to be employed right up to her dismissal was that of “Clinic Manager – Sexual Health Service” at Band 5 and for 37.5 hours per week. Consequently, that was the only job from which she could be dismissed under section 95 Employment Rights Act 1996.

376. It is correct that the claimant had, at the date of her dismissal, been absent from work for over a year because of her ill health. In the normal course of events, it may well be reasonable for an employer to dismiss an employee on the grounds of capability in such circumstances. In this case, however, that cannot have been the real reason for terminating the claimant’s employment contract.

377. The respondent was extremely clear in their correspondence with the claimant including the grievance outcome and the grievance appeal outcome that the claimant could not return to her job of Clinic Manager – Sexual Health Service, because that job had ceased to exist in January 2017. Further, had the claimant been fit for work, the respondent would not have allowed her to return to her job of Clinic Manager – Sexual Health Service for the same reason. That job did not exist. To that extent, the fact of the claimant’s ill health was wholly irrelevant to the decision as to whether she could return to or continue to undertake, her role under her contract of employment.

378. The reason for the dismissal is a set of facts known to the employer, or it may be of beliefs held by him (*Abernathy*). The facts known to the respondent were that the claimant’s job did not exist. We accept that they also knew that the claimant was too ill to attend work (generally) but they further knew that if the claimant did turn up for work and insist on performing her contractual role, she would not be able to do so.

379. We find, therefore, that the real reason for dismissal was not capability as pleaded by the respondent and the claimant’s dismissal was unfair.

380. It may not be strictly speaking necessary for us to do so, but we are able to and do find that in fact the reason for the claimant’s dismissal was redundancy. The respondent’s need for people to undertake the role of Clinic Manager – Sexual Health had ceased, or certainly diminished. It is irrelevant whether the respondent acted fairly in dismissing the claimant for redundancy, because that is not the reason that they relied on. However, we would find, if we were required to, that denying for over a year that the claimant was in fact redundant and then dismissing her on the basis of her ill health was not within the band of reasonable responses of a reasonable employer or, in all the circumstances, fair.

381. We have not addressed the question of reasonableness in the context of a capability dismissal because capability was not the reason for the claimant’s dismissal.

Disability

382. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times (other than at the date of dismissal which is conceded) because of the condition of anxiety and depression?

383. In our judgment, the claimant was disabled by reason of anxiety and depression from 12 January 2018. As is clear from our findings, this was the date from which the impairments were *likely* to continue to have a substantial adverse impact on her day to day activities (in the absence of any medication) for a total of at least 12 months.

Direct age and/or disability discrimination and harassment

384. We address both heads of direct discrimination and harassment together in respect of the alleged incidents. We deal with section 15 and victimisation separately, below.

385. Refusing to allow the claimant to be redeployed in December 2016.

386. We have found that this happened. The sole reason for this decision was because the restructure had not been finalised and agreed. To redeploy the claimant in advance of the final decision would be contrary to the respondent's policy and good practice. This decision was unconnected with the claimant's age particularly or age generally. In so far as it is pleaded as an allegation of harassment related to disability the claimant was not disabled at this point and it was unconnected with disability at all.

387. This claim of direct age discrimination and harassment related to age and/or disability is unsuccessful.

388. Leaving the claimant as the only employee in December 2016 to be without a role.

389. The claimant was not the only person to be left without a role in December 2016. We have made findings about the employees who were at risk at that time and it is clear that into 2017 other people were still being redeployed. We refer to Ms Osborne, for example.

390. This claim of direct age discrimination and harassment related to age and/or disability is unsuccessful.

391. Not ring fencing the claimant for the Band 4 IT Data position in January 2017 and instead placing the claimant's colleague Viv Osbourne in the role, in breach of the Trust's policies,

392. This allegation was withdrawn as an allegation of discrimination of any kind at the hearing.

393. Accusing the claimant of breaching confidentiality when she raised with Tracy Furlow that she had provided inaccurate information.

394. We have found that this did happen, and that Ms Furlow's reaction to the incident was not wholly reasonable. We have found that the reason for Ms Furlow's response is that she was irritated and defensive. This allegation is out of chronological order in the list of issues. In fact, the allegation was made in a letter dated 28 March 2017 from Ms Furlow to the claimant. This was after the occupational health referral in February 2017 and after the claimant had raised an allegation of age discrimination at the meeting on 2 March 2017.

395. In our judgment, this accusation was not related to the claimant's age or disability. (The claimant was not disabled at this time). The claimant has not produced sufficient evidence from which we could conclude that this unjust criticism was *because of* the claimant's age and neither (in so far as it is relevant for the purposes of the harassment claim) is there any link at all to disability. It was, we have found, more likely borne out of frustration at the claimant

396. This claim of direct age discrimination and harassment related to age and/or disability is unsuccessful.

397. Excluding the claimant from discussions, emails and essential clinic information during and following the claimant's return from sick leave in January 2016.

