EMPLOYMENT TRIBUNALS

Claimant: Mrs F Ntakibirora Mahoro

Respondent: The Northern Care Alliance

Heard at: Manchester

On: 16, 17, 18, 21, 22 and 23 February, 21 and 22 April, 23 May and in chambers on 7, 8 and 9 June 2022

Before: Regional Employment Judge Franey
Ms V Worthington
Ms A Roscoe

REPRESENTATION:

Claimant: Mr D Matovu, Counsel
Respondent: Mr J Boyd, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. By consent the title of the respondent in these proceedings is amended to The Northern Care Alliance.

2. Each complaint of direct disability discrimination contrary to section 13 Equality Act 2010 fails and is dismissed.

3. Each complaint of discrimination arising from disability contrary to section 15 Equality Act 2010 fails and is dismissed.

4. Each complaint of a breach of the duty to make reasonable adjustments contrary to sections 20 and 21 Equality Act 2010 fails and is dismissed.

5. The claimant has permission to amend her claim so as to make the second allegation of harassment related to disability contrary to section 26 Equality Act 2010 a conversation with Kate Ryan on 8 March 2018. However, each complaint of harassment related to disability fails and is dismissed.

6. The complaint of unfair dismissal is not well founded and is dismissed.

7. The complaint in respect of unauthorised deductions from pay is not well founded and is dismissed.

8. The complaint of breach of contract is not well founded and is dismissed.

9. The complaint that the respondent unreasonably failed to give written reasons for the dismissal of the claimant is not well founded and is dismissed.

REASONS

Introduction

1. By a claim form presented on 12 December 2018 the claimant complained of disability discrimination during her employment as a Biomedical Scientist by the respondent NHS Trust ("the Trust") in its Microbiology Service. The claimant said she was disabled by reason of a longstanding spinal condition, and that following an operation in 2016 there had been disability discrimination in the refusal of her request to work short days, in the failure to provide her with a suitable chair, in the failure to provide her with an alternative microscope, in relation to her workload, and in the conditions at her workstation.

2. By a response form of 6 February 2019 the Trust defended all the claims and denied any unlawful treatment.

3. The response form did not admit that the claimant was a disabled person, but that was subsequently conceded by a letter of 25 April 2019.

4. The complaints and issues arising in that first claim were identified by Employment Judge Howard at a case management hearing on 20 March 2019, and then in more detail by Employment Judge Horne at a preliminary hearing on 30 April 2019. The case was listed for a six day final hearing in July 2020. That hearing was postponed because of the pandemic. At a preliminary hearing before Employment Judge Rice-Birchall on 25 September 2020 the hearing was relisted for nine days in February 2022, the additional time being because it was understood a fresh claim was about to be presented.

5. The second claim was presented on 29 October 2020. The claimant had been dismissed following a period of absence with effect from 31 July 2020. The second claim alleged that this dismissal was unfair and discriminatory. There were also complaints of direct discrimination and discrimination arising from disability in relation to different aspects of the claimant's work.

6. The response form of 14 December 2020 defended all those complaints on their merits. The issues in the second claim were set out by Employment Judge Buchanan following a preliminary hearing on 29 January 2021.

7. After that hearing the Trust clarified the legitimate aims upon which it relied for the purposes of the justification defence in a letter of 12 March 2021.

The Final Hearing

8. Prior to the final hearing the Trust applied for its witnesses to give evidence by video link ("CVP"). That application was refused by Employment Judge Dunlop. It was renewed by Mr Boyd on the first day of the final hearing. Having heard from both sides we rejected that application. There were no specific details of health concerns or travel difficulties preventing the witnesses attending in person. The respondent was based in Salford, only a short distance from the hearing venue. The basis for the application was simply that the witnesses were generally very busy with clinical work. In fact it transpired that a number of them were able to observe the hearing in person or remotely before they were required to give their own evidence.

9. The non legal member, Ms Worthington, was unable to travel to the Tribunal venue because of adverse weather conditions on the first three days of the hearing, and participated in the hearing by CVP. She attended in person on the remaining days.

10. The Tribunal could not accommodate a nine day hearing as no judge was available. The hearing began on Wednesday 16 February instead. The representatives agreed that a nine day listing had not been sufficient in any event. On the first six days the Tribunal read all the material, and heard from the claimant and Ms Ryan. The seventh day was lost as the judge's father was hospitalised overnight. The evidence was completed on three further days in April and May 2022. Counsel agreed that written submissions were preferable and these were considered by the Tribunal in deliberations in private on 7, 8 and 9 June 2022.

The Issues

11. It was apparent from the case management hearings that the claim had been pleaded in a manner which led to excessive complexity and overlapping allegations. That had a number of consequences. Some of the points we had to decide were overlooked in the witness statements. The hearing had to be a long one, and despite counsel's diligence some relatively minor points in the List of Issues were not properly put in cross examination. The length of the List of Issues made the Tribunal's deliberations more complicated, even when some of the allegations were withdrawn in the written submission. It also accounted for the length of these written reasons.

12. At the start of the final hearing the Tribunal discussed the issues in some detail with the representatives and a consolidated List of Issues was prepared in draft. Both sides suggested amendments to the draft. The version which was eventually agreed by the time the Tribunal commenced deliberations was as follows, reflecting some complaints withdrawn by the claimant in written submissions:

> ***Part 1: Equality Act 2010***
>
> ***Disability and Knowledge***
>
> *1. The respondent accepts that at all material times the claimant was a disabled person by reason of a degenerative spinal condition, and that it knew this.*

Breach of duty to make reasonable adjustments – sections 20 and 21

Hours of work

2. It is accepted that the respondent applied a PCP requiring staff in the claimant's role to work a full day of 7½ hours over 8½ hours including one hour lunch break, and that this placed the claimant at a substantial disadvantage compared to a person without her disability because working a full day exacerbated her back symptoms. The respondent knew that the claimant was at this substantial disadvantage.

3. Did the respondent fail in its duty to take such steps as it is reasonable to have to take to avoid the disadvantage by failing to allow the claimant to work a maximum six hour day on a permanent basis?

4. The claimant maintains this allegation in the first claim, and in her second claim in respect of the period from 11 April 2019 to 31 July 2020.

Chair

5. The respondent accepts that but for the provision of an auxiliary aid in the form of a chair or stool with brake-loaded or lockable castors, the claimant was put at a substantial disadvantage because she could not move her chair around freely, causing back symptoms, and that it knew of this substantial disadvantage.

6. Did the respondent fail in its duty to take such steps as it was reasonable to have to take to provide the auxiliary aid? The respondent contends that the provision of a chair with castors went beyond what was reasonable because of health and safety concerns.

7. In addition the claimant also relies on the auxiliary aid of an ergonomic chair without castors in the periods from 22 December 2016 to 16 July 2018, and 11 April 2019 to 31 July 2020.

Manual microscope

8. Did the absence of an ergonomic and/or digital microscope place the claimant at a substantial disadvantage compared to a person without her disability because using the manual microscope from 4 December 2017 caused damage to her neck and back, or postural problems? Alternatively, did the respondent apply a PCP of requiring those in the claimant's role to use a microscope which put the claimant at that substantial disadvantage?

9. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

10. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have supplied an ergonomic and/or digital microscope, and/or to adjust the PCP by allowing the claimant to work on sections not requiring microscope use?

Workstation

11. It is accepted that the respondent applied a PCP of requiring staff in the claimant's role to work at a workstation with a terminal on it which occupied some desk space. Did this PCP put the claimant at a substantial disadvantage compared to someone without her disability because the inability to place samples on the desk in front of her because of inadequate space limited the range of duties she could undertake and led to a negative perception of her?

12. If so, can the respondent show that it did not know and could not reasonably have been expected to have known of this disadvantage?

13. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided the disadvantage? The adjustments for which the claimant contends are:

(a) Allowing the claimant to work from a different workstation made more spacious by moving the keypad there.

14. In her second claim the claimant contends that the respondent should also have made adjustments in the form of:

(b) Allowing the claimant to work at an adjustable bench;

(c) Allowing the claimant to work on some unused low benches.

Time off for medical appointments

15. It is accepted that the respondent applied a PCP that an employee who took time off work for a medical appointment should ensure that her work was covered, either by arranging for a colleague to cover the work or by catching up at other times. Did this PCP place the claimant at a substantial disadvantage compared to a person without her disability in that she was more likely to have to attend medical appointments and therefore to have to arrange cover or catch up with work?

16. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

17. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The adjustment for which the claimant contends was for the respondent to arrange for the claimant's work to be covered by a colleague. The respondent maintains that this was done in any event.

Manual handling

18. [This was withdrawn by the claimant in the written submission.]

19. [This was withdrawn by the claimant in the written submission.]

20. [This was withdrawn by the claimant in the written submission.]

Discrimination arising from disability – section 15

Maldi training

21. Can the claimant prove facts from which the Tribunal could conclude that in denying the claimant the opportunity to do Maldi training before she went on leave for surgery in May 2016, the respondent treated the claimant unfavourably because of something (a belief that the claimant would forget her training during her absence) which arose in consequence of her disability (because the surgery was necessitated by her disability)?

22. If so, can the respondent show that there was no contravention of section 15, either because the treatment was not unfavourable or because the reason was simply the practical scheduling of the training not related to anything arising in consequence of disability. The respondent does not rely on any justification defence.

Removal of rota responsibility

23. Can the claimant prove facts from which the Tribunal could conclude that in removing from the claimant the responsibility for drawing up the weekly rota upon her return from surgery in November 2016, the respondent treated her unfavourably because of something (the fact she had not been doing laboratory work) which arose in consequence of her disability?

24. If so, can the respondent nevertheless show that there was no contravention of section 15, either because there was no unfavourable treatment as this was a measure to reduce the claimant's workload upon her return, or in the alternative because the treatment was justified as a proportionate means of achieving the legitimate aim of providing the claimant with a safe workload contributing to the efficiency of the department?

2017 mid year review

25. Can the claimant prove facts from which the Tribunal could conclude that in converting a full appraisal in 2017 to a mid year review the respondent treated the claimant unfavourably because of something (her absence on sick leave) which arose in consequence of her disability?

26. If so, can the respondent nevertheless show that there was no contravention of section 15, either because there was no unfavourable treatment as this was to lead to a better structured and fairer review, or because any unfavourable treatment was justified as a proportionate means of achieving the legitimate aim of having a properly structured and fair review process?

Failure to hold 2017 end of year review

27. It is accepted that the postponement of the end of year review meeting on 29 September 2017 was unfavourable treatment because the delay impacted on the opportunity to be awarded a pay increment, and denied her the opportunity to discuss her adjustment needs. Can the claimant prove facts from which the Tribunal could conclude that it was because of something (her absence due to surgery) which arose in consequence of disability?

28. If so, can the respondent nevertheless show that there was no contravention of section 15 because in reality the appointment was postponed for a reason which did not arise in consequence of disability?

Workload

29. Can the claimant prove facts from which the Tribunal could conclude that from 4 December 2017 the claimant was subjected to unfavourable treatment by being given an unreasonable workload when the claimant was given a whole section (Enterics) to do in the afternoon to compensate for being unable to do one hour of the work on the Gynae section, and/or paperwork and other tasks for section leads and managers?

30. If so, the respondent accepts that this was because of something arising in consequence of disability but will argue that it was justified as a proportionate means of achieving its legitimate aim of maintaining a reasonable and efficient workload for employees with some limitation in their capabilities.

Restriction of sections

31. Can the claimant prove facts from which the Tribunal could conclude that in restricting her to work on the Gynae and Enterics sections the respondent treated her unfavourably?

32. If so, the respondent accepts that this was because of something which arose in consequence of her disability, but will argue that it was justified as a proportionate means of achieving the legitimate aim of allowing it to investigate fully what adjustments would be reasonable so as to enable the claimant to undertake other types of work.

Support with microscope work

33. Can the claimant prove facts from which the Tribunal could conclude that the respondent treated her unfavourably by failing to ensure that the microscope working element of the Gynae section work for the claimant was done by her colleagues?

34. If so, can the claimant prove facts from which the Tribunal could conclude that this was because of something (a perception that the claimant was a problem) which arose in consequence of her disability through the adjustments put in place?

35. If so, can the respondent nevertheless show that there was no contravention of section 15, either because managers did ensure that this element of work was done by others, or because the reason did not arise in consequence of disability, or because it was justified as a proportionate means of achieving a legitimate aim of an efficient allocation of work?

Additional tasks December 2017 – July 2018

36. Can the claimant prove facts from which the Tribunal could conclude that the respondent subjected her to unfavourable treatment in allocation of the following tasks from December 2017 onwards in addition to her existing work:

(1) Completion of protocols, otherwise known as monthly tables, in relation to two sections;

(2) The annual management review report;

(3) Two trials;

(4) Incident investigations in June and July 2018;

(5) In April 2018 work on BSAC organisms from Farida Ahmed and Sam Fish;

(6) In April 2018 chasing the claimant for a health and safety report;

(7) In April 2018 asking the claimant to start with new templates for staff to record data on the EUCAST system;

(8) Between April and July 2018 requiring the claimant to undertake competency assessments and training on staff;

(9) In May 2018 asking the claimant for an urgent appraisal on CR;

(10) In July 2018 asking the claimant to undertake a COSHH assessment for KW;

(11) In July 2018 asking the claimant to review the algorithm for norovirus testing;

(12) In July 2018 asking the claimant to prepare questions for BMS internal candidate interviews.

37. If there was unfavourable treatment, the respondent accepts that it was because of something which arose in consequence of disability. Can the respondent nevertheless show that the treatment was justified as a proportionate means of achieving its legitimate aim of ensuring an equitable and fair distribution of work between employees?

Flu training February/March 2018

38. Can the claimant prove facts from which the Tribunal could conclude that the respondent treated the claimant unfavourably by excluding her from training on the use of a flu machine in February or March 2018, and that this was because of something (the perception that the claimant was a problem) which arose in consequence of her disability via the adjustments which had to be made?

39. If so, can the respondent nevertheless show that there was no contravention of section 15, either because there was no unfavourable treatment, or because this was for a reason unrelated to disability, being simply a scheduling issue?

Day off for OH appointments

40. [This was withdrawn by the claimant in the written submission.]

41. [This was withdrawn by the claimant in the written submission.]

42. [This was withdrawn by the claimant in the written submission.]

Missed tests

43. [This was withdrawn by the claimant in the written submission.]

44. [This was withdrawn by the claimant in the written submission.]

45. [This was withdrawn by the claimant in the written submission.]

<u>2018 appraisal</u>

46. Can the claimant prove facts from which the Tribunal could conclude that in conducting the 2018 end of year appraisal on 29 June 2018 the respondent treated the claimant unfavourably by requiring the claimant to submit amended paperwork combining two years and denying her a pay increment?

47. If so, can the claimant also prove facts from which the Tribunal could conclude that this was because of something (her manager not valuing her contribution) which arose in consequence of her disability (because of a negative attitude on her manager's part due to the claimant's need for adjustments)?

48. If so, can the respondent nevertheless show that there was no contravention of section 15, because there was no unfavourable treatment, or because the treatment was justified as a proportionate means of achieving the legitimate aim of having a well structured and fair appraisal?

<u>Questioning ability to do lab work</u>

49. [This was withdrawn by the claimant in the written submission.]

50. [This was withdrawn by the claimant in the written submission.]

51. [This was withdrawn by the claimant in the written submission.]