398. We have found that the claimant was excluded from emails and information while off sick, but not on her return to work. We have also found that the reason for that was for the two reasons that the respondent did not want to contact the claimant while she was off sick and they wanted to progress the restructure in time for their own deadline at the end of January 2017.

399. In our judgment, this was unconnected with the claimant's age, or age generally, and neither (in so far as it is relevant for the purposes of the harassment claim) was it related to disability generally, the claimant not being disabled at this time.

400. This claim of direct age discrimination and harassment related to age and/or disability is unsuccessful.

401. Referring the claimant to Occupational Health after two weeks absence.

402. It is agreed that this happened. We have found that the reason for this referral was because the respondent's policy required a referral to occupational health where part of the reason for absence is stress. This is an admirable policy that we condone. It was unconnected with age or disability. This allegation of direct age discrimination and harassment related to age and/or disability is unsuccessful.

403. Ticking a box on the respondent's occupational referral form on 19 February 2017 asking the OHP to comment upon the claimant's 'retirement due to ill health'

404. It was not disputed that this happened. In our view, the claimant has shown facts from which we could conclude that this decision was because of the claimant's age. It is inconceivable, in our view, that Ms Furlow would have ticked the box had the claimant been substantially younger. The respondent submitted that a question about ill health retirement was inherently **un**connected with age. Ill health retirement is available *despite* age rather than because of it. And in any event, they say, the claimant could not have been granted ill health retirement because she was already over retirement age.

405. We reject the respondent's submissions. The key part of the phrase "ill-health retirement" is "retirement". The purpose of granting ill health retirement is for access to a pension. It is obvious, in our view, that most people automatically and naturally associate receipt of a pension with an older person. We emphasise that we just do not believe that Mrs Furlow would even have considered the possibility of ill health retirement for someone much younger than the claimant. The fact that Mrs Harrad and Mr Bagnall knew that the claimant could not access ill health retirement is irrelevant. The question for us is whether Mrs Furlow knew and/or was thinking about that when she ticked the box and we conclude that she did and/or was not.

406. The claimant has therefore shown facts from which we could conclude both that the decision to tick the ill health retirement box was because of her age and, in so far as it relates to harassment, related to her age. For the same reasons, we find that it was unconnected with disability.

407. Mrs Furlow gave a number of inconsistent explanations for her decision to tick the box throughout the period from the claimant's initial complaint about it up to the final hearing which we will not repeat. The respondent has failed to provide evidence to show that the decision to tick the box was in no way related to the claimant's age.

408. We also find that this was detrimental treatment and unwanted conduct. It is perfectly clear from the evidence given by the claimant – at the tribunal and from her initial complaints about it – that she was upset by this decision. In the particular circumstances, we find that any reasonable employee would be. It was not an unjustified sense of grievance, but a genuine and legitimate concern about how the claimant had been treated or, more accurately, how she believed she was perceived, by the respondent.

409. As is clear, we find that the question about ill health retirement would not have been asked about a younger person. Subject to our decision about time limits and the effect of s112 Equality Act 2010 the claimant's claim of direct age discrimination on this point is made out.

410. In respect of the claimant's claim of harassment, we must consider whether the conduct – the act of ticking the box enquiring about ill-health retirement – have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

411. We conclude that it was not the purpose of Ms Furlow to do that – we have heard no evidence that it was. However, it did have that effect. The claimant said on many occasions that it left her feeling as if she was regarded as old. She said she had never felt like that before. A one off incident can amount to an act of harassment if it is sufficiently serious. From the claimant's perspective, it was serious. We find that it created for her an offensive and degrading environment to the extent that she ultimately went off sick (although we do not find at this stage that there was a legal direct causal relationship between the act in question and the claimant's illness).

412. We are required to consider whether, having regard to the claimant's circumstances, it was objectively reasonable for the conduct to have that effect. We find that it was. We are mindful of the warning by the EAT not to encourage a culture of hypersensitivity, but we think that although one person might brush such an act off, another person might react in the way that the claimant did and both reactions are reasonable.

413. As we have made clear, we do not accept the respondent's attempts to dismiss the comment as unrelated to age. It is obvious why someone would conclude it was – as not only the claimant, but the occupational health adviser also did. In the particular circumstances where the claimant reasonably perceived her job to be at risk because of the restructure exercise, her age, her long service, and that there was no objective justification for Mrs Furlow to ask the question that she did, it was reasonable for the claimant to perceive the effect of this as offensive and degrading.

414. For these reasons, (and subject to our decision about time limits below) we find that the claimant's claim of harassment related to age on this allegation is made out.