<u>Dismissal</u>

52. It is accepted that the respondent treated the claimant unfavourably by dismissing her, and that this was because of something which arose in consequence of her disability. Can the respondent show that the dismissal was a proportionate means of achieving the legitimate aim summarised in the respondent's letter to the Tribunal of 12 March 2021?

Direct disability discrimination – section 13

53. Can the claimant prove facts from which the Tribunal could conclude that in the following alleged respects the respondent treated her less favourably than the comparators named below, or in the alternative a hypothetical comparator, and that this was because of the claimant's disability (in that assumptions based solely on the fact of her disability had a material influence on the mental processes, conscious or subconscious, of the decision maker)?

(1) [This was withdrawn by the claimant in the written submission]

(2) Failing to provide the claimant with Maldi training from November 2016 on her return to work following surgery;

(3) [This was withdrawn by the claimant in the written submission];

(4) In requiring the claimant to work full days and not requiring the same of her non-disabled comparators Sue Fraser, Kate Ryan, Susan Chinta, Jane Storey, Jessica Kervella, Gill Royle, Lina Lakhani and Jacky Cuffaro;

(5) In dismissing the claimant.

Harassment related to disability – section 26

54. Can the claimant prove facts from which the Tribunal could conclude that on any of the following alleged occasions:

(a) the respondent subjected her to unwanted conduct;

(b) which was related to her disability; and

(c) which had the purpose or effect (applying section 26(4)) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

(i) A conversation with Sue Fraser 31 May 2018 when Ms Fraser told her that she was not any use in the lab and contributed 1%.

(ii) (after amendment) A conversation with Kate Ryan on 8 March 2018 when Ms Ryan told her that she was only doing 1% of the work of a BMS.

(iii) A conversation with Sam Fish on 16 July 2018 when she was criticised for not doing enough work, and her explanations of excessive workload were dismissed?

(iv) In Sam Fish chasing the claimant for completion of the tasks allocated to her in the period April – July 2018 (see paragraphs 36(5) - (12) above) despite knowing that the claimant had not had time to do the work?

55. If so, can the respondent nevertheless show that there was no contravention of section 26?

Equality Act time limits – section 123

56. Insofar as any of the matters for which the claimant seeks a remedy occurred more than three months prior to the presentation of her claim forms, allowing for the effect of early conciliation, can the claimant show that it formed part of an act extending over a period ending less than three months before presentation?

57. If not, can the claimant show that it would be just and equitable for the Tribunal to allow a longer period for presenting her claim so that the Tribunal has jurisdiction over it?

Part 2: Unfair Dismissal – section 98 ERA

58. What was the reason or principal reason for the dismissal? The burden is on the respondent to show that the principal reason was a potentially fair reason, namely one relating to the claimant's capability based on ill health.

59. If potentially fair reason is shown, was the dismissal fair or unfair applying the test set out in section 98(4)?

Part 3: Unlawful Deductions/Breach of Contract

60. Can the claimant prove that at the date her employment terminated the respondent made an unlawful deduction from her pay and/or acted in breach of contract in failing to pay her for the following matters:

(a) [pursued only as a remedy issue if an Equality Act complaint succeeds]

(b) Payment for annual leave which had accrued but was outstanding; and/or

(c) [This was withdrawn by the claimant in the written submission]?

Part 4: Written statement of reasons for dismissal – section 92 ERA

61. Did the respondent unreasonably fail to provide a written statement giving particulars of the reasons for dismissal in breach of the claimant's right under section 92?

Evidence and Witnesses

13. The Tribunal had a bundle of documents in three lever arch files running to almost 1590 pages. Some documents were added to the bundle by agreement during the hearing. Any references to page numbers in these Reasons is a reference to pages from that bundle unless otherwise indicated.

14. We also had a supplementary bundle which contained an agreed chronology, a reading list and some photographs. The photographs had been taken after the events which gave rise to this case, but helped to give the Tribunal a general impression of the rooms in and the benches at which the claimant and her colleagues had worked.

15. The Tribunal heard from seven witnesses, each of whom confirmed the truth of their written statement before answering questions orally.

16. The claimant was the only witness on her side.

17. The Trust called six witnesses. **Kate Ryan** was the Operational Manager in the Microbiology Service and later the Service Manager. **Sam Fish** was a Senior Biomedical Scientist and subsequently acted as the Operational Manager, reporting to Kate Ryan. **Jackie Elliott** was the Manager of Pathology until 2018 when she became the Pathology Divisional Managing Director. **Chris Sleight** joined the Trust in 2018 as Managing Director of the Diagnostics and Pharmacy Group. **Lucy Turner** was a Specialist Occupational Health Physiotherapist working in the

Occupational Health Department, and **Katy Chadwick** was the Human Resources ("HR") Business Partner.

18. The Tribunal did not hear any evidence from Sue Fraser, who was the Microbiology Service Manager until her retirement in 2019. The Trust had had no contact with her since she retired.

Relevant Legal Principles – Equality Act 2010

Jurisdiction

19. The complaints of disability discrimination were brought under the Equality Act 2010. Section 39(2)(c) and (d) prohibit discrimination against an employee by dismissing her or subjecting her to a detriment. Section 39(5) applies to an employer the duty to make reasonable adjustments. Section 40(1)(a) prohibits harassment of an employee.

20. By section 109(1) an employer is liable for the actions of its employees in the course of employment.

Burden of Proof

21. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

22. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

23. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden or proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

24. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable…**
>
> **(2) …**
>
> **(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."**

25. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96** which deals with circumstances in which there will be an act extending over a period.

26. A complaint which is otherwise out of time may benefit from a just and equitable extension under section 123(1)(b). The case law includes **British Coal Corporation v Keeble [1997] IRLR 336**, in which the EAT confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. In **Department of Constitutional Affairs v Jones [2008] IRLR 128** the Court of Appeal emphasised that the guidelines expressed in **Keeble** are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case.

27. In **Robertson v Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]** the Court of Appeal observed that the exercise of discretion to extend time is the exception rather than the rule, and in **Chief Constable of Lincolnshire v Caston [2010] IRLR 327** it confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

Direct Disability Discrimination

28. Direct discrimination is defined in section 13(1) as follows:

> **"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."**

29. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"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."**

30. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability.

31. There are some cases where the protected characteristic forms part of the criterion upon which the decision was taken in a way that does not require any considering of the underlying mental processes. In **Interserve FM Ltd v Tuleikyte [2017] IRLR 615** the EAT considered this at paragraphs 15 and 16. Where the criterion is inherently based on or indissociably linked to the protected characteristic, it or its application constitutes the reasons or grounds for the treatment complained of, and there is no need to look further.

32. However, as the EAT and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to the relevant protected characteristic, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Discrimination arising from disability

33. Section 15 of the Act reads as follows:-

> **"(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."**

34. "Unfavourably" is not defined in the Equality Act. The treatment will have to be a "detriment" if pursued under section 39(2)(d), for which the test is whether it

could reasonably be seen as detrimental: **Shamoon v Chief Constable of the RUC [2003] ICR 337** at paragraph 35.

35. The Equality and Human Rights Commission Code of Practice ("the Code") at paragraph 5.7 states that it means that the disabled person "must have been put at a disadvantage". The Code notes that: "Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

36. Section 15(1)(b) introduces a justification defence. This will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant: a test established in the context of indirect discrimination in **Hampson v Department of Education and Science [1989] ICR 179 CA**.

37. The Code also contains some provisions about justification. Paragraph 4.27 considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

- is the aim legal and non discriminatory, and one that represents a real, objective consideration?
- if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

38. As to that second question, the Code goes on to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. Factors to be considered in the balancing exercise may include whether a lesser measure could have achieved the employer's legitimate aim.

39. Paragraph 4.31 notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

40. Paragraph 5.21 states –

> **"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.**"

41. In paragraph 19.9 of the Code it is made clear that:-

> **"Where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability or their conduct, they must consider whether any reasonable adjustments need to be made to the performance management or dismissal process which would help improve the performance of the worker or whether they could transfer the worker to a suitable alternative role".**

Reasonable Adjustments

42. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in Section 20, Section 21 and Schedule 8.

43. The duty is set out in Section 20 as having three requirements:

> **"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."**

44. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the EAT in **Environment Agency v Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland v Ashton [2011] ICR 632.**

45. The disadvantage resulting from a provision, criterion or practice must be "substantial", defined in section 212(1) as being "more than minor or trivial".

46. The "knowledge defence" in Schedule 8 requires the respondent to prove that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at the disadvantage in question.

47. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage (or to provide the auxiliary aid) is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

48. An increased risk to health and safety for anyone (including the disabled employee) is relevant (paragraph 6.27).

49. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case.

50. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

Harassment

51. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

> **"(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 sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**

52. Chapter 7 of the EHRC Code deals with harassment.

Relevant Legal Principles – Employment Rights Act 1996

Unfair Dismissal

53. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

54. The potentially fair reasons in Section 98(2) include a reason which:-

> **"relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".**

55. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

56. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

> **"…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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".**

57. It has been clear ever since the decision of the Employment Appeal Tribunal ("EAT") in **Iceland Frozen Foods Limited v Jones [1982] IRLR 439** that the starting points should be always the wording of Section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office v Foley; HSBC Bank Plc v Madden [2000] IRLR 827**.

58. The application of this test in cases of dismissal due to ill health and absence was considered by the EAT in **Spencer v Paragon Wallpapers Limited [1976] IRLR 373** and in **East Lindsey District Council v Daubney [1977] IRLR 181**. The **Spencer** case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In **Daubney**, the EAT made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

59. More recently the EAT considered this area of law in **DB Shenker Rail (UK) Limited v Doolan [UKEATS/0053/09/BI**). In that case the EAT (Lady Smith presiding) indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited v Burchell [1978] IRLR 379**) is applicable in these cases. The Court of Session in November 2013 decided **BS v Dundee City Council [2014] IRLR 131** in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a sick note for a further four weeks. The Court reviewed the earlier authorities and said this at paragraph 27:

> "**Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical**

> **examination; all that the employer requires to do is to ensure that the correct question is asked and answered."**

Unauthorised Deductions from Pay

60. The right not to suffer unauthorised deductions from pay arises under Part II of the Employment Rights Act 1996. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable to the worker. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

Breach of Contract

61. The Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994. If the contract of employment, properly construed, contains an obligation which the employer has failed to meet, damages can be awarded.

Written Reasons for Dismissal

62. Section 92 of the Employment Rights Act 1996 gives an employee the right on request to a written statement of the reasons for her dismissal. Section 93 entitles a complaint to be made to a Tribunal if there has been an unreasonable failure to supply such a statement.

Findings of Fact

63. This section of our Reasons sets out the broad chronology of events in the period with which this case is concerned. Almost all of what follows in this section was uncontroversial. Any disputes of primary fact which are of significance will be addressed in the discussion and conclusions section.

The Respondent and its Policies

64. The respondent is an NHS Trust with thousands of employees and significant resources, including dedicated HR and Occupational Health ("OH") functions.

65. Its policy entitled "Employing Individuals with Disabilities [and] Long-term Health Conditions" dated from June 2014 and appeared at pages 1375-1386. The passage on reasonable adjustments gave examples which included alteration to working hours. An appendix referred to Access to Work and the availability of financial assistance. We will call this the "disability policy".

66. In addition there was a Staff Redeployment Policy at pages 1387-1401, a Flexible Working Policy at pages 1423-1438, and a Policy on the Management of Long-term Sickness at pages 1412-1432. In broad terms that policy provided for OH input, for redeployment to be considered, for phased return where appropriate,

but also envisaged the possibility of the termination of employment. We will call this the "LTS policy".

Organisation of the Microbiology Service

67. There were approximately 50 members of staff in the Microbiology Service. The Operational Manager at band 8A reported to the Service Manager at band 8B.

68. Each section had a manager at band 7 who was a Biomedical Scientist ("BMS"). Within the section there were BMSs at band 5, and some at band 6 who were specialist BMSs or team leaders. The team leaders undertook some management roles as well as laboratory ("lab") work. The BMSs were all rotated across different sections to ensure they did not lose their skills in any particular section.

69. Supporting the BMS were Associated Practitioners ("APs") at band 4, and Medical Laboratory Assistants ("MLAs") below band 4.

70. In physical terms the lab had a number of different rooms and areas, all with laminate flooring rather than carpeting. One room contained the **Reception** area, where samples were brought in by MLAs. The **Urine** section was in the same room.

71. In another room was the **Automation** lab where blood cultures were processed, and urgent samples such as spinal fluids analysed.

72. In a room off the automation room was the **Serology** lab where the BMSs tested bloods.

73. That left the main lab which had a number of different sections in it. The Gynaecological ("**Gynae**") section operated with the BMS culture plates and sending results out in the morning, and in the afternoon doing work requiring use of a microscope.

74. The **Enterics** section dealt with analysis of faeces and was seen by management as a half day job. It worked with the **Tissues** section, and in general one BMS covered Tissues in the morning and Enterics in the afternoon, and the other did the opposite.

75. The **Wound**s section was divided into a section for 24 hour tests and one for 48 hour tests.

76. Each of these five sections in the main lab had a dedicated bench which is higher than a normal office table where the equipment and other material needed for that type of work is kept. A BMS assigned to work on that section would work at that bench.

77. Finally, there were two other separate rooms, one known as the Containment Level 3 laboratory for high risk work, and the other known as the room where MALDI tests were done. MALDI is an acronym for a mass spectrometer device used to identify organisms using a laser.

Hours of Work

78. The service had to deal with work which required an urgent response. The core hours were regarded as 9.00am to 5.30pm on weekdays and weekends. However, during the week there were some early shifts from 8.00am to 4.30pm, and there would generally be one BMS on a late shift from 11.30am to 8.00pm. Staff who worked at the weekend had time off in lieu on two days during the week. There was in addition an on-call service overnight which would require the BMS to attend the lab if called out.

79. The rotas were prepared a week in advance by one of the section managers. The aim was to keep staff on the same section for at least a week, but there had to be flexibility if areas required cover.

Variation in hours of work

80. One of the allegations of direct disability discrimination was that the claimant was denied the chance to work less than full days when non-disabled employees were permitted to do so. From the evidence we heard about the named comparators we concluded the position was as follows:

(1) **Sue Fraser** was Service Manager at band 8B, a role which did not require bench work. She retired but returned to the Trust in June 2018 on reduced hours and was allowed to work from home one day a week as part of a planned pathway to complete retirement. Kate Ryan increased her hours to make up that difference.

(2) **Kate Ryan** had returned to work on a part-time basis when she re-joined the Trust in 2007 after the birth of her daughter. When a senior manager left she increased her hours to two or three days a week. She increased her hours again whilst Sue Fraser was ill, on a temporary basis. Whilst working part-time she worked full days. Her role did not require any bench work.

(3) **Susan Chinta** was an AP at band 6. Her bench work entailed her reading MRSAs, a role which could be completed in the morning, and from 2013 she worked five days a week 9.00am-12.45pm.

(4) **Jane Storey** retired from the Trust about a decade ago, having worked three days a week 9.00am-5.20pm.

(5) **Jessica Kervella** was a BMS team leader at band 6 like the claimant. In September 2015 (page 363) it was agreed that she would work 8.30am-5.00pm Monday to Friday. It transpired after a few weeks that she was having trouble getting into work on time so it was changed to 8.45am-5.15pm.