415. As the detriment relied on (ticking the ill health retirement box) amounts to an act of harassment, it cannot, therefore, also under s 112 Equality Act 2010 amount to an act of direct discrimination and the claimant's claim that this act amounts to direct age discrimination is unsuccessful.

416. Reducing the claimant's banding from Band 4 to Band 5 and her hours from 37.5 to 18.75 on 15 May 2017 by placing her in the Band 4 IT Data position.

417. In our judgment, this act was not related to either age or disability in any way. The respondent was, for some reason, wholly unable to accept that the claimant was in fact redundant from 31 January 2017. In truth, we do not know why. We have found that the respondent did not genuinely believe that the claimant had accepted the Band 4 role. However, we have heard no evidence that links the decision to attempt to force the claimant into a role she repeatedly rejected was related to her age or disability in any way. In any event, we have found that the claimant was not disabled at this point. We think it was most likely because the respondent did not want to dismiss anyone for redundancy.

418. The respondent had a policy of redeploying people following the restructure exercise. We heard that it did that for many of the staff affected by the 2016 exercise including, for example Ms Osborne who ended up taking a lower banded role. The policy of wanting to avoid redundancies is often admirable, but not if it results in the circumstances described at length above.

419. We have considered whether the fact of the il-health retirement question, which we have found is age discrimination was sufficient to link the acts. We conclude that this is sufficient to reverse the burden of proof. We could conclude that, in light of the discriminatory act, the decision to change the claimant's role was, at least in part, to persuade the claimant to retire thereby avoiding the need to dismiss the claimant and make her redundant. It is obvious, we think, that such a thought process would not apply to a younger person under normal retirement age.

420. We think, however, that the respondent has shown a reason for the treatment which was not because of or related to age. The respondent successfully redeployed many other staff. We have concluded that the respondent had an informal "no redundancy" policy. They have only made one person redundant as far as the respondent's witnesses could remember.

421. The reason for the respondent's belligerence about the claimant's position, was not, therefore, because of or related to her age and nor was the decision to put her into a lower graded role on part-time hours.

422. The claimant's claims of direct age and disability discrimination and harassment in relation to this allegation are unsuccessful.

423. <u>Backdating that change to March 2017, causing the claimant to have been 'overpaid' by the respondent such that she was deducted £1348.47 from her pay.</u>

424. The reason that Mrs Furlow backdated the change to the claimant's role was because, in our view, she believed that the claimant would come round to the Band 4 job. As we have found, Mrs Furlow's actions in relation to the Band 4 job were based on a later misunderstanding of the claimant's initial complaint about the Band 4 job being allocated to one person without consultation or competition, combined with the application of the respondent's informal no redundancy policy.

425. This act is closely related to the decision to put the claimant into the Band 4 part time role. The decision to backdate that was an administrative continuation of the same decision and for the same reasons it is not because of or related to the claimant's age (or disability).

426. The claimant's claims of direct age and disability discrimination and harassment in relation to this allegation are unsuccessful.

427. <u>Predetermining the outcome of the claimant's grievance on 18 January 2018;</u>

428. We have found that effectively the outcome of the claimant's grievance was predetermined. There was no investigation into the allegations of age discrimination and members of the panel asked leading questions of the management reflecting their view of the case.

429. The grievance, in so far as it related to the complaint about the ill health retirement question, was based on an assumption that Mrs Furlow had made a mistake. It was not, therefore, properly considered and, in our view, there was no objective consideration by the grievance panel of this part of the complaint. Similarly, it was, or should have been, obvious that the claimant had not accepted the Band 4 job. Again, the panel did not consider this objectively, but adopted without objective analysis the management case that the decision to put the claimant in the job was in accordance with policy.

430. We have found that the claimant was disabled by this time. However, in our view the decision of the panel was not *because* of the claimant's age or disability. We have not heard any evidence from which we could conclude that the approach of the panel was because of age or disability. In our view, it was conducted in the way it was because of the respondent's grievance policy.

431. The claimant's claims of direct age and disability discrimination in relation to this allegation are therefore unsuccessful.

432. However, in our view, the outcome and the conduct of the hearing were clearly unwanted conduct from the claimant's perspective. The claimant's allegation of age discrimination was dismissed without any suggestion that it had been properly considered. The grievance letter wrongly stated that Ms Furlow had apologised to the claimant for the ill health retirement question. We have found that she did not.

433. By this stage, the claimant had been making a complaint about age discrimination for almost a year. We find that dismissing the claimant's complaint in the way that the grievance panel did violate the claimant's dignity. She was obviously, and it was obvious to the respondent, in a bad way and the grievance outcome appeared to make the claimant feel worse.

434. The claimant was entitled to have her complaints considered and investigated and they were not. It was therefore, in our view, objectively reasonable for the grievance outcome to have the effect of violating the claimant's dignity. Again, we have had regard to the imprecation by the EAT not to devalue harassment, but in our view the conduct of the respondent in predetermining, and not taking sufficiently seriously, the claimant's grievance, including about age discrimination, did have that effect.

435. This is also, in our view, related to age. One of the key complaints the claimant was making was about the age discrimination – it has been a consistent complaint of the claimant throughout. The grievance panel did not even consider that Ms Furlow might have, consciously or unconsciously, discriminated against the claimant because of her age. They simply

adopted the assumption that initially came from Nicky Pilgrim that the box on the referral form was a mistake.

436. To this extent, the decision was related to the claimant’s age and for that reason, this allegation of harassment succeeds.

437. <u>Failing to contact the claimant in accordance with the Trust's procedures when she was absence through ill health during her periods of ill health.</u>

438. We have found that the respondent did contact the claimant during her sickness absence. The policy offers a great deal of discretion for employees on long term sick as to the frequency of contact.

439. At times the contact was more formal than it might have been and was perhaps not as frequent as it might have been. However, it was clear that the claimant was very unwell at times and in our view the respondent was trying to maintain a balance between keeping in touch with the claimant and not exacerbating any problems she had.

440. Even if they did not always get that exactly right, it does not amount to direct age or disability discrimination or harassment. We also note that the respondent was prepared to communicate with the claimant’s trade union representative and her husband as appropriate which, in our view, reflects them applying the appropriate flexibility under the sickness policy.

441. <u>Advertising the claimant's role of Band 4 IT Data in February 2018;</u>

442. We have found that this was not, in fact, the claimant’s job. However, the decision of the respondent to advertise the job they had been insisting was the claimant’s was, we fully accept, distressing for the claimant.

443. Nonetheless, the reason to advertise the job was in our judgement because no-one (including the claimant) was doing the work under that job and the respondent needed someone to do it. This, in our view, was the reason the job was advertised. It was unrelated in any way to the claimant’s age or disability.

444. The claimant’s claims of direct age and disability discrimination and harassment in relation to this allegation are unsuccessful.

445. <u>Not following the recommendations of the OHP report of [11] May 2018.</u>

446. The recommendations in that report were that when the claimant returns to work she should do so on a phased return and steps should be taken to reintroduce the claimant to work and her colleagues gradually and gently.

447. The reasons that these steps were never taken was because the claimant did not return to work, nor indicate a specific time when she would or might do so. It would not, therefore, have been *possible* for the respondent to take those steps.

448. The reason was therefore not because of the claimant’s age or disability.

449. In so far as the claimant was absent because of her disability at the time, the decision could be said to be *related to* her disability. However, we heard no evidence that the failure to implement a phased return when the claimant was not attempting to return to work cased the claimant to be harassed and nor would it have been objectively reasonable for it to have done so.

450. The claimant's claims of direct age and disability discrimination and harassment in relation to this allegation are unsuccessful.

451. <u>Dismissing the claimant on 22 May 2018.</u>

452. We have found that the reason the claimant was dismissed was because her job no longer existed. However, the reason for the decision that was communicated to the claimant was that her employment was terminated was because of her sickness absence. It was not because of the claimant's disability or age. The claimant's claims of direct age and disability discrimination in relation to her dismissal are therefore unsuccessful.

453. In respect of harassment, the conduct was clearly unwanted and related to the claimant's disability. The reason for her absence was her disability by this stage. However, although it is likely that that decision was very upsetting for the claimant, we heard no evidence to show that the decision violated the claimant's dignity or created a hostile, degrading etc environment. We have concluded that the decision to dismiss the claimant could not have come as a great surprise to her and in fact she had asked the respondent to acknowledge the fact that she was redundant previously.

454. We conclude therefore that the decision to dismiss did not have the proscribed effect, and it was not for a proscribed purpose.

455. The claimant's claims of direct age and disability discrimination and harassment in relation to this allegation are unsuccessful.

456. <u>Failing to complete a form AW8 to cover the claimant's pension prior to 22 May 2018 impacting upon her pension entitlements.</u>

457. We have found that the reason that the respondent did not complete the forms was because the claimant did not request them.

458. The claimant's claims of direct age and disability discrimination and harassment in relation to this allegation are unsuccessful.

459. In respect of the age discrimination claims generally, the respondent has not pleaded any legitimate aim.

EQA, section 15: discrimination arising from disability

460. <u>Did the following thing(s) arise in consequence of the claimant's disability:</u>

461. <u>The claimant's sickness absences between 3 April 2017 and 22 May 2018 which led to her dismissal?</u>

462. The claimant's sickness absence from 12 January 2018 was in consequence of her disability. The fact that the claimant's absence for ill health started earlier does not prevent each day's absence from 12 January 2018 being in consequence of her disability.