(6) **Gill Royle** was a part-time MLA at band 2. She worked full days Monday and Tuesday, but from 2008 worked Wednesday 9.00am-3.00pm to carry out a specific test for which funding had been received. The test was complete by 3.00pm when she left each Wednesday.

(7) **Leena Lakhani** was a part-time BMS at band 6 who transferred to the Trust under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") when the Trust merged with another Trust in 2012. The contract which the respondent inherited was for her to work 20 hours per week across three days. That was later amended to 18 hours a week working 9.00am-3.00pm on three days. She left the Trust in October 2014.

(8) **Jacky Cuffaro** was a part-time MLA working 16 hours a week across two days, working more than a full day on each of those days.

The Claimant

81. The claimant had a degree in Biomedical Sciences and was recruited initially as an MLA at band 2 but qualified as a BMS in October 2007.

82. In June 2014 she had progressed to the position of BMS team leader at band 6, a role she retained until her employment ended. The terms and conditions of her team leader role were set out in a statement of 12 June 2014 at pages 352-360.

83. By the time of her spinal operation in May 2016 the claimant had been a team leader for almost two years. She was experienced and fully competent. She had worked across all the sections in the service.

84. The claimant had a long-term spinal condition. It affected her mobility and caused her significant pain. In 2015 it became apparent that there were spinal disc fragments blocking the nerve route for her leg which deprived her of feeling and function in her left leg. Eventually in March 2016 the treating clinicians arranged for her to undergo surgery and set a date at the end of May 2016.

MALDI training

85. From December 2015 there was training on the new MALDI machine. It was difficult to train all the staff and eventually people were trained one by one, whilst those who had not received training continued to analyse the samples in the traditional method. The claimant was not on the list for training prior to her scheduled operation, and Ms Ryan accepted that the fact she was going to be off for some time after the operation was part of the reason for not allocating her training at that time. This was the first allegation of discrimination arising from disability and we will return to it in our conclusions.

November 2016 return to work

86. After the operation the claimant was off sick and returned to work on a phased basis working half days initially on 29 November 2016. That followed an Occupational Health report of 15 November 2016 at page 405 supporting a phased return and limitations on manual handling. A fit note from her GP on 24 November 2016 (page 409) confirmed that the claimant would be fit if her hours were altered. An email from the claimant of 21 November at page 408 confirmed that she would be using annual leave to mean that she would be working mornings only during her phased return up to Christmas 2016.

87. When the claimant returned to work in November 2016 it was not arranged for her to do MALDI training. This was one of the allegations of direct discrimination to which we will return in our conclusions.

88. In addition she was not given back the responsibility of drawing up the rota which she had been doing before she went off for her operation. She was asked to show another team leader how to do the rotas before she went off for her surgery, and when she came back the task was left with the same team leader. This formed an allegation of discrimination arising from disability to which we will return.

Flexible Working Application December 2016

89. At the end of November the claimant was giving consideration to reducing her hours on a permanent basis. She discussed this informally with Sue Fraser on 9 December (page 411). Ms Fraser was supportive but told the claimant to make her application under the flexible working policy.

90. The flexible working application form was submitted on 12 December 2016 (pages 412-414). The pro forma had a number of boxes to tick which referred to the statutory grounds upon which such a request could be made, such as responsibility for a child under 16 or a disabled child under 18. The claimant ticked the box to indicate that none of those reasons applied, but instead wrote:

> **"Medical reasons (avoid prolonged hours post spinal surgery)."**

91. The claimant confirmed that she was currently working all three shifts, with on-call and weekend working, but wanted to work six hours per day, if possible 8.00am-2.30pm including a 30 minute break. She said that was more practicable than 9.00am-3.30pm as with those hours she would not be able to collect her children from school and would incur childcare costs. That would be 30 hours per week over five days. Her application made suggestions as to how this could be accommodated in terms of the work in the department.

92. On 22 December 2016 Ms Turner, the Specialist OH Physiotherapist, reported the result of a workstation assessment. She referred to a cardiac issue which had been diagnosed. She said she fully supported the application to reduce her hours overall to avoid additional strain on her back. She recommended a new chair with improved lumbar support should be purchased. The current lab chairs did not support the claimant in a good position, and she was too tall when standing to use the microscope in a suitable posture. She recommended that the claimant be taken off on-call duties.

93. That same day the claimant spoke to Sue Fraser. She wanted to know what her working pattern would be on her return from leave in January 2017. Ms Fraser said she was not happy with the requested hours, and could only offer the claimant 18.75 hours per week, which had been "unused" for two years by a previous member of staff who had left. Those hours would have to be worked over two full days and a half day. Ms Fraser said she was not going to invest in a chair for "someone who is about to leave".

94. The claimant emailed her union representative, Steve Nelson, on 3 January 2017 (page 416) to record what she had been told.

<u>January 2017</u>

95. The claimant returned to work on 3 January 2017. Ms Ryan agreed (page 419) that the claimant could carry on working six hours per day for five days a week, leaving at 3.30pm each day, until a decision was made on her application.

96. Ms Fraser wrote to the claimant on 4 January 2017 (pages 420-422) to confirm that the flexible working application was refused. The letter said that if the claimant were the only person starting at 8.00am others would not be able to do the early rota since two people could not start so early given the BMS activities and workflow later in the day. Other staff would be required to complete the work the claimant had not completed when she left for the day. Lone working was not possible because of the cardiac issue. The offer of 18.75 hours per week over 2.5 days was reiterated. The letter ended by giving the claimant the right of appeal, which she exercised on 18 January (page 429).

97. An OH report of 5 January 2017 (page 423) confirmed that adjustments would be needed for the claimant to fulfil her contractual role, and that she should avoid lone working. The report supported the request to reduce hours to 30 per week although made no comment on the working pattern. It said the claimant was likely to be disabled under the Equality Act.

98. The claimant set out details of her appeal in a letter of 30 January 2017 at page 442, later supported by a statement of case at pages 444-446. She asked for any arrangements between 9.00am and 5.30pm that allowed six hours working with a 30 minute lunch break, not necessarily starting at 8.00am. A pattern of six hours per day would allow her to maintain a fairly even level of activity combining work, back exercises and family commitments at a manageable pace. The 18.75 hours over 2.5 days did not allow the required pacing of her activities.

99. The flexible working appeal was heard on 10 February 2017 by Jackie Elliott, the Pathology Directorate Manager, and the HR Business Partner, Anita Finn. Sue Fraser did the management notes before the hearing at pages 450-460. The last three pages were a response to the points made by the claimant. Notes taken by Ms Finn of the meeting were not disclosed by the respondent.

100. The appeal could not be concluded. Although no confirmation was issued in writing, the conclusion was that management would revisit their final offer of weekly hours increasing from 18.75 to 30 hours, OH input would be sought, the provision of a suitable chair would be investigated further, and that the claimant would not be using a saddle stool because she was concerned that the castors on the stool increased the risk of her falling (recorded by Ms Briody in her email of 10 February at page 461). She was to be relieved of weekend work, on-call duties, and any early and late shifts.

101. In the meantime, she continued to work six hour days using annual leave, until 1 April 2017 when her hours and pay reduced to 30 per week (page 492).

A Chair with Castors – February 2017

102. Kath Briody was the Trust's back care advisor and part of the OH department. She was helping in the search for a suitable chair to use in the lab. That meant it had to be a chair at a high level because the lab benches were higher than ordinary desks. The chair needed to have castors so that the claimant could move it around freely, rather than "glides" which are rounded feet which do not move but which enable a chair to be pushed or dragged across the floor. The claimant's back condition meant that pushing or dragging a chair with glides was not appropriate. However, the chair also needed to be safe when the claimant was sitting in it, so the castors needed to be lockable or brake-loaded so that the chair would not move under load. Although the terminology varied at times, we will refer to a suitable chair as a "BLC chair", shorthand for a chair with Brake-Loaded Castors which could be used at lab bench height.

103. Initially in February 2017 Ms Briody found out that one of the two companies used by the Trust to supply chairs would not supply a BLC chair due to health and safety rules (page 448), but an alternative supplier was being contacted. On 10 February 2017, however, she sent an email at page 461 to Ms Fraser confirming that the majority of companies she had contacted did not offer a high level chair with castors due to the risk of falling. One company would supply the chair with glides but with a set of five castors which could be used to replace the glides, against their advice. Ms Briody had been in touch with the medical equipment department who did have some BLC chairs and she was making enquiries about their origin and price.

104. The claimant tried out a BLC chair in the office where she was working, albeit one with a fabric covering which would not be suitable for lab work. Lab work would require a wipe clean vinyl covering. On 17 February 2017 (page 462) she sent an email to say that the chair had an adjustable height that fitted the bench perfectly as well as the office desk, and that she was happy with it, describing it as "really safe and comfortable". She had been securing it against the table before sitting down, and found that once she sat down it was very stable.

105. Ms Fraser responded by saying that she would have a vinyl covered chair ordered to support the return to lab duties. That afternoon she emailed a quote from a company called Wagstaff Interiors (pages 465-468) for a chair costing £86 plus VAT. She was waiting for confirmation that the chair could be raised high enough for bench work.

106. Mr Briody responded on 27 February 2017 (page 469) to confirm that she had checked with the claimant that the chair was suitable for working at desk height and at bench height, and she recommended that a similar chair with a vinyl covering be ordered.

107. At this stage it seemed that there would be no problem providing a BLC chair, as it would be identical to the one the claimant had tried, apart from the fabric covering being replaced by vinyl.

March – April 2017

108. There was a further OH report on 6 March 2017 from Dr Prasad, an Occupational Health physician. It appeared at pages 470-471. It referred to the adapted chair being awaited, and it recommended a decrease in hours if operationally possible.

109. On 10 March 2017 the claimant was permanently excluded from manual handling training (page 474).

110. The chair arrived on 28 March 2017. It was the wrong chair. It had glides, not castors. It had armrests which had not been ordered. They prevented it being moved close enough to the terminal on the lab bench. Sue Fraser asked the claimant to try the chair in the lab anyway from the following day.

111. On 29 March 2017 the claimant resumed lab work for the first time since her operation. She lasted three days before she was complaining of being in more pain (page 478). The arm rests had been removed but the chair had to be moved around on the glides. She also felt that the heavy workload meant she could not afford to walk away from the chair as much as she needed to mobilise. In an email to Mr Nelson of 3 April at page 480 she described herself as "back to square one in terms of pain".

112. The claimant was taken off lab work and put back on paperwork in the office pending assessment by Kath Briody.

113. That assessment by Kath Briody took place on 12 April 2017. She emailed Sue Fraser and Sam Fish the same day (page 483) that a BLC chair was needed. That would enable her to move her chair herself rather than getting a colleague to do it. The email also recorded that the claimant was not able to do microscopy due to the forward leaning required.

114. The reply from Sue Fraser the same day confirmed that two BLC chairs had been ordered and should arrive within a month. She asked for confirmation that the claimant could work on all benches other than Serology and those requiring significant microscopy.

13 April 2017 – Grievance

115. On 13 April the claimant spoke to Sam Fish and was told to resume lab work on Monday 17 April 2017. Sue Fraser came in and joined the meeting. The claimant thought that she could work on Serology but this was not agreed.

116. The claimant was upset by this and completed a grievance report form the same day (page 484). The grievance was that the Trust had not fulfilled its obligation to ensure a safe and gradual return to full duties, and had failed to provide a suitable chair, jeopardising her health and leaving her in pain. The grievance sought a review of progress regarding the provision of a phased return to work.

117. It was emailed by Steve Nelson to Anita Finn at shortly before 11.00am (page 491). The claimant was going to do some office work for the rest of the day. Anita

Finn responded within an hour saying that she had discussed it with Sue Fraser and the claimant would be kept off the lab bench until the appropriate chair arrives. She said that OH advice had been followed and that a case conference with the OH physician had been requested. She said that as these actions would address the points of the grievance she trusted that it would be stayed until a conclusion was reached.

118. Mr Nelson responded on 18 April (page 490) to say that that sounded sensible.

119. The grievance was never in fact reactivated following this exchange. The claimant did not return to work in the lab until October 2017.

120. The case conference was arranged for 2 May 2017. It involved Dr Prasad, and by a letter of 24 April (page 496) OH wrote to the claimant to ask her to attend on 2 May at 3.00pm. The letter said that the case conference would be attended by OH, HR and a manager.

BLC Chair Disclaimer

121. In the meantime there had been discussions with Wagstaff about the correct chair. On 20 April (page 494) Wagstaff emailed the Trust to say that a disclaimer would have to be signed.

122. The disclaimer appeared at page 492e. It said:

> **"The definition of non-standard is any product for which a new product release form has not been issued. It may include amongst other things:**
>
> - **Castors on draughtsman's chairs;**
> - **Arms on draughtsman's chairs;**
> - **Extra high centres on typist, operator and executive chairs…**
>
> **You have requested on the above order product reference PS4001D/6114D in a form that is not in accordance with our standard model.**
>
> **This product as ordered has not been through our development procedure and we cannot answer for either the suitability of the chair or its performance in use. In addition, it may be that the changes you have requested render it unsafe for any user.**
>
> **We will however comply with your request on the basis that both you and your customer are aware of our reservations. The product will not be covered by our normal guarantee and we cannot accept return for repair, replacement or credit, as we are unable to forecast the long-term effect of the alterations on the product.**
>
> **We can accept no responsibility for any damage to persons or property due to the alteration of the product and would advise that you check your liability insurance levels. Please sign and return this notification and we will proceed with your order.**
>
> ***We have read and understood the above and accept the terms of supply of the non-standard product. Our customer has been notified and Wagstaff Interiors Group will not be held liable for any failure in use or any accident or damage to persons or property as a result of the supply of the product.***

> **Signed:** …………….
>
> **Print Name:** …………….
>
> **Position:** …………….
>
> **Date:** …………….”

123. The email requiring the disclaimer was forwarded to Jackie Elliott. On 24 April 2017 (page 492b) she emailed Kath Briody and Anita Finn to say:

> **“The chair with castors is not a standard chair and they have asked we sign a disclaimer re they accept no liability re damage to people. I am not prepared to sign this due to the reasons for purchasing the chair. Therefore please can you recommend a different chair that has castors please as a matter of urgency as until we have this Francine cannot work in the laboratory.”**

124. Ms Elliott’s position on the disclaimer was based on a discussion with the Director of Workforce, David Hargreaves, who told her that the Trust could not sign any such disclaimer. From the email it was clear that she wanted an equivalent chair without any such disclaimer to be ordered. Her position was also informed by her knowledge of an incident which Ms Ryan mentioned in her witness statement where some seven years earlier a colleague called Ms Ashton had had to grab hold of the bench to stop herself falling when a chair moved away as she went to sit down on it. There was no injury and no formal report, and the respondent was unable to produce the risk assessment which we were told had been done after this incident. However, we accepted it had been in the mind of Ms Ryan and Ms Elliott.

125. On 2 May (the morning of the case conference) Jackie Elliott emailed Wagstaff (page 493) to query the disclaimer. Her email said:

> **“We have received this disclaimer. Please could you provide some information as to why this is necessary – what do you perceive to be the risks related to fitting lockdown castors to the chair as requested? We then have to make a decision as to whether to pursue this order.”**

126. The response from Wagstaff came back within a few minutes and included the following:

> **“We have asked for the below referenced disclaimer to be signed as there is a slight amount of movement once the chairs have been brake-loaded. Normally these are supplied with gliders, however as requested we have placed this order for brake-loaded castors. As soon as this disclaimer is returned, our manufacturer can continue the production of this chair for you.”**

<u>Case Conference 2 May 2017</u>

127. The case conference took place at 3.00pm. Ms Ryan attended together with the panel who were considering the flexible working appeal, Anita Finn and Jackie Elliott. Dr Prasad was there as well. No notes of this meeting were produced and we were reliant on the evidence we had from Ms Ryan and Ms Elliott as to what transpired.