463. Did the respondent treat the claimant unfavourably as follows:

464. The allegations at paragraphs (vi) to (xv) in 6(f) above (of the case management summary). They are:

465. Referring the claimant to Occupation Health after two weeks absence,

466. Ticking a box on the respondent's occupational referral form on 19 February 2017 asking the OHP to comment upon the claimant's 'retirement due to ill health'

467. Reducing the claimant's banding from Band 4 to Band 5 and her hours from 37.5 to 18.75 on 15 May 2017 by placing her in the Band 4 IT Data position,

468. Backdating that change to March 2017, causing the claimant to have been 'overpaid' by the respondent such that she was deducted £1348.47 from her pay,

469. These allegations all occurred before the claimant was disabled. They cannot, therefore, have been because of something arising in consequence of the claimant's disability and these allegations of discrimination arising from disability are unsuccessful.

470. Because of the timing and the way the issues have been identified, we have not been required to make findings as to whether the respondent's policy to remove pay protection for redeployees in periods of sickness is discriminatory or not. We suggest, however, that the respondent may wish to consider the claimant's circumstances in this case and review whether that policy might have the potential to be in breach of s 15 Equality Act 2010 in other, similar, circumstances.

471. Predetermining the outcome of the claimant's grievance on 18 January 2018;

472. As we have already found, the reason for this was that the grievance panel preceded on a mistaken assumption and followed the respondent's grievance policy. It was not related to the claimant's absence from work due to ill health.

473. This allegation of discrimination arising from disability is unsuccessful.

474. Failing to contact the claimant in accordance with the Trust's procedures when she was absence through ill health during her periods of ill health;

475. We have found that this allegation was not made out on the facts.

476. This allegation of discrimination arising from disability is unsuccessful.

477. <u>Advertising the claimant's role of Band 4 IT Data in February 2018;</u>

478. Firstly, as stated above, this was not the claimant's job. Secondly, the reason the job was readvertised was that the claimant was not doing it. The claimant was not doing the job, as se made clear, because it was not her job, rather than because of her ill health absence.

479. This allegation of discrimination arising from disability is unsuccessful.

480. <u>Not following the recommendations of the OHP report of [11] May 2018.</u>

481. The reason, as stated above, that the recommendations were not implemented was because the claimant was not coming back to work. The reason the claimant was not returning to the Band 4 job was because it was not her job. The reason the claimant did not return to do some work of any kind was because she was too ill to do so and that was related to her disability.

482. The decision not to implement the occupational health recommendations in these circumstances (being that it was not possible to do so because the claimant was not at work) was not unfavourable treatment. It could not possibly have impacted on the claimant at all whether a phased return was adopted as the claimant was unable to attend at work at all at that stage. It was agreed that up to the date of dismissal the claimant was not fit to attend work albeit that she might have been at some point int the future. During her employment, however, this was not unfavourable treatment.

483. This allegation of discrimination arising from disability is unsuccessful.

484. <u>Dismissing the claimant on 22 May 2018.</u>

485. This was self evidently unfavourable treatment. The reason for the claimant's dismissal was not, as we have said, her sickness absence. It was redundancy. However, the *asserted* reason for dismissing the claimant at the time, and in fact the mechanism for doing so, was the claimant's sickness absence.

486. The respondent was able to purport to rely on this reason because of the claimant's long term absence and this absence, by the date of her dismissal, arose in consequence of her disability.

487. The legitimate aim relied on by the respondent for dismissing the claimant was not set out explicitly but we are prepared to accept Mr Jarvis' submissions that it is clear from the facts that the respondent needed someone to do the Band 4 job. Even if that was the aim relied on, it was not proportionate to dismiss the claimant for her long term sickness absence because firstly, that was not her job so dismissing her from it would not make any difference as to whether the job could be done; and secondly, the respondent had already started to recruit someone to that job before dismissing her anyway.

488. Not only was the decision to dismiss the claimant not a proportionate means of achieving that aim, it was wholly irrelevant to it. In so far as the respondent says the claimant was incapable of any work so it was not proportionate to retain her in employment, the obvious answer to that is that there was no work for the claimant to do and the only proportionate response was to dismiss her properly for redundancy.

489. We have considered the steps taken to redeploy the claimant from the point the respondent accepted that she did not want (from their perspective) to do the Band 4 roles. However, the respondent applied the wrong redeployment policy – the sickness redeployment policy. They only offered her lower graded jobs than she would properly have been entitled to if redeployed under the Change Management policy and they were not prepared to offer the corresponding pay protection, That, therefore, does not assist the respondents in any arguments about proportionality.

490. We also find that the respondent was aware that the claimant was disabled by this time. The claimant had been providing fit notes identifying a mental impairment of depression since May 2017. The claimant had informed the respondent of the serious effects of her mental impairments throughout and it was perfectly clear that she was not well enough to attend the grievance appeal or her capability hearing. The claimant was not even able to communicate directly with the respondent.