128. Ms Ryan did not know anything about the grievance. Ms Elliott and Ms Ryan did not know that the claimant and Mr Nelson would be attending. They were

informed that they were in the waiting area. Dr Prasad said it was not appropriate for him to speak to the claimant about her medical position in the presence of managers, and that he would arrange to see her separately in private to do that.

129. Anita Finn came out to tell them to leave and that Dr Prasad would contact the claimant to arrange an assessment.

130. Ms Elliott recalled that during the discussion with Dr Prasad he demonstrated from his desk how it was possible to stand up and sit down on a chair which swivelled without pushing it back from the desk, simply by rotating to the side before standing. Dr Prasad said that he would need a written referral before he could confirm his advice in writing.

OH Review May 2017

131. Jackie Elliott completed the OH referral form on 2 May 2017 (pages 497-500). The referral said that working five mornings only 30 hours per week would not meet the requirements of the lab. It said that the chair recommended had been purchased, omitting to mention that the wrong chair had been supplied. The referral form also said that Ms Elliott was not prepared to sign the disclaimer for a BLC chair. The doctor was asked to review whether the claimant could work 30 hours over four days with Wednesday or Thursday off, and whether a swivel chair without castors would be suitable for her. It appeared, therefore, that the plan to obtain a BLC chair without a disclaimer had been abandoned.

132. The claimant was not aware of the disclaimer issue at all. Dr Prasad told her about it when she saw him on 24 May.

133. His report appeared at pages 501-503. He said that the claimant was fit for her contractual duties. He said that a swivel chair (without castors) would help the claimant to continue in her role and that such a chair should be provided at all workstations that she would have to work at. He said she was medically fit to work 30 hours over a four day period with a Wednesday or Thursday off. The report also referred to the claimant having been assessed by an occupational therapist who recommended a customised chair which would allow her to swivel from under the workstation to stand without having to push the chair. In fact no such recommendation (i.e. for a chair without castors) had been made by any occupational therapist.

134. It was the claimant's case that she was deliberately excluded from the case conference on 2 May so that the managers could prime Dr Prasad as to the report they were looking for from him, namely a report which confirmed that she was fit to work full days and that she did not need a BLC chair. We will return to this issue in our conclusions.

135. Around this time 15 new swivel chairs without castors had been ordered for the department, partly in replacement for worn out chairs but also to meet the requirement for such a chair at each bench at which the claimant might work.

136. The claimant compiled some comments on the OH report (pages 504-505). She pointed out that she was not working full hours, but still only six hours per day

pending the flexible working appeal outcome. She said that the chair provided for her working three days in the lab was not suitable even though it swivelled. She explained how using that chair had made her back symptoms recur. She could not agree that she could use a swivel chair without castors. She had known nothing about the disclaimer issue.

<u>End of year review June 2017</u>

137. The claimant was on an appraisal cycle which meant that she could expect an end of year review in the middle of each calendar year. She did not have one in 2016 because of her absence (page 509). The 2017 end of year review was scheduled for 29 June 2017.

138. When she got to the meeting Sam Fish informed her that it would have to be a mid year review instead. Ms Fish told us in evidence that she had been advised by HR that because the claimant was off sick and had missed her end of year review the previous year it should be a mid year review.

139. This was one of the allegations of discrimination arising from disability and we will return to it in our conclusions.

<u>Oxford Seating Chairs – August 2017</u>

140. On 2 August 2017 Ms Ryan had informed the claimant that Dr Prasad had not changed his report of 25 May 2017 after receipt of the claimant's comments (page 555). A meeting to discuss a phased return to laboratory work was arranged for 22 August. The flexible working appeal was to be heard on 12 September 2017.

141. Having learned of the disclaimer issue the claimant made her own enquiries. On 11 August (pages 563-566) she identified a company, Oxford Seating, that would supply a BLC chair for use at lab bench height without any disclaimer having to be signed. However, the information on the company's website included this:

> **"Oxford Seating does not accept liability where a user specifies freewheeling castors on hard floors or any type of castor for intermediate or high gas lift use.**
>
> **We recommend the use of glides for both high and intermediate chairs, although we are prepared to supply castors fitted to the chairs at the liability of the customer."**

142. Email exchanges between the claimant and the company included the statement that:

> **"Should you be looking to purchase a draughtsman height chair and have castors, we usually caution people that care must be taken when using a high chair with castors."**

143. At their meeting on 22 August 2017, Ms Ryan made clear that the claimant was expected to go back to normal lab duties when the 15 newly ordered swivel chairs were delivered. The claimant made clear that she did not think this was practicable and drew attention to the fact that she had found a company that would provide a BLC chair without any disclaimer. She described how pushing the chair without castors could cause a relapse, as it had done on those three days of lab work at the end of March 2017.

144. In a subsequent email to her union representative on 25 August (page 556) the claimant explained why she disagreed with management's proposition that she would not have to move the swivel chair without castors because there would be one at every workstation. She would still have to push the chair to get it into position, to get up each time she took a postural break, and when she had to move forward to leave space for a trolley to pass behind her.

145. The claimant also informed Ms Ryan on 22 August that she was willing to reconsider the offer of 18.75 hours per week.

146. That same day she provided some more information about her medical position to Ms Ryan (page 560). Ms Ryan said she would get OH input on this information before the flexible working appeal, but in fact did not do so.

147. The claimant sent Ms Ryan the Oxford Seating information on 31 August (page 561). The material she forwarded included an email from Oxford Seating to her of that date (page 561) which said:

> **"The castors can be supplied without any requirement for signing the disclaimer. Our concern is only that a customer is aware that there is a possible safety issue. However, the castors are safety castors and we are not aware of any issues at all with castors being supplied on high gaslift chairs."** [Emphasis in the original]

Flexible Working Appeal September 2017

148. The flexible working appeal before the panel of Ms Elliott and Ms Finn reconvened on 12 September 2017. The claimant prepared a note for it at pages 566-567. She made clear that a chair with castors would be suitable and that she had sourced a company who could provide one without a disclaimer. She emphasised that she needed to work six hours per day.

149. The outcome of the appeal was contained in a letter of 21 September 2017 (pages 572-573). The requested hours of 8.00am-2.30pm with a 30 minute break were not possible because the claimant would be a lone worker from 8.00am, and because management could not use the remaining 7.5 hours to recruit another person. There would therefore be an impact on service delivery. The letter recorded that the 18.75 hours per week post was no longer in existence and therefore no longer an option.

150. In relation to the chair, the letter confirmed that the Trust did not regard the signing of a disclaimer as appropriate, and that the OH report (May 2017) had said that there was no need for a chair to have castors.

151. The management offer remained one of 30 hours per week with either Wednesday or Thursday off, without weekends, late nights and on-call duties. The claimant could use the 15 new swivel chairs bought for the lab and there would be an assessment by OH to ensure that she used them correctly. There would be a phased return to work. It was later apparent from the statements of case for the appeal against dismissal (pages 1065 and 1078) that only one of these chairs was specifically assigned to the claimant, and that it was transported back and forth by colleagues between the two sections at which she worked during the day. It was not an ergonomic chair and no risk assessment had been undertaken.

152. Prior to the outcome letter the respondent obtained a letter from Ms Turner based on discussion with Ms Ryan and a review of the claimant's notes. She provided advice on a phased return over an eight week period, progressing to full days in the second half of that period. There should be regular meetings to monitor her symptoms, and if the return was not successful then redeployment should be considered (page 568).

End of year review 29 September 2017

153. The claimant was due to have her delayed end of year review on 29 September 2017, instead of the original date of 29 June. This review did not take place. Ms Fish said in evidence that the appointment was postponed because of an inspection in early October by the United Kingdom Accreditation Service ("UKAS"), and that she forgot to set a new date. This was one of the allegations of discrimination arising from disability and we will return to it in our conclusions.

Return to lab work October 2017

154. The claimant returned to work in the lab on a phased basis on 9 October 2017. She worked on the Gynae section in the mornings and helped other BMSs with their work in the afternoons. Her rest day was moved to Wednesday to give her a break in the middle of the week (page 578).

155. She was using swivel chairs with no castors. Ms Briody had assessed the claimant for working on the Gynae section and sent an email on 17 October (page 581) saying that the claimant had been shown how to place her chair and to adjust it. She was to ask colleagues to get racks of plates for her to avoid lifting them. There was no microscope work because of the neck flexion involved. The claimant responded the same day (page 581) pointing out that if she were to move to a different section she would need a second chair for the "picks", of which there were relatively few on the Gynae bench.

November – December 2017

156. By the time the claimant was four weeks into the phased return and working full days, she started to feel growing pressure in her lower back which affected her walking (page 584). The symptoms worsened into December 2017. She had to stop her physiotherapy and her back classes.

157. Dr Prasad reported on 30 November 2017 (pages 585-586) that there was now some use of the microscope, leading to some pain in her neck, and that she should have adequate postural breaks and changes in position to help manage some of her symptoms. He recommended regular meetings with her manager to discuss her workload, and that there should be an up-to-date workstation assessment.

158. On 4 December 2017 the claimant was moved to the Tissues section and was assigned a second section, Enterics, to be run in parallel. The Tissues section required more twisting and reaching for plates, and in addition it had a heavy workload of urgent matters and the claimant found that there was insufficient time for her Enterics work in the afternoon. The view of Ms Ryan was that the claimant had

time to do both because she was not doing the microscopy work. They discussed this on 7 December 2017. The result of that discussion, however, was that the claimant did not work on Tissues any longer but instead worked on Enterics and Gynae.

159. She found it very difficult to complete all the work within 7.5 hours of a full working day. Ms Fish accepted in cross examination that the tasks allocated to the claimant would take longer than 7.5 hours a day.

160. The claimant only had one chair measured and allocated to her from the 15 new ones, so she had to ask a colleague to move the chair between the two sections several times a day as she switched between them. Her physical symptoms continued to deteriorate.

161. Despite the recommendations of Dr Prasad, there were no regular formal meetings to discuss workload, and no assessment of all the workstations was done until 8 March 2018.

<u>January – March 2018</u>

162. During early 2018 the claimant sought to raise a number of times her concern about workload. She had a discussion with Ms Ryan in early January. She raised issues about workload at the regular "safety huddle" on 18 January (page 602), 1 February (page 608) and 8 March (page 632). A particular issue was having breaks and lunch covered by other staff.

163. In February 2018 the training for flu testing started. The claimant had not received training by March 2018. She mentioned this but did not hear anything further. This was one of the allegations of discrimination arising from disability, and we will return to it in our conclusions.

164. On 22 February 2018 Ms Ryan made a further referral to OH (pages 624-627). The referral confirmed that the claimant was restricted to two sections of the lab with no microscope work. It had been agreed that she would work on one section only due to significant discomfort while working. An OH appointment was arranged for 28 March. The claimant thought this was premature because she was waiting for further input from her treating doctors, but the appointment went ahead. The resulting OH report at pages 640-641 suggested a further review after that specialist information.

165. In the meantime Ms Briody carried out an assessment on 8 March which led to a letter of 16 March (pages 638-639). She said the workstation was largely unchanged from the previous assessment. Advice was given on moving the keyboard (a smaller keypad, not a full Qwerty keyboard) to within her reach when she had to use it to avoid having to reach across the workbench. There had been issues with her chair being left in different locations in the lab by others. She was using a microscope to a limited extent and was given advice on posture. There were only minor adjustments made to the workstation following this assessment.

166. The claimant had a meeting with Kate Ryan on 8 March 2018. Her log appeared at page 637. They discussed the OH referral. One of the allegations of

harassment (by amendment) related to a comment at this meeting by Ms Ryan about the percentage of a full workload which the claimant was doing. We will return to that issue in our conclusions.

<u>April 2018 onwards – Workload</u>

167. Dr Prasad had recommended in his report of 28 March that the claimant continue on reduced duties, and from early April 2018 the claimant was working only on Enterics, but having to deal with a range of other tasks allocated to her which did not involve laboratory work. One of the allegations of discrimination arising from disability was that the combination of these tasks overloaded her in this period. We will return to that in our conclusions.

168. The tasks she had to do in this period included updating protocols or SOPs (there were 66 outstanding from early March – page 630 – of which 21 were for the claimant), dealing with a health and safety inspection and preparing an action plan (pages 648-676), completing data entries for EUCAST QC for 2016/17 and making templates for 2018/2019 (page 642), being in charge of BSC organisms which required research organisms to be located, defrosted, cultured and referred to another lab (page 642), performing competency assessments for staff (page 679), preparing for a norovirus trial (page 710) and helping with an Enterics PCR test (page 717), dealing with investigations into clinical incidents in June and July 2018, and dealing with COSHH assessments such as one for Kate Whatmough on 6 July 2018 (page 643). The claimant was also asked to prepare some questions for internal interviews in July 2018 (page 814).

169. The claimant accepted in cross examination that she never said directly during this period that she was overloaded, but said it should have been obvious to managers that they were allocating her too much work. The managers disagreed, taking the position that the work allocated could reasonably be expected of the claimant given the restrictions on her laboratory work. We will return to that issue in our conclusions.

170. Following further specialist appointments with treating doctors in April 2018, there was a further OH report from Dr Prasad dated 9 May 2018 (pages 689-690). It recorded the view from the treating surgeons that there was no conclusive diagnosis as to the cause of current shoulder pain, but it might be secondary to an increase in lower back pain. Dr Prasad recommended that all workstations and all benchwork at different workstations be assessed so that adjustments could be made. The claimant was currently fit to continue in her role with adjustments but should be reviewed towards the end of June 2018.

171. Within a week the back pain had worsened to the extent that Ms Ryan told the claimant to seek medical attention for her back. She attended the Trust's Accident and Emergency Department and was given some tablets, which she later learned were sedatives. She was off work for three days, and a further two days later in May after a spinal injection.

Chair incident at Wigan

172. In late May 2018 Ms Elliott saw a form reporting an injury at work on the part of a member of staff in the laboratory at Wigan. The person concerned sat back down on a chair with castors but it had moved slightly behind her and the chair shot away from under her, leading her to fall on the floor.

173. A risk assessment on laboratory chairs was carried out on 25 May 2018 (pages 692e-692i) which recommended that castors be swapped for glides. This assessment was approved at a Pathology health and safety meeting on 30 May 2018 (page 692c). Effectively chairs with castors were no longer to be used in laboratories where the floor was laminate rather than carpet.

31 May 2018

174. On 31 May 2018 the claimant met Sue Fraser. The purpose was to discuss Dr Prasad’s recommendations.

175. At that meeting Sue Fraser told the claimant that her contribution in the lab was only 1%. She said there was no guarantee that working hours would be reduced any further, and that the claimant had not been doing the work of a band 6 BMS. This formed an allegation of harassment related to disability and we will return to it in our conclusions.

176. The subsequent letter from Ms Fraser of 8 June 2018 (pages 702-703) confirmed that as the claimant was reading only one bench it formed only “1% of your contractual duties”, and the rest of the hours were used to update SOPs and do occasional audits. This was not a long-term arrangement. The claimant had explained the position with her treating specialists. Any future requests for a reduction in hours would have to be pursued by way of a flexible working application. There was an OH appointment on 3 July 2018.