491. If the respondent was not actually aware that the claimant was disabled by the date of her dismissal, they ought to have been. Even disregarding our findings that the effects of the impairment were likely to be long term by January 2018, they had actually been going on for a year or thereabouts by the date of the claimant's dismissal. The respondent certainly had enough information form the claimant to conclude that she was disabled by 22 May 2018.

492. This allegation of discrimination arising from disability is successful.

493. Failing to complete a form AW8 to cover the claimant's pension prior to 22 May 2018 impacting upon her pension entitlements.

494. As set out above, this was because the claimant did not request the form and, in any event, it was after her employment and wholly unrelated to her sickness absence.

495. This allegation of discrimination arising from disability is unsuccessful.

Equality Act, section 27: victimisation

496. Did the claimant do a protected act? The claimant relies upon the following:

497. Advising Tracy Furlow and Nikki Pilgrim (HR) at a meeting on 2 March 2017 that the respondent had subjected the claimant to age discrimination by referring the claimant to Occupational Health for retirement due to ill health after two weeks absence and that this amounted to age discrimination.

498. In our judgment, this did amount to a protected act. The claimant, we found, made a clear allegation that the question about ill health retirement amounted to age discrimination. This is a clear allegation that Mrs Furlow had contravened the Equality Act 2010. It does not have to be explicit, and we have found that it is likely that the claimant referred to age discrimination specifically. This is sufficient, we find, for the allegation to amount to a protected act.

499. Did the respondent subject the claimant to the following treatment:

500. The allegations at paragraphs (viii) to (xv) of paragraph 6(f) above.

501. These are the following specific allegations:

502. Reducing the claimant's banding from Band 4 to Band 5 and her hours from 37.5 to 18.75 on 15 May 2017 by placing her in the Band 4 IT Data position,

503. Backdating that change to March 2017, causing the claimant to have been 'overpaid' by the respondent such that she was deducted £1348.47 from her pay,

504. Predetermining the outcome of the claimant's grievance on 18 January 2018;

505. Failing to contact the claimant in accordance with the Trust's procedures when she was absence through ill health during her periods of ill health;

506. Advertising the claimant's role of Band 4 IT Data in February 2018;

507. Not following the recommendations of the OHP report of [11] May 2018.

508. Dismissing the claimant on 22 May 2018.

509. Failing to complete a form AW8 to cover the claimant's pension prior to 22 May 2018 impacting upon her pension entitlements.

510. It would not be proportionate in our view to set out again the reasons for the decisions of the respondent. In our judgment, none of these acts were done because the claimant did the protected act.

511. We think it is likely that the burden of proof could potentially shift in respect, only, of the allegation that the grievance was pre-determined. It related at least in part to the claimant’s protected act. However, we have set out our reasons for the panel acting as they did. The assumption of a mistake stemmed, we have found, from Nicky Pilgrim, not Mrs Furlow, and there is no reason to conclude that this assumption was deliberate or deliberately seeded to disrupt the grievance process. We think, on balance, that the assumption was simply an unthinking mistake.

512. This is, in our view, not connected to the fact that the claimant complained about the ill health retirement question.

513. For these reasons, the claimant's claims of victimisation are unsuccessful.

Time limits – discrimination claims

514. The claimant undertook early conciliation from 20 August 2018 (Day A) to 20 September 2018 (Day B). The claimant submitted her claim to the Employment Tribunal on 17 October 2018. The claimant's unfair dismissal claim is in time, as is the claimant's claim for unauthorised deductions from wages (see below).

515. Any allegations relied on as claims before 20 May 2018 are, on the face of it, out of time.

516. Subject to our decision on time, we have upheld the following allegations of discrimination:

517. <u>Ticking a box on the respondent's occupational referral form on 19 February 2017 asking the OHP to comment upon the claimant's 'retirement due to ill health'</u>

518. Harassment related to age

519. <u>Predetermining the outcome of the claimant's grievance on 18 January 2018;</u>

520. Harassment related to age

521. <u>Dismissing the claimant on 22 May 2018.</u>

522. Discrimination because of something arising in consequence of disability

523. Only the last incident is within the primary time limit. The first question to ask, therefore, is whether the first two incidents form part of a continuing course of conduct with each other and/or with the dismissal. Were they, or any of them, part of an ongoing state of affairs?

524. This is not a case where there are allegations of institutional discrimination, or a campaign of harassment. However, all of the issues arose from the change management process and the removal or proposed removal of the claimant's job.

525. She was initially off sick with stress which she attributed at least in part to the restructure. This prompted the occupational health referral with the ill health retirement question. From the claimant's perspective, the impact of the continuing change management and the respondent's continued failure to deal with her grievance to her satisfaction exacerbated her illness. The claimant's evidence that we have accepted is that her health worsened following communications about her job in February 2018.