177. Ms Briody did an assessment of the claimant's workstations on 19 and 28 June, and reported on 29 June (pages 767-772). She assessed all the areas in the lab together with the claimant and Sam Fish. These included Serology, Blood Cultures, Urines, Wounds and Tissues. Advice was given as to how the claimant could work on each of these sections with adjustments. A key focus was the extent to which the claimant would be required to work for long periods without being able to take a postural break, and whether she could adjust her position on a regular basis to avoid static positioning. Lifting and moving samples and other lab items was also considered. None of the areas considered were thought to be beyond her capabilities with adjustments.

178. On 29 June 2018 the claimant had her end of year review. The documentation appeared between pages 730 and 766. The claimant alleged that she was subjected to discrimination arising from disability when she was asked to redo the paperwork and combine documents from June 2017. We will return to that in our conclusions.

OH Report July 2018

179. The OH appointment on 3 July went ahead and the report dated the same day from Dr Prasad appeared at pages 773-774. He referred to a report on her workstations from an "occupational therapist", which must have been a reference to the report from Ms Briody. He had also been provided with a table of estimated times for the claimant to carry out jobs at each different workstation in the lab. His report said the claimant felt she could do the majority of the roles in the Briody assessment, that her medical condition appeared to have stabilised, and she could carry out the majority of her contractual duties. He said:

> **"I would advise that given the change in her condition over the past 6-12 months it would be advisable for her to reduce her hours, possibly between 15 to 20 hours per week, and I would also recommend reviewing flexible hours if this is feasible."**

180. He said that the claimant should be fit to return to contractual duties at reduced hours within the next 2-3 weeks.

181. In fact that did not happen. The claimant had a meeting with Sam Fish on 16 July 2018, following which she went off sick and was never to return.

Meeting 16 July 2018

182. The conduct of this meeting was another allegation of harassment related to disability, and we will return to it in our conclusions.

183. The claimant's description of the incident appeared on page 821. She alleged that she was "confronted" by Sam Fish about outstanding paperwork with a deadline of 20 July. An allegation that she had already been chased for these additional tasks formed another allegation of harassment related to disability to which we will return. The claimant believed in this meeting that her manager was being unreasonable, that the argument was becoming personal, and that no-one else was being asked to do what she had to do. Her note described herself as shaking with anger and frustration and almost in tears, and that she then informed Ms Fish that she would be going home as it was already past 4.40pm.

184. The note prepared by Ms Fish after the meeting appeared at pages 818-819. She described how the claimant said she had not made progress with the documents as she had too much to do. She alleged that the claimant started to speak loudly, was gesticulating a lot, and speaking to Ms Fish in an aggressive and disrespectful manner. There ensued a discussion about the amount of work the claimant felt she had to do, during which the claimant said it was too stressful to have to do bench work and paperwork. The claimant pointed her finger at Ms Fish and said she did not feel that her health was being taken into account. The meeting ended when the claimant became upset, but Ms Fish was also upset by what she saw as the disrespectful response to her reasonable questions.

185. The other person present during the first part of the meeting was Christine Chorlton. She produced a brief note at page 820 which described how Ms Fish asked the claimant if she had completed the documents that were needed for a meeting on Friday 20 July, and that the claimant "became very agitated and said that she had not completed the work". Ms Fish said the claimant had been on the

Enterics bench which was not a full day job to give her time to do that work, but the claimant "became very angry at this point and reeled off a list of jobs she had to do on the section". Ms Chorlton left the meeting at that point.

186. In our discussion and conclusions section we will make findings of fact about this incident.

July – December 2018

187. The claimant was not in work for the remainder of her employment with the respondent.

188. Initially she had a fit note for stress at work for four weeks from 17 July (page 825) which was then issued for a further two months on 14 August (page 829). In the meantime her treating Consultant Spinal Surgeon, Mr Hassan, prepared a report on 10 August 2018 (pages 827-828) which recommended an Occupational Therapist review in terms of her sitting and said that it may be that a seat without a back and a sloped seat would be of benefit for her.

189. An OH report of 24 August 2018 was produced by Dr Mijares, an Occupational Health Consultant and Clinical Lead who was senior to Dr Prasad. A second fresh OH opinion had been requested. A stress assessment by Dr Mijares recorded concerns about workload, relationships with management (the claimant felt intimidated, bullied and harassed), and a lack of control over her activities. She felt the level of support was below what she expected. He summarised the clinical position and recorded the claimant wondering if redeployment might be an option. His recommendations were a stress risk assessment, regular one-to-one meetings to discuss objectives and issues, and counselling to give her psychological support. He did not consider that redeployment outside a laboratory environment would be workable given the claimant's abilities as a BMS, and recommended that the claimant should be able to continue in her current department as long as management had a supportive and understanding attitude towards her needs and expectations. He supported a reduction in working hours permanently to no more than 20 hours per week, working three days in a row with time to recover. If adjustments could be made, she would be fit to return to work once her current anxiety-related symptoms settled. The report did not make any express reference to seating.

190. This was the first time that OH had expressly recommended working less than full days. Working 20 hours over three days would inevitably involve at least one part day.

191. On 20 September 2018 Ms Fraser wrote to Dr Mijares to query a number of aspects in his report. Her letter appeared at pages 835-837. She disputed that the claimant had been "bombarded with other work that normally should be carried out by two people". She said there had been no previous allegation of intimidation, bullying or harassment by management. No grievance had been submitted. It was unclear what was meant by "lack of control". There had been a number of steps taken to support the claimant including a reduction in hours, removal of out of hours work, assistance from colleagues with lifting and moving items, reduced microscopy, and regular back care/workstation assessments.

192. Dr Mijares responded on 2 October 2018 (pages 838-839). He noted her points. On the bullying and harassment matter he said he was only reflecting the information provided by the claimant. He was unable to elaborate on what the claimant meant by “lack of control”, he noted the support management said they had provided, and he referred Ms Fraser back to his earlier report on the question of how the claimant could do the job of a BMS despite her physical limitations.

193. The long-term sickness review procedure under the LTS policy also began in October 2018. The first meeting took place on 11 October with Sue Fraser. This formed the final allegation of harassment related to disability. The views which Ms Fraser had put in her letter to Dr Mijares were raised and discussed. Ms Fraser told the claimant that she thought the claimant had committed misconduct in the incident with Ms Fish on 16 July. The claimant felt she did not get the opportunity to tell her side of the story. Ms Fraser told her that there were witnesses who saw her behaving aggressively towards Sam Fish from the other end of the lab. She was told that Christine Connor and another colleague were the witnesses in question. The claimant told Ms Fraser that the reduction in hours was a reasonable adjustment that had to be accommodated. Eventually Ms Fraser conceded that the claimant could drop from 30 hours to 10 hours per week. It was agreed there would be an exploration of mediation and that the claimant would initiate the Access to Work process. Ms Fraser’s letter to the claimant confirming the outcome of the meeting appeared at pages 851-853 – 2 November 2018.

194. In October 2018 there was contact about a possible mediation. The claimant went to ACAS to initiate early conciliation on 12 October (page 845). The discussions eventually resulted in a mediation meeting between the claimant and Sam Fish on 25 April 2019. Ms Fraser retired around that time and Ms Ryan formally took over. The mediation did not result in a position whereby the claimant could return to work. The outcome email from the mediator (page 921) recorded that both parties agreed to work in a more structured way with the claimant’s workload being authorised by Ms Fish alone rather than coming from different directions without Ms Fish’s knowledge.

195. On 7 November 2018 (page 859) Ms Fraser wrote to the claimant to confirm that a flexible working request to work no more than 20 hours per week had been accepted. The claimant was offered 15 hours per week working two full days, Monday and Tuesday each week, for a 12 month period. The claimant replied on 30 November (page 868) saying that this would be of a physical benefit to her, but she would prefer to work 20 hours over three even days of six hours 40 minutes each day.

196. The claimant contacted Access to Work and was interviewed on the telephone on 9 November 2018. She continued to be certified unfit for work due to stress at work. Access to Work told her that they had not been able to speak to Sue Fraser, who had gone off herself, and was suggesting that the assessment be done when she was back at work.

197. On 12 December 2018 the claimant presented her claim form in case number 2417889/2018.

<u>January 2019</u>

198. Ms Ryan sought HR advice and responded to the claimant on 31 January 2019 (page 887) refusing the proposal to work 20 hours per week over three even days. The offer to work 15 hours per week over two full days still stood. She was able to offer a later start time of 9.30am to reduce the need to travel during peak rush hour.

199. The email contained Ms Ryan's reasons for refusing those part days. She said that an early finish three days per week would require significant operational, functional and staffing changes which were not possible without a high risk of error and/or delays in the issue of important results, with the potential of patient harm. She gave examples of BMS work which was required in the afternoon up to 5.30pm.

<u>March 2019</u>

200. There was a further OH report from Dr Mijares on 7 March 2019 (pages 905-906). He recorded no change in the physical position but that the claimant perceived the lack of support to have worsened. The main issue there was the failure to agree 20 working hours per week distributed over part days. Dr Mijares said:

> **"I believe that she would benefit from working her 20 hours distributed in three, four or five days per week."**

201. He made the point that the reasonableness of an adjustment was a matter for management, but potential adjustments beyond reducing working hours were the reduction of manual handling activities, a risk assessment with an ergonomic chair and possible elevating desk, and a stress risk assessment. A phased return would be required.

<u>April 2019</u>

202. On 11 April the claimant sent an email to Kate Ryan (page 920) enclosing a fit note with recommendations for a return to work plan. The fit note appeared at page 918. The GP had ticked the box which said:

> **"You may be fit for work taking account of the following advice."**

In the box for details all four boxes had been ticked, and the doctor had written:

> **"May be fit for work if adjustments made in line with the recommendations of Dr A Mijares, Occupational Health Consultant dated 4 March 2019."**

<u>May – June 2019</u>

203. The second long-term sickness meeting took place on 9 May 2019. The outcome letter was issued on 20 June by Ms Ryan at pages 939-941. The OH report of 7 March 2019 was discussed. Ms Ryan stood by her email of 31 January 2019 explaining why an early finish could not be accommodated.

204. The possibility of digital microscopy was raised. The benefit of a digital microscope would be that the claimant could view the image on a screen rather than

having to bend forward to look through the microscope itself. It was used in cellular pathology but Ms Ryan was not aware of any microbiology department using it. She would have to do some research.

205. The Access to Work matter was to be pursued but the claimant would need to do a further application. A date for the assessment was being arranged.

206. The letter also dealt with the question of the chair. It said that a big concern was the disclaimer required by the Trust's provider. The alternative provider sourced by the claimant (Oxford Seating) had also said there was a possible safety issue and did not accept liability. Ms Ryan's letter said she had not seen a chair with lockable castors in any laboratories recently. The right chair could be considered by Access to Work.

207. The letter recorded that if the claimant was unable to return to her own role there would be consideration of redeployment, but if that was not practicable then termination on the grounds of ill health capability was a potential outcome. There was no possibility of amalgamating vacancies to create a role: there was a national shortage of BMSs.

Access to Work Report 1 July 2019

208. The Access to Work assessment took place on 11 June. The report was dated 1 July (pages 942-951). It recommended the purchase of four specific ergonomic chairs at a total cost of £2,592.82. The current chair did not provide enough support and could not be adjusted to meet her needs. There was no suitable chair in any of the rooms in the lab in which she worked. The chairs recommended would provide the appropriate support, and four were needed because of the four different areas in which she worked.

209. An email from Access to Work of 18 July 2019 (page 961) said that the chairs were deemed as standard equipment to be provided as a reasonable adjustment. Ms Ryan emailed on 22 July 2019 (page 961) querying that because they came with castors, and the Trust believed there was a risk of accidents using a chair with castors at lab height. She asked for confirmation that the recommended chair was safe for the claimant with her disabilities for working in the lab area. There was no reply to this email.

210. Access to Work also recommended what was described as an "electric microscope", which we took to mean a digital microscope. It was also recommended that the claimant be permitted to work from a lab bench with enough space, when practicable, as some of the benches had limited space which meant she had to twist and turn to do her work.

Digital Microscope: July – August 2019

211. The claimant made some enquiries about digital imaging microscopes in early July 2019 (page 953). Information came from a company called Brunel Microscopes (pages 954-959). The product worked by a digital camera back being attached to the microscope, and the images viewed on the viewfinder of the camera. Alternatively, images could be viewed on a screen connected by a USB cable.

212. At the third long-term sickness review meeting on 19 July 2019 it was confirmed that there would be a trial of the digital microscope in the lab. This was confirmed in the outcome letter of 6 August 2019 at pages 980-982.

213. The trial of the digital microscope took place in the lab on 22 July, 29 July and 2 August 2019. The claimant went into the lab for those trials. Adjustments to how it was operating, and the provision of a cable, meant that it worked much better by the third date than it had on the first one.

214. During Ms Fish's evidence the respondent disclosed two emails about the trial. They were inserted at pages 977a and 977b. Both emails came before the third and final day of the trial. The first was from Daniel Moore dated 25 July 2019. He expressed concerns about the wires being "cumbersome and intrusive", and about the adequacy of the image when looking at specimens containing a lot of debris or other complications. The second came from Michael Rattray on 29 July 2019. After reviewing the pros and coms he expressed the view that it was the worst piece of equipment he had ever used in the laboratory and that he could not do his job with the set-up. He said there was a very high risk of an incorrect report causing harm to the patient.

215. The claimant sent an email about the trial on 6 August 2019 to Kate Ryan (page 977). Her email said that although she was waiting for a report from Kath Briody on the posture, her opinion was that the digital microscope could work with minimal adjustments. The camera could be removed so that other members of staff could use the microscope without it.

216. Ms Briody's report on the trial was dated 9 August (pages 988-990). There was a concern about the screen being knocked off the bench. The claimant had needed to move the basic microscope further back on the bench, causing further leaning on her part. There were different issues at different benches. There might be some changes the supplier could make, such as longer cables and a stand for the screen. She recommended that enquiries be made about whether the equipment was being used for examination of samples or as a teaching aid elsewhere.

217. On 6 August Ms Ryan emailed Brunel Microscopes asking if any of the equipment was in use in a clinical microbiology department in the UK. The response of 12 August (page 985) said not, as it would be unusual for routine diagnostic screening to use an add-on camera in laboratory microscopes unless there is a special request. Usually the supplier would supply an integral system with a camera built in. The "budget" system was usually provided to industry and universities and pathology training teams.

218. Ms Ryan told us in cross examination that she made her own enquiries of different microbiology departments in the North West and none of them were using digital microscopes. No documentary evidence of these enquiries was produced. We will return to that in our conclusions. No other department was using these and the respondent decided not to pursue the digital microscope option. Ms Elliott told us in her oral evidence that the microscope could not be used in any event because it had not been accredited by UKAS, and even if it had worked superbly there would not have been sufficient time to do the work necessary to get it accredited.

September 2019

219. Dr Mijares reported on the claimant again on 4 September 2019 (pages 992-993). He recorded the claimant's view that she could return to work if the Access to Work recommendations were implemented and the digital microscopes were in place. He said she would not be suitable for redeployment because she was able to work in her own field with adjustments and her qualifications meant it was only laboratory work that was appropriate, and she would not qualify for retirement on ill health grounds. He suggested a phased return. The report also recorded a note from the claimant that she could use the temporary chair in the office and return to work not doing microscopy. She was plainly keen to return to work.