526. Although the incidents are separated in time and we have found most of the intervening events not to be discriminatory, in our view these three incidents are intrinsically linked with each other. In reality, and from the claimant's perspective, everything from the November 2016 meeting has been linked

and a continuation of a process and actions by the respondent This culminated in the claimant's discriminatory dismissal.

527. In our judgement, therefore, all of these actions are part of a continuing course of conduct – there was an ongoing state of affairs relating to the change management, the ill health retirement question and the claimant's illness and latterly disability. All of these issues were inextricably linked.

528. The last incident of discrimination, being the claimant's discriminatory dismissal, was in time and it was the last in a series of events forming a continuous course of conduct. The tribunal therefore has jurisdiction to hear these allegations of discrimination.

Unauthorised deductions

529. Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by reducing the claimant's banding and hours of work without her consent from March 2017 and failing to pay her in accordance with her contract of employment? Was the claimant, from March 2017, paid less in wages and contractual sick pay or protected pay than she was entitled to be paid and if so, how much less?

530. In so doing did the respondent breach the claimant's contract of employment. If so what damages, if any, should be awarded to the claimant.

531. In our judgement, right up to the termination of her employment the claimant continued to be employed under her contract of employment as Clinic Manager – Sexual Health Service" at Band 5 and for 37.5 hours per week.

532. The claimant did not, at any point either implicitly or explicitly agree to do the Band 4 job. We reject the respondent's case that by not explicitly refusing the job (which in any event the claimant ultimately did) by April 2017 she could be deemed to have accepted it. We also reject the respondent's case that by attending the meeting on 29 March to discuss the Band 4 roles the claimant agreed to the new job by her conduct. The claimant maintained her objection to the role at that meeting and after. The claimant was a conscientious and long serving employee. She was obviously going to attend the meeting that she was invited to by her manager. To infer that the claimant, by so doing, had accepted the Band 4 job is wrong.

533. It hardly needs stating, but it is trite contract law that a new contract or a change in contract can only happen by agreement – by a meeting of minds. There was no such agreement at any point. The claimant's contract of employment was, before 30 January 2017, to work as "Clinic Manager – Sexual Health Service" at Band 5 and for 37.5 hours per week. It remained the same from then until the termination of her employment.

534. The respondent cannot, could not and did not change that position without the claimant's agreement no matter how many times they assert or asserted that they had.

535. From 27 March 2017, the claimant's purported contractual salary dropped in accordance with the respondent's unilateral decision to appoint her to the part time Band 4 job. When the claimant went off sick, she lost her pay protection and her salary reduced substantially.

536. Throughout the period of her sickness absence until her pay stopped on 15 March 2018, the claimant was paid less than she ought to have been. The claimant did not agree to this deduction – as can be seen she vociferously objected to it – and consequently the respondent has made an unauthorised deduction form the claimant's wages.

537. The claimant was paid her notice pay at the Band 4 rate. She was at that time employed under her full time band 5 contract so that the respondent has made a further unauthorised deduction from the claimant's wages in respect of her notice pay.

538. The underpayment of notice pay is, in our judgment, the last in a series of deductions. They all arose out of the same decision and the only reason the deductions stopped in March was because the claimant was off sick, They resumed again during her notice period or in respect of pay in lieu of notice.

539. The last payment was made on or after the claimant's dismissal. It is agreed that the claim was made within 3 months (including early conciliation) of the claimant's dismissal and consequently the tribunal has jurisdiction to determine all of the deductions claims.

540. To the extent that it is necessary, we also find that the respondent was in breach of contract in failing to pay the claimant her full contractual entitlement for the same periods. That breach of contract remained in issue on the termination of the claimant's claim as she was underpaid her notice pay.

541. The exact amount of underpayment is currently unclear as some has been repaid to the claimant in respect of the recovery of the alleged overpayment. Determination of the amount owed to the claimant will be dealt with at a remedy hearing.

Other claims

542. Did the respondent fail to provide the claimant with a statement of her main terms and conditions of her employment following the change of her role in March 2017, contrary to section 1 ERA 1996?

543. We have found that the claimant was given a written statement of her main terms of employment at some point during her employment.

544. In addition, the claimant received a copy in or around February 2018 but this was for the Band 4 job which was not the claimant's job. The respondent had no obligation to send this written statement and it did not apply to the claimant. However, her job had not changed so there was no obligation for the respondent to send notification of changes.

545. All claims relating to an alleged failure by the respondent to provide the claimant with a written statement of her terms of employment under s 1 or 4 Employment Rights Act 1996 are therefore unsuccessful.

Employment Judge Miller

20 June 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS

Appendix – list of issues

The issues between the parties which potentially fail to be determined by the Tribunal are as follows:

Time limits / limitation issues

a. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") and sections 23(2) to (4) of the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred, whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures, whether it was not reasonably practicable for a complaint to be presented within the primary time limit and whether time should be extended on a "just and equitable" basis,

b. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 21 May 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Unfair dismissal

c. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")'? The respondent asserts that it was a reason relating to the claimant's capability.

d. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Disability

e. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times (other than at the date of dismissal which is conceded) because of the condition of anxiety and depression?

EOA, section 13: direct discrimination because of age

f. Has the respondent subjected the claimant to the following treatment:

- i. Refusing to allow the claimant to be redeployed in December 2016;
- ii. Leaving the claimant as the only employee in December 2016 to be without a role,
- iii. Not ring fencing the claimant for the Band 4 IT Data position in January 2017 and instead placing the claimant's colleague Viv Osbourne in the role, in breach of the Trust's policies,
- iv. Accusing the claimant of breaching confidentiality when she raised with Tracy Furlow that she had provided inaccurate information,
- v. Excluding the claimant from discussions, emails and essential clinic information during and following the claimant's return from sick leave in January 2016,
- vi. Referring the claimant to Occupation Health after two weeks absence,

vii. Ticking a box on the respondent's occupational referral form on 19 February 2017 asking the OHP to comment upon the claimant's 'retirement due to ill health'
viii. Reducing the claimant's banding from Band 4 to Band 5 and her hours from 37.5 to 18.75 on 15 May 2017 by placing her in the Band 4 IT Data position,
ix. Backdating that change to March 2017, causing the claimant to have been 'overpaid' by the respondent such that she was deducted £1348.47 from her pay,
x. Predetermining the outcome of the claimant's grievance on 18 January 2018;
xi. Failing to contact the claimant in accordance with the Trust's procedures when she was absence through ill health during her periods of ill health;
xii. Advertising the claimant's role of Band 4 IT Data in February 2018;
xiii. Not following the recommendations of the OHP report of [11] May 2018.
xiv. Dismissing the claimant on 22 May 2018.
xv. Failing to complete a form AW8 to cover the claimant's pension prior to 22 May 2018 impacting upon her pension entitlements.

g. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

h. If so, was this because of the claimant's age, the Claimant was 70 at the time of her dismissal, and/or because of the protected characteristic of age more generally? The Claimant alleges that she was essentially 'written off' because of her age, when the respondent undertook the restructuring exercise in December 2016, and that the subsequent treatment of her was because of her age.

i. If so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

Disability

j. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following conditions: anxiety and depression. The respondent admits the claimant was a disabled person by 22 May 2018, but not at the time of earlier allegations of discrimination.

EOA, section 13: direct discrimination because of disability:

k. Has the respondent subjected the claimant to the following treatment:

The allegations set out at paragraphs (vi) to (xv) in 6(f) above

l. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others

("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

m. If so, was this because of the claimant's disability of anxiety and depression and/or because of the protected characteristic of disability more generally?

EQA, section 15: discrimination arising from disability

n. Did the following thing(s) arise in consequence of the claimant's disability:

> i. The claimant's sickness absences between 3 April 2017 and 22 May 2018 which led to her dismissal?

o. Did the respondent treat the claimant unfavourably as follows:

> The allegations at paragraphs (vi) to (xv) in 6(f) above.

p. Did the respondent treat the claimant unfavourably in any of those ways and/or did the respondent dismiss the claimant because of that sickness absence?

q. If so, has the respondent shown that the unfavourable treatment and dismissing the claimant was a proportionate means of achieving a legitimate aim?

EQA, section 26: harassment related to age/disability

r. Did the respondent engage in conduct as follows:

> The allegations at paragraphs (i) to (xv) in 6(f) above

s. If so was that conduct unwanted?

t. If so, did it relate to the protected characteristic of age and/or disability.

u. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act, section 27: victimisation

v. Did the claimant do a protected act? The claimant relies upon the following:

> i. Advising Tracy Furlow and Nikki Pilgrim (HR) at a meeting on 2 March 2017 that the respondent had subjected the claimant to age discrimination by referring the claimant to Occupational Health for retirement due to ill health after two weeks absence and that this amounted to age discrimination.

w. Did the respondent subject the claimant to the following treatment:

i. The allegations at paragraphs (viii) to (xv) of paragraph 6(f) above.

x. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Unauthorised deductions

y. Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by reducing the claimant's banding and hours of work without her consent from March 2017 and failing to pay her in accordance with her contract of employment? Was the claimant, from March 2017, paid less in wages and contractual sick pay or protected pay than she was entitled to be paid and if so, how much less?

z. In so doing did the respondent breach the claimant's contract of employment. If so what damages, if any, should be awarded to the claimant.

Other claims

aa. Did the respondent fail to provide the claimant with a statement of her main terms and conditions of her employment following the change of her role in March 2017, contrary to section 1 ERA 1996?