220. Around this time the claimant had been in touch with the chair suppliers recommended by Access to Work. An email from the supplier Online Ergonomics of 11 September 2019 (page 994) said that a BLC chair might be worth considering although there would be an extra cost. The chair could be supplied in a vinyl covering suitable for laboratory use.

221. The fourth long-term sickness review meeting took place on 12 September with Ms Ryan. The outcome was confirmed in a letter of 1 October at pages 1003-1005. The letter said:

- Access to work had been chased about the safety of the chair they had recommended, and it had previously been identified that castors were not safe in the laboratory.
- It was not possible for the claimant to work solely from one designated bench with a lower chair because of the workflow and the positioning of cabinets and equipment.
- It was not reasonable to ask colleagues to do the manual handling for the claimant on a permanent basis.
- Working 20 hours per week over three, four or five days was not possible but 15 hours over two full days was still possible.
- The digital microscope could not be implemented because there was no clinical microbiology department using such a microscope for routine examination of specimens, the two manufacturers approached only provided them as teaching aids, and following the trial in the department the feedback from the microbiology team was that it had a reduced field of vision, making cell counts very difficult. There was a significant risk that errors would be made given the inferior image, and therefore a significant risk to patient care.

222. The letter concluded as follows:

> **"On the basis that the Trust is unable to make reasonable adjustments to support a return to work and that redeployment and ill health retirement are not suitable alternatives you were advised that this case would now be referred to a Final Long Term Sickness Absence Hearing, where an impartial panel will consider the case**

> **without prejudice, an outcome of this hearing might be to terminate your employment on the grounds of ill health capability."**

223. In the meantime the claimant had been issued with a further fit note for one month on 26 September (page 1001). The condition was specified as "disability requiring accommodating", and it said that the claimant may be fit for work if there were workplace adaptations implemented in line with the recommendations of the OH report.

Final Hearing – November 2019

224. The claimant was formally invited to the final sickness hearing by a letter of 17 October 2019 (page 1011). The management case was to be presented by Ms Ryan. The decision would be made by Ms Elliott as Pathology Services Director, and Katie Chadwick, the Divisional HR Business Partner. The date was set for 14 November 2019.

225. In preparation for the final hearing the management statement of case by Ms Ryan appeared at pages 1023-1024. It reiterated the points already made about working hours, the digital microscope and the chair.

226. The claimant's statement of case was at pages 1015-1022. She provided a history of matters since July 2018 and attached 23 documents including a timeline showing demands in addition to benchwork (page 1020) and her analysis of what she could do without adjustments, with small adjustments and the training she had missed.

227. The claimant's note of what happened at the hearing appeared at pages 1029-1030. She was accompanied by her husband and they brought with them the chair with castors which she used at home, although it was not a chair at bench height. We had some handwritten notes from Kate Ryan between pages 1026 and 1028, but the quality of the copy was very poor and they were barely legible. However, they did record on page 1027 mention of the chair incident at Wigan in 2018.

228. The outcome was confirmed in a letter of 18 November 2019 at pages 1031-1032. After recording the essence of the discussion, the letter said that the claimant had presented new information about her current health and wellbeing and her ability to undertake restricted duties without the adjustments relating to the chair, the microscope and working hours. It had been decided that there would be a further OH referral with the latest information before any final decision.

OH referral November 2019 – January 2020

229. The referral was contained in a letter from Ms Elliott to Dr Mijares of 18 November 2019 (pages 1033-1034). He was asked to advise on whether his position had changed on the requirement for the adjustments relating to the chair with castors and working at lower height benches, since the claimant was now saying she could return to work without those adjustments, although she would not be able to do microscopy or work at the pace associated with the role. Dr Mijares

was asked whether returning to work without those adjustments would cause a risk to her health.

230. Ms Elliott chased him up for a reply on 3 December (page 1036). Her email said she wanted “medical clearance” that the claimant would not suffer any further harm if she returned without these adjustments.

231. On 5 December Dr Mijares drafted a reply which he sent to Justine Brookes (page 1040). The draft reply in response to the request for medical clearance was as follows:

> **“I understand that you want my confirmation that, if no adjustments were provided, this lady will not suffer any other flare-up or deterioration of her symptoms. If my assumption about your question is correct, I am afraid that I cannot provide such confirmation.”**

232. The claimant was asked by OH if she was happy for Dr Mijares to respond to that email (page 1038).

233. On 10 December (page 1037) Justine Brookes of OH emailed Dr Mijares to say that the claimant had telephoned and did not want an email sending to Ms Elliott yet until she had seen Dr Mijares again on 22 January 2020.

234. Dr Mijares emailed Ms Elliott the following day (page 1037) saying:

> **“I am afraid that** [the claimant] **has declined consent to release my reply to the question that you raised. This is line with her rights under the confidentiality rules. I am afraid that without this information, you will need to make a decision based on the information that you have from previous reports from OH.”**

235. On 18 December Dr Mijares said that he did not need to see the claimant again and the appointment for 22 January was cancelled (page 1040).

<u>January 2020</u>

236. On 9 January 2020 Ms Elliott emailed the claimant to say that she understood that the claimant had refused consent for Dr Mijares to release his advice to the Trust. She said that if the claimant did not provide consent or respond within seven days a decision would be made on the basis of the information the Trust had available.

237. The claimant responded (page 1047) the same day to say that she had not refused consent but simply wanted to see Dr Mijares before he provided the advice requested. She said that the appointment had then been cancelled by OH. Although we did not see the email exchange itself, it was common ground that the claimant did send to Ms Elliott the draft reply in which Dr Mijares declined to provide the confirmation sought.

238. Ms Elliott responded on 23 January asking the claimant to clarify whether she needed adjustments to return to her substantive position or not.

239. The response of 27 January (pages 1046-1047) from the claimant said she was confused why she was not back in work, especially if the suggested adjustments

were not being put in place. She explained what she had been saying on 14 November at the hearing as follows:

> **"I responded to the management statement highlighting safety and practical concerns and questioning my physical ability to carry out my day-to-day duties; and as I stated during all other previous LTS meetings and below, I said that I can work on most lab benches that do not require the medical professionals and Access to Work suggested adjustments; I handed to the panel two additional summary tables to support my response.**
>
> **As a result of the last LTS meeting, I understood no decision could be made on the day regarding my return to work; and that I will be re-referred to Occupational Health for assessment. Once Dr Mijares' opinion is received in regards to my health condition, you would advise me further. Now I understand, from our last correspondences, that there is no further advice to obtain from Occupational Health; I would be grateful if you could please facilitate my return to work as soon as possible; as this situation is causing me unbearable distress."**

240. On 29 January Katie Chadwick emailed the claimant to ask her to reiterate what adjustments she felt were required.

241. The response came on 31 January (page 1045). The claimant reiterated the adjustments that had been recommended in the past and attached again (page 1051) the table she had put forward to the hearing in November. She had listed the lab sections that could be worked on without or with the suggested adjustments. She had updated it to include the solution of a low level bench workstation. She would move any materials or the keypad to a different workstation when practicable but would ensure that they were returned to where they should be. She suggested that there be a phased return

> **"trying all the proposals in real time to assess their feasibility [with] an opportunity to conduct risk assessment where it is felt needed".**

<u>Dismissal</u>

242. Ms Elliott wrote to the claimant on 21 February notifying her that the decision had been taken to dismiss her. The letter appeared at pages 1053-1054. It reviewed the recent exchange with Dr Mijares, and said that as it stood the advice from the GP and OH was that the claimant could only return with adjustments discussed in the hearing and summarised in her letter. The Trust did not want to aggravate the long-term health condition by facilitating a return to work not supported by OH.

243. Ms Elliott went on as follows:

> **"You provided a table at the hearing and via email in regards to the range of duties you felt you could undertake with or without adjustments, having reviewed this table and looking at the range of duties you feel you could undertake without adjustments, I do not feel this fits within the scope of your substantive role of band 6 Biomedical Scientist. Kate Ryan at the hearing reviewed the table and provided an overview to the panel on the duties suggested, for example, reception duties on the low benching, which is a band 2 job responsibility. To accommodate the adjustments required, it would mean redesigning the workflow of the department, at present microbiology laboratories are set up in order for the BMS to go to the section where the work is, not the work to go to where the person is. As stated most sections require a degree of**

> **microscopy which you will be unable to perform, thus adding this to the duties of already busy BMS staff within the department.**
>
> **Having taken into account all of the information received, I am writing to inform you that it is my decision to issue you with 12 weeks' notice of the termination of your contract on the grounds of ill health. Your termination date with the Trust will be as of today, 21 February 2020. Your notice and outstanding annual leave will be paid to you. Your annual leave has been calculated as 148.5 hours (20 days)."**

Appeal

244. The letter gave the claimant the right of appeal. She exercised it on 5 March (page 1059). The appeal hearing was arranged for 7 May. The claimant prepared a statement of her case at pages 1061-1065, with 82 appendices. The management statement of case appeared at pages 1076-1081. It had been prepared by Katie Chadwick and Andrew Evans, the Pathology Divisional Manager, as Jackie Elliott had left the Trust on 31 March 2020.

245. The appeal hearing took place on 7 May before a panel composed of David Hargreaves, the Director of Human Resources, and Chris Sleight, the Managing Director of Diagnostics and Pharmacy. They had HR support. The claimant was represented by a regional officer from her union. The management case was presented by Andrew Evans and Katie Chadwick.

246. The outcome of the appeal was contained in a letter of 14 May 2020 at pages 1084-1086. It was identified that the Trust had made an error in that the claimant had been maintained in employment but not paid. That was put right.

247. The conclusion was that the dismissal was reasonable, and it was upheld. However, redeployment had not been properly explored by means of a skills assessment or aspirational interview. The notice period was extended for a further 12 weeks to 31 July 2020 to enable redeployment to be arranged if possible. If not, the claimant would be paid for all outstanding leave and could consider an application for ill health retirement.

Redeployment

248. Redeployment was taken forward by Katie Chadwick. The claimant met her on 22 May 2020. She had to complete a redeployment form (known as the TRAC form) to log in to the online vacancy system to get priority over vacancies before they were advertised. Before the form was done Ms Chadwick emailed her details of a fundraising role, in which the claimant was not interested because she did not have the necessary skills (28 May 2020 page 1104).

249. The TRAC completed in early June appeared in various places in our bundle between pages 1095 and 1126. The claimant had a concern about being redeployed to a role which did not enable her to maintain her professional registration (page 1131) which she escalated to the Health Care Professions Council ("HCPC") in early June. The HCPC reply of 11 June at page 1133 told the claimant that if she was not able to practice as a BMS, or draw on her skills and knowledge in the field, she would need to follow the guidance on returning to practice.

250. The redeployment form from the claimant was circulated on 6 July (pages 1139-1140). Andrew Evans sent the email, which indicated the search was for a role in pathology at band 6, and that an assessment would be needed about reasonable adjustments, training, flexibility and OH advice. The possibility of alternative roles at band 5 or band 4 should be considered.

251. One of the replies to the email came from Haematology and Blood Transfusion, which was about to interview for a Band 5/6 BMS role. The exchange of emails between pages 1138-1140 showed that the role required involvement in around the clock cover, and that it would take between 24-36 months for a BMS from microbiology to develop the necessary knowledge and skill in haematology. As a result that role was not offered to the claimant.

252. The claimant had not heard anything further by the time her employment ended on 31 July 2020. She sent an email to Katie Chadwick chasing a response that day (page 1145).

253. There was no reply until 4 September. Ms Chadwick apologised for the delay (page 1144) and said she thought she had responded. She said that although the redeployment form had been shared with the other specialities an alternative role had not been identified. She hoped the claimant had been able to seek an alternative role elsewhere.

254. It was not clear to the claimant what had happened. She emailed on 7 September (page 1144) asking for an update on her current employment status. She chased Ms Chadwick for a reply on 17 September, and a reply came that day (page 1143). It said that as the Trust had been unable to find suitable alternative employment by 31 July, the claimant's employment had been terminated on the grounds of ill health that day.

255. The claimant responded the same day (page 1143) requesting a written statement of the reasons for her dismissal in accordance with section 92 Employment Rights Act 1996. The allegation that the respondent unreasonably failed to reply to this is one to which we will return in our conclusions.

256. The claimant was paid outstanding monies on 22 December 2020 in the sum of £6,266.00. It was not clear to her how this amount had been calculated.

Submissions

257. It was agreed by counsel at the conclusion of the oral hearing that written submissions would be preferable in this case. Both advocates provided a lengthy initial submission addressing the issues recorded in the agreed List of Issues. Each then made a short supplementary written submission replying to any key points made by the other side.

258. The Tribunal had regard to all those written submissions, whether we refer to them expressly in these Reasons or not. Rather than summarise them here, we will summarise the position taken by each side as we go through each of the issues one by one in our conclusions section.

Discussion and Conclusions - Introduction

259. These final sections of the Reasons contain our analysis and conclusions in relation to each of the matters raised in the List of Issues set out above. For some of the issues the factual findings were not in dispute, and it was simply a question of applying the law as it is summarised earlier. For others we had to resolve disputed issues of fact before the law could be applied. In each section we had regard to the competing positions taken in the written closing submissions.

Discussion and Conclusions – Breach of duty to make reasonable adjustments

260. The complaint of a breach of the duty to make reasonable adjustments concerned five different matters, and we will deal with each in turn in the order in which they appeared in the List of Issues.

261. Before that there were two preliminary points we needed to address.

Individual Adjustments

262. The first was a point made by the Trust, which was that it would be artificial to separate out the reasonable adjustment complaints and look at them in isolation because no one adjustment on its own would have ensured that the claimant could return to work. Mr Boyd suggested that "in effect a number of different proverbial planets had to align" in order to make that possible.

263. Although the different adjustments had to be considered together, the case law is clear that whether an adjustment would in itself completely avoid the substantial disadvantage, or whether it may simply contribute to doing so, is a question to be taken into account when reasonableness is considered. There is no requirement for an adjustment to be a complete solution to the problem before it becomes reasonable for the employer to make it.

264. We therefore considered it appropriate to address each reasonable adjustment complaint in isolation, noting that the Code recognises in paragraph 6.34 that it may sometimes be necessary for an employer to take a combination of steps. The question is whether a specific adjustment should reasonably be made, either in isolation or together with other adjustments.

Disability Policy

265. The second preliminary point was made by Mr Matovu in the opening part of his closing submission. He suggested that it was a significant and extraordinary feature of the case that at no stage did the Trust's managers refer to or consider the disability policy.

266. This point arose immediately in the context of the reasonable adjustment complaint about hours of work, since the claimant's application was made by way of a flexible working application and pursued through an initial decision and an appeal under that policy. We considered the factual material to identify whether Mr Matovu's contention was well-founded.

267. The first mention of a desire on the part of the claimant to reduce her hours was an informal meeting with Sue Fraser on 9 December 2016. The claimant's note appeared at page 411. It is clear that the claimant raised her medical position as part of the rationale for requesting the change. It was already known to managers that she was likely to be a disabled person under the Equality Act (for example, an OH report of 17 May 2016 at page 369). However, she was advised by Ms Fraser to pursue her application under the flexible working policy, not as a request for a reasonable adjustment under the disability policy. It does not appear that Ms Fraser, or indeed any of the managers who subsequently dealt with the matter at the initial or appeal stages, made any reference to the disability policy in their dealings with the claimant on this issue. That was despite the fact that the flexible working application form at page 413 said that the reason for making the application was medical reasons post spinal surgery, and despite the fact that the OH report of 5 January 2017 (a month before the appeal hearing) again said that the claimant was likely to be a disabled person. It was surprising that there was no reference to the obligation to make reasonable adjustments in the management statement of case for the flexible working appeal hearing at pages 449-460, and nor was there any reference in the appeal outcome letter of 21 September 2017 at pages 572-573. Ms Elliott accepted in her evidence that she did not think of the disability policy at all in the flexible working application (or, indeed, at dismissal). Her position was that she relied on HR support from Ms Finn to intervene if what was being considered would be in breach of the disability policy. No such intervention was made by Ms Finn. We did not hear any evidence from Ms Finn as to her thought processes.

268. Mr Matovu invited us to treat this as a strong indication that the Trust did not take the duty to make reasonable adjustments for the claimant as seriously as it should have done. He supported that contention by the observation that the flexible working policy emphasised that the needs of the service should always come first (page 1427), and the passage in the witness statement of Ms Elliott (paragraph 65) where she said at the time of dismissal that she thought that managers had complied with their duty "to consider adjustments", rather than their duty to make adjustments (our emphasis).

269. We noted that the flexible working policy gave explicit primacy to the needs to the needs of the business in a way that the disability policy did not. The reasonable adjustments section of the disability policy (page 1379) said that each case would be considered on an individual basis, and that careful consideration would be given to the adjustments required, taking into account "the cost, benefit and practicality of making the adjustments". There was some force in Mr Matovu's submission that the emphasis was quite different between the two policies. However, it is equally clear that an employer is entitled to take into account its business needs when deciding whether an adjustment is reasonable, even if on the page that was subsumed within the word "practicality" in the disability policy.

270. However, we were mindful of the fact that in deciding whether an adjustment would have been reasonable, the Tribunal is concerned with the quality of the eventual decision, not the process of reasoning by which a possible adjustment was considered. That was made clear in paragraph 24 of **The Royal Bank of Scotland v Ashton**. The real issue for the Tribunal was that set out in issue number 3, which was whether the failure to allow the claimant to work a maximum six hour day on a

permanent basis was a failure to take a step that it would have been reasonable to have taken, however the employer got to that decision.

Issues 2-4: Hours of work

271. Having considered those two preliminary points we addressed the issues. Issue 2 simply recorded the concession that the Trust applied a PCP of working a full day and that it knew that this placed the claimant at a substantial disadvantage because doing so made her back symptoms worse.

272. As for issue 3, we noted that the request made by the claimant in her flexible working application was quite specific. She wanted to work 8.00am – 2.30pm, including a 30 minute break, if possible, for a total of 30 hours per week. She said that option was "more practical" than 9.00am to 3.30pm, because the latter would require her to incur childcare costs.

273. The application was rejected by Ms Fraser in a letter of 4 January 2017 at page 420, going into some detail. The claimant could not be the sole person in the lab between 8.00am and 9.00am because of her cardiac condition, and her work would not be completed by 2.30pm so that other staff would have to complete it when they already had other duties to undertake. Broadly, that remained the position even though matters were expanded upon in the claimant's detailed statement of appeal at pages 444-446, and the equally detailed notes prepared by Ms Fraser for the appeal hearing from pages 450 onwards. In particular Ms Fraser in appendix 3 to those documents responded to a document the claimant put forward about lab workflow and bench cover, and set out in some detail why she disagreed with the claimant's propositions.

274. It was clear that this was not an application which was dismissed out of hand: it was given serious and detailed consideration.

275. In the light of the contemporaneous documents, and the evidence given orally to our hearing, and noting the provisions of the Code at paragraphs 6.27 and 6.28, we concluded that the adjustment sought by the claimant went beyond what would have been reasonable. This was a busy lab dealing with deadlines and work requiring prioritisation at different times. Delay in completing work could have a direct impact on patient safety and cause delays in other parts of the Trust. The decision that allowing the claimant to finish early on a working day would leave work to be done by others was substantiated by managers. There was a realistic concern about how difficult it would be to recruit a BMS to cover a few hours at the end of each working day, since that was very unlikely to be an attractive working pattern, particularly where there was an acknowledged shortage of BMSs. It meant that allowing the claimant to leave early would create additional work towards the end of the day for staff who had their own workloads to complete, and the concern that this would have a detrimental impact upon the performance of the lab was a genuine and reasonable one.

276. We considered the point raised by Mr Matovu that the circumstances of the comparators showed that it would have been possible to have allowed the claimant to work less than full days. Although this allegation was also put as one of direct discrimination (see below), Mr Matovu relied upon these comparators as showing

that what the claimant was seeking could reasonably have been done. In his written submission Mr Matovu highlighted two of those individuals.

277. The first was Jessica Kervella, a BMS Team Leader at Band 6 who was allowed to work until 5.00pm Monday to Friday in 2015, then to 5.15pm. We did not consider that this assisted the claimant as a 5.00pm or later finish is quite different from a finish at 2.30pm.

278. The second individual was Leena Lakhani, a part-time BMS at Band 6 who transferred under TUPE and worked 20 hours per week across three days. Sometime after the transfer her hours were amended to 18 hours per week, finishing at 3.00pm on three days. Ms Lakhani left the Trust in October 2014, about two years after her transfer in 2012. This was some time before the events in this case and it appeared that the working pattern was inherited by the Trust upon transfer rather than one to which it had agreed at the time. Without further details of the circumstances of this period, and the arrangements put in place to deal with it, we did not consider that it assisted the claimant.

279. Mr Matovu also suggested that the Trust's position was inconsistent with offering the claimant 18.75 hours per week instead of 30 hours per week, when they were saying that they were short of BMS staff. However, we concluded that was explained by the fact that the Trust considered that recruiting another BMS to work 18.75 hours per week, rather than a lesser figure, was more likely to be realistic.

280. We therefore unanimously concluded that the complaint of a breach of the duty to make reasonable adjustments in the failure to allow the claimant to work part days on a permanent basis between November 2016 and July 2018 by failing to allow the claimant the working pattern she sought in her flexible working application failed. An adjustment of that kind went beyond what would have been reasonable.

281. As for the later period from April 2019 onwards, we noted that the position had changed in the sense that for the first time an OH report recommended allowing her to work part days (report of Dr Mijares 24 August 2018 at pages 831-834). Previously the OH advice had not ruled out the claimant working full days.

282. However, whether that adjustment could reasonably have been made remained a matter to be determined by reference to the working conditions in the lab, in which respect there had been no material change. The difficulties identified in the flexible working application during 2016/2017 remained.

283. When the claimant asked in her letter of 30 November 2018 to work three days of six hours 40 minutes each, that was given detailed consideration by Ms Ryan when that request was refused (page 887). Ms Ryan gave a number of examples of BMS work which was required in the afternoon up to 5.30pm. She said that asking staff to take on additional work after an early departure by the claimant would be unreasonable as it would cause them unacceptable additional pressure and stress, and would likely lead to an increased number of errors which could potentially cause harm to themselves, colleagues or patients.

284. The matter was raised again in the long-term sickness review meetings, but ultimately we unanimously concluded that such an adjustment went beyond what

would have been reasonable and therefore the complaint failed for this period as well.

Issues 5-7: Chair

285. We reviewed the sequence of events which resulted in the Trust refusing to supply to the claimant a chair with castors for her to use in the lab. The claimant had tried a saddle stool with castors but had expressed a concern that the castors increased the risk of her falling (page 461). The search was instead for a BLC chair.

286. Ms Briody found out in February 2017 that most of the companies she contacted did not offer a high level BLC chair due to the risk of falling. However, there was one company which would supply a chair with glides, but also with a set of five castors which could be fitted in place of the glides, against their advice. A chair of that kind with a fabric covering not suitable for lab work was trialled by the claimant in the office, and she confirmed on 17 February 2017 (page 462) that she found it to be safe and comfortable. The Trust set about ordering the same chair with a vinyl covering.

287. When that chair arrived at the end of March it turned out that the wrong chair had been ordered. It had glides rather than castors, and arm rests. The claimant tried it out for a few days, but it caused an exacerbation of her condition and she was taken off lab work once again. It transpired, however, that the company which would supply a BLC chair would only do so if a disclaimer was signed which confirmed that they would not accept any liability for any accident or damage to persons or property. Following discussions with Mr Hargreaves, Ms Elliott confirmed that the Trust would not sign any such disclaimer. However, an equivalent chair where no such disclaimer was required would be acceptable.

288. That was the background to the case conference which occurred on 2 May 2017 with Dr Prasad. The case conference resulted in his report which confirmed that the claimant did not need a chair with castors.

289. The claimant maintained that the case conference had been set up improperly in order to pressure Dr Prasad into providing such advice, and that she was wrongly excluded from it. Based on the evidence we heard, we concluded that the position was as follows. As the OH report of 6 March 2017 at page 470 was inconclusive, Ms Finn formed the view that a case conference with OH would be appropriate. The natural meaning of a case conference is a discussion with the employee as well as with managers and the OH adviser. That was why she used the phrase "case conference" in her email to Mr Nelson of the union of 13 April at page 490. That resulted in agreement to stay the grievance, as the resolution sought in the grievance (page 484) was a review of progress with the return to work. The process was being driven by Ms Finn. Ms Elliott did not know what to expect and assumed – wrongly – that the meeting would only be between managers and Dr Prasad. She also relied upon Ms Finn's assurance that this was normal procedure even when she was one of the panel dealing with the flexible working appeal.

290. However, a case conference would ordinarily be attended by the employee and therefore the OH department sent out the invitation letter to the claimant which appeared at page 496. It is unclear what Dr Prasad's expectation was, but Ms Elliott

told us in her oral evidence that he said it was not appropriate for him to see the claimant and the managers at the same time because some medical information might have to be discussed with the claimant. He therefore said that he would arrange to see the claimant privately on another occasion and thereafter report in writing. It was this that prompted the decision that the claimant would not be invited into the meeting.

291. Unfortunately, from the claimant's perspective this was wholly unsatisfactory. She had been invited by OH to a case conference with Dr Prasad and then excluded from it by managers. It was entirely understandable that she was suspicious about what was going on. The suspicions could only have been heightened when she was informed by Dr Prasad some weeks later that there was an issue about the disclaimer for the chair.

292. It was also unsatisfactory that we had not seen the emails or appointments by which managers were invited to this meeting, and nor were any notes of the meeting itself kept. We could rely only on the evidence of Ms Ryan and Ms Elliott as to what transpired during the meeting. We accepted that in the meeting Dr Prasad gave a demonstration of how a swivel chair (at desk height, not bench height) could be turned before sitting in or standing up from it so that it would not need to be pushed backwards away from the desk. This informed his subsequent report saying that castors were not required. However, we rejected the contention that managers had arranged this meeting for the purpose of pressuring Dr Prasad to give them the advice that they wanted. This was not a change in advice from OH. There was no previous OH report saying that a chair with castors was required. Previous references to chairs in the report had been less specific than that. The recommendation for a chair with castors came from Ms Briody.

293. It is correct, of course, that the referral to Dr Prasad which followed that meeting (page 497) contained an error in saying that the chair which had been purchased and trialled in March was the chair which was required. The wrong chair had been ordered and supplied. However, it was accurate in recording that the same chair with brake-loaded castors would only be supplied by the company if the Trust signed a disclaimer, and that the Trust was not prepared to do this. That clearly showed to Dr Prasad that if he were to recommend that the claimant have such a chair with castors that adjustment would not be implemented. To that extent we found there was some expectation that Dr Prasad would provide a different recommendation. Indeed, he was specifically asked in the referral whether the swivel chair without castors was suitable for the claimant. That was something which he had already said verbally and demonstrated during the case conference. It can hardly have been a surprise to managers that his subsequent report confirmed that in writing. However, he did have further discussions with the claimant prior to preparing his report of 25 May at page 501.

294. Against that background we considered whether provision of a BLC chair would have been a reasonable adjustment. Mr Matovu sought to suggest that the real reason for this had nothing to do with health and safety but was simply the requirement to sign a disclaimer. We rejected that because the two things were inextricably linked. The information from Wagstaff and the wording of the disclaimer made clear that it was required because provision of the chair with castors might

"render it unsafe". Similarly, the information later provided by Oxford Seating on the website (which the claimant sent to Ms Ryan at the end of August 2017) made clear that the company would not accept liability if a chair with castors was used in that situation. The decision that the Trust could not order a chair on this basis, where it would be solely liable even if an injury was caused to the claimant or another person due to the chair moving when under load, was one made by the Director of Human Resources, Mr Hargreaves.

295. We unanimously concluded that supplying a chair with that increased risk, and the attendant disclaimers of liability by the manufacturer (whether signed by the Trust or not) would have been beyond what was reasonable. That was the position even before the provision of Dr Prasad's report, although his report confirmed that the BLC chair was not required for the claimant in any event. We unanimously concluded, therefore, that the complaint of a breach of the duty to make reasonable adjustments in the failure to supply a chair with brake-loaded castors failed and was dismissed.

296. This position was maintained throughout the claimant's employment. The decision in May 2017 not to sign a disclaimer was influenced to a minor extent by the incident involving Ms Ashton some seven years earlier which featured in the evidence of Ms Ryan. However, within 12 months there was a further incident in the lab at Wigan which resulted in the approval of a risk assessment preventing chairs with castors being used in the lab. That reinforced the management decision that providing such a chair went beyond a reasonable adjustment. We concluded there was no breach of the duty in this respect.

297. The second part of this allegation (issue 7) was about the provision of an ergonomic chair without castors. In the list of issues the claimant relied on the periods from December 2016 to 16 July 2018, and then from 11 April 2019 (when her fit note said she may be fit to return if adjustments were made) to the termination of her employment.

298. In fact there was no pleaded case about the earlier period (22 December 2016 to 16 July 2018). The original claim form did not mention an ergonomic chair without castors in the section dealing with chairs, and the point arose only tangentially in the further particulars (page 61) when the claimant mentioned the report from her treating Spinal Surgeon in early August 2018. This in fact recommended a chair without a back and a sloped seat, which was somewhat different from an ergonomic chair.

299. The position on the claimant's pleadings was properly reflected by Mr Matovu in his written submissions, because when he addressed the question of an ergonomic chair without castors (paragraph 56 of his submission) he did so from the Access to Work report in July 2019. The reality was that in the period before the claimant went off sick with stress in July 2018 the focus had been entirely upon provision of a chair with castors, and it was only after Dr Mijares provided his Occupational Health report of 7 March 2019 at pages 905-906 that the provision of an "ergonomic chair" was raised as a reasonable adjustment. That informed the fit note from the GP of 11 April 2019 which said that the claimant may be fit for work if adjustments were made in line with that OH report.

300. The Access to Work report in July 2019 recommended the provision of ergonomic chairs with adjustable lumbar support, a memory foam seat, adjustable arms and a neck roll. However the chairs recommended came with castors, as was evident from the quotation at page 966. That recommendation concerned Ms Ryan, as the decision had been taken that castors were not suitable for use in the lab at high bench height, and she sought to clarify with Access to Work whether the chair would be safe for the claimant. That was done by telephone and then by email of 22 July 2019 at page 961. There was no response, and therefore the clarification sought by managers before these chairs could be ordered was not provided.

301. It has to be said, however, that the provision of an ergonomic chair with castors as recommended by Access to Work would not have assisted the claimant in her return to work unless she was able to work at a low bench. Mr Matovu recognised this link in paragraph 58 of his written submission. We explained above why we considered that management acted reasonably in ruling out the use of a chair with castors at a high lab bench. We consider below whether it would have been a reasonable adjustment to have provided her with a fixed workstation at a low bench. Given our conclusion that such an adjustment was not reasonable, it seemed to us that this could not be viewed as a failure to make a reasonable adjustment since for working at a high lab bench the ergonomic chair was not suitable.

Issues 8-10: Microscope

302. Issues 8 and 9 concerned whether the claimant was at a substantial disadvantage due to use of a manual microscope, and if so whether the respondent could show that it could not reasonably have known of this. Neither of these matters was disputed by Mr Boyd in the written submissions at paragraph 37. That was entirely appropriate, because the problems with using a microscope featured in medical reports from September 2017 onwards. Although in paragraph 39 of his written submission Mr Boyd denied that the absence of a digital microscope placed the claimant at a substantial disadvantage, where a digital microscope could not be used in the laboratory, this seemed to us to be a point that went to whether such a microscope could reasonably have been supplied. We were satisfied that having to use the manual microscope exacerbated the claimant's symptoms, and that the respondent knew of this. Indeed, it was part of the respondent’s case that she was relieved of using the manual microscope for periods and colleagues had to assist her with it. Issues 8 and 9 were resolved in favour of the claimant.

303. The real issue for us to determine was issue 10: whether provision of a digital and/or ergonomic microscope would have been a reasonable adjustment, and if not whether it would have been a reasonable adjustment to have allowed the claimant to work on sections not requiring microscope use.

304. From the evidence presented to us it appears that there were three different concerns about whether a digital microscope could be provided.

305. The first concern was about the physical issues presented by the equipment when installed on the lab bench. That was the subject of Ms Briody’s report of 9 August 2019 at page 988. It did not appear that those problems were insoluble on their own.

306. The second concern was about whether the digital microscope was suitable in principle for microbiology work. The feedback from two colleagues of the claimant following the first and second days of the trial was in very negative terms (pages 977a and b). Following the third day the claimant expressed a different view in her email of 6 August 2019 at page 977. However, Ms Ryan made her own enquiries as to whether a digital microscope was in use in any microbiology lab in the North West. Although no documentary evidence of those enquiries was produced, we accepted her oral evidence. The departments she contacted included those at Bolton and Stepping Hill Hospital. None of the microbiology labs she contacted were using digital microscopes. They were used in Cellular Pathology, but that was different because it was an image of a prepared static slide as opposed to viewing live samples. She also did an extensive literature research to find the evidence base and it transpired that there was no evidence base supporting the use of digital microscopes in microbiology, and consequently no validation by UKAS. Her evidence on this point was supported by Mr Sleight, who described himself as an expert in digital microscopy and who explained that it was a wholly new technology and could not be viewed simply as a replacement for a manual microscope. It was also consistent with what Brunel Microscopes said about simply adding a camera to an existing microscope (page 985).

307. The third concern was the fact that without UKAS validation the Trust could not use such a microscope in the lab. Getting such a product validated, even if it were suitable in principle, would be a long and time-consuming process.

308. Despite the claimant's own view that the digital microscope would have been an appropriate solution, we were satisfied that provision of one as an auxiliary aid would have gone beyond what was reasonable. The concerns about whether it was appropriate for microbiology work and the absence of UKAS validation meant that the complaint on this point failed and was dismissed.

309. Insofar as the adjustment sought was the provision of an ergonomic microscope, rather than a digital microscope, Mr Matovu relied on the documents from a website at pages 1173 onwards. This was a primer on proper microscope observation posture which referred to an old style microscope without basic ergonomic conveniences, and a newer design with lowered focus knobs and observation tubes which were adjustable to the operator's height.

310. This was put to Mr Sleight in cross examination and he said that all the microscopes could be adjusted. We took this to mean that the microscopes in the laboratory were already the kind which allowed for adjustment to the user and in that sense were "ergonomic". Although the claimant made the point about an ergonomic microscope in paragraph 295 of her witness statement, referring to the website in question, these were not points made by her at the time. Nor did adjustments to the microscope feature in the OH report of March 2019 which set out the adjustments which the claimant maintains needed to be made to enable her to return to work.

311. Given what Mr Sleight said about the fact that the existing microscopes could be adjusted, and given that the focus in the contemporaneous evidence was entirely upon the provision of a digital microscope, not an ergonomic microscope, we concluded that there was no failure to make a reasonable adjustment in failing to

supply some other type of microscope which was ergonomically better suited to the claimant.

312. The alternative adjustment was for the claimant to be allocated on a permanent basis to sections which did not involve any microscopy work. For reasons analysed in more detail below, we were satisfied that use of the microscope was a core part of the role of a BMS in a microbiology lab and therefore that it would not have been a reasonable adjustment to have created a permanent role for the claimant in which all the microscopy was done by colleagues.

313. Accordingly the complaint of a breach of the duty to make reasonable adjustments on this issue failed and was dismissed.

Issues 11-14: Workstation

314. Issue 11 formulated the PCP as one requiring staff in the claimant's role to work at a workstation with a terminal on it which occupied some desk space, and suggested that the substantial disadvantage was due to the inability of the claimant to place samples on the desk in front of her, thereby limiting her duties and creating a negative perception. Mr Boyd suggested in paragraph 40 of his written submission that this was not accurately framed, and we agreed that the point was really a broader one: the PCP of requiring a BMS to work at the bench for the section to which she was allocated for the day meant that the claimant was having to work at benches which did not have sufficient space for her, and this meant that she could not work at those benches. That led to the restriction in her duties. We were satisfied this was a substantial disadvantage.

315. Mr Matovu began his written submissions on this point at the Access to Work report in 2019 which recommended that the claimant be permitted to work from a lab bench which had enough space to ensure that she did not have to twist and turn. From this point onwards management were aware of the substantial disadvantage, and indeed this was considered in the LTS procedure. The letter from Ms Ryan of 1 October 2019 at pages 1003-1005 dealt with the request for a designated (desk height) bench with a lower chair, which would of course have avoided the problem with castors at a high bench. The letter recorded that Ms Ryan had explained to the claimant that the organisation of workflow in the department meant that this could not be accommodated. Ms Ryan expanded upon this when cross examined by Mr Matovu during our hearing.

316. The key issue in this part of the case, therefore, was whether the objections articulated by Ms Ryan meant that allocating the claimant a fixed workspace went beyond what would have been reasonable. We noted that this had not been subject to any trial period. Further, although the low bench was in use for other purposes we were satisfied that that alone would not have prevented this being a workable arrangement.

317. Much more significant, we concluded, were the concerns about how this would impact on workflow in the lab. The work was highly technical, often time pressured, and complex. There was a flow of samples coming into the lab being allocated to different sections, being prepared and tested, and then results interpreted and further action taken. The work had to be done in a way which

maximised efficiency whilst minimising any risk to patient safety through errors being made. For this reason there was a high degree of systematic organisation of the work: each section had its own high lab bench at which could be found all the equipment and paperwork needed to do the work of that section. This was not just the keypad. Ms Ryan explained that whilst it might be possible to move the keypad to a low bench when the claimant was working on a particular section, that alone would not mean that she could do the work of that section from the low bench. There would still be a need either to relocate the equipment and paperwork to the low bench temporarily while she was working on that section, or in the alternative for her to get up and go to the usual section bench to get what she needed. This would have created significant disruption to the workflow in the laboratory. In particular, when samples were brought to the laboratory it would not be possible for them simply to be left on the bench allocated to that section if the claimant was working, since she would be at a different bench.

318. Having considered the points made at the time and in our hearing by Ms Ryan, and the challenges to those points made by Mr Matovu, we concluded unanimously that allocating the claimant a permanent fixed workstation at low bench height would have gone beyond what was reasonable as an adjustment since it would have had a significant disruptive effect on the flow of work through the laboratory as a whole.

319. The complaint of a breach of the duty to make reasonable adjustments therefore failed in relation to all the matters raised in paragraphs 13 and 14 of the List of Issues.

Issues 15-17: Time off for medical appointments

320. Mr Boyd accepted in his written submission that the PCP of requiring an employee to take time off work for a medical appointment to ensure that her work was covered was applied, that it put the claimant at a substantial disadvantage because she was more likely to need time off because of her disability than someone without it, and that the respondent knew of this.

321. The only issue was whether the respondent failed to make a reasonable adjustment by not arranging for work to be covered by a colleague. Mr Boyd contended simply that that was done, relying upon paragraph 62 of the claimant's witness statement, but that paragraph was specifically concerned with a period in 2015 before the spinal operation, and therefore not directly relevant to our decision. However, in her oral evidence the claimant explained that although for a quick appointment at the hospital she was happy to go and come back, for a long appointment she might miss half a day and could not be expected to cover her work by midday. She gave an example of a spinal clinic appointment on 11 January 2018 at 2.00pm where she had to ask people to cover for her because Ms Fish and Ms Chorlton had told her they could not provide cover. She said she was caused more worry by the fact that no-one was doing the bench reads on her section while she was out at the appointment.

322. However, it was evident from the claimant’s own evidence that her managers took a relatively relaxed approach to her being absent from work for these appointments. On the claimant’s own case Ms Fish simply said that she should

leave the work and carry on with it when she got back. Leaving aside that this appears to have been an isolated incident in January 2018, given that approach on behalf of the manager we were satisfied that arranging for a colleague to cover the work of the section during the claimant's absence (which would be of uncertain duration even though it may have ended up taking all afternoon) would have gone beyond what was a reasonable adjustment. The BMSs working on other sections were just as busy as the claimant. We were satisfied that this complaint failed and should be dismissed.

323. As a consequence it followed that all the complaints of a breach of the duty to make reasonable adjustments failed and were dismissed. We did not need to deal with the question of time limits.

Discussion and Conclusions – Discrimination arising from disability

324. We considered the different complaints under section 15 in accordance with the List of Issues.

<u>Issues 21 and 22: MALDI training</u>

325. Training on the new MALDI machine had begun in December 2015 and there was a rolling programme. Staff were not all trained all at once. Ms Ryan accepted in her evidence that the claimant had not been trained by the time she went off for her operation in May 2016 in part because managers knew that she was going to be off for a period after that operation. That absence was something which arose in consequence of disability, and it had a material influence on the decision not to provide training at that stage.

326. However, we were satisfied that this could not be regarded as unfavourable treatment or a detriment <u>at this stage</u>. The test is whether the claimant could reasonably regard it as unfavourable or detrimental. Regarding it as a detriment was not a reasonable view given that the claimant was going to be off for some time after the operation and not carrying out any work, let alone work which might be done on the MALDI machine. The real issue was the question of whether she would receive the training upon her return, which formed a later allegation and we will deal with it at that stage.

327. Because there was no unfavourable treatment in not providing this training for the claimant before her operation, this allegation failed.

<u>Issues 23 and 24: Removal of rota responsibility</u>

328. This allegation was pleaded in the further particulars (page 65) as an example of a non-physical task that was taken away from the claimant. Upon her return from surgery responsibility for the rota was left with another team leader, even though the claimant had more time available than her colleague because she was not doing lab work as part of her phased return. The matter was raised in cross examination of the claimant and she said that she asked twice for the task to be given back to her but that was not done. We had no record in our notes of the point being put to the respondent's witnesses.

329. Mr Boyd suggested that if it was pursued, it was justified as a proportionate means of achieving the aim of providing the claimant with a safe workload upon her return, or in the alternative was out of time. He did not contest that it would be regarded as unfavourable treatment.

330. The evidential basis for this allegation was very limited indeed. It did not appear to have featured in any of the contemporaneous documentation, nor in any detail in the claimant's witness statement. However, it had been pleaded in the further particulars and not addressed by the Trust’s witness statements. On balance we were satisfied that this was unfavourable treatment. The claimant could reasonably take the view that it represented a slight loss of status, particularly when she was unable to do lab work upon her phased return to work.

331. Further, the fact she did not take up this work was because of something (her absence due to surgery) which arose in consequence of her disability.

332. Nor did we think that the respondent had established the justification defence. We had no evidence from the respondent as to the reason for the work not being restored to her. On the claimant's unchallenged evidence, it appeared to have been something that managers just did not get around to doing. The discriminatory impact on the claimant, however slight, was not outweighed by any benefit to the Trust, since none was identified. A less discriminatory means of achieving the legitimate aim would have been to have restored this task to the claimant.

333. We will address below whether this complaint was presented within time.

Issues 25 and 26: 2017 mid year review

334. The claimant was on an appraisal cycle meaning that she had an end of year review in the middle of each calendar year, and a mid year review towards the end of the year. Ms Fish recorded at page 535 that having consulted HR she decided to convert the June 2017 end of year review into a mid year review, because the claimant had not had a mid year review in November 2016 due to only just having returned from her post surgery absence. The end of year review was to be delayed for three months. It was arranged for 29 September 2017.

335. It is clear that the reason for postponing the end of year review and converting it to a mid year review was something which arose in consequence of the claimant's disability. Her disability caused her absence from surgery, and that absence caused the mid year review in November 2016 to be omitted, and that in turn resulted in the decision in June 2017.

336. The first question for us, therefore, was whether that was unfavourable treatment. On the face of it an employee who had missed a mid year review could not reasonably regard it as detrimental to have an end of year review delayed by three months so that the mid year review could be done first. Mr Matovu sought to deal with this by drawing a link with the pay increment. At pages 506-508 in the bundle there was an exchange of emails between Ms Fish and HR confirming that the claimant was not due to have her pay increment due in June 2017. However, that documentation showed that the reason for the manager not authorising pay progression was that the claimant had had 175 days off sick. It was not that the

claimant had not had an end of year review. Although those two factors were linked, in that the absence through disability was part of the cause of both the lack of pay progression and the conversion of the end of year review to a mid year review, there was no causal link between the position on the review and the position on pay. In those circumstances we considered that the claimant could not reasonably regard this as unfavourable treatment. The withholding of the pay increment certainly was, even though it was reinstated in November 2018, but this complaint was not about the pay increment itself. This complaint failed and was dismissed.

Issues 27 and 28: Failure to hold 2017 end of year review

337. The end of year review was arranged for 29 September but it was postponed. The respondent accepted that the postponement was unfavourable treatment. The question was whether we could conclude that it was because of something which arose in consequence of disability, and if so whether it could be justified.

338. The reason for the postponement was put to Ms Fish in cross examination. She said that the meeting was cancelled because it clashed with a UKAS inspection which was happening a few days later.

339. In his submissions Mr Matovu (paragraph 89) invited us to conclude that the postponement of this meeting was because of the claimant's absence on sick leave due to surgery, which of course had arisen in consequence of her disability. We rejected that on the facts. We accepted that the appointment was postponed because of the clash with the UKAS inspection, which was not something which arose in consequence of the disability. This allegation therefore failed.

340. The question of why it was not rearranged was potentially more fruitful for the claimant, but that point was not pursued in cross examination or in written submissions. Ms Fish said under cross examination that she should have set a new date but did not and “it got missed”. This was not challenged on the basis that the failure to rearrange the appointment arose in consequence of disability, and we concluded it would be unfair to the respondent to decide the matter on that basis.

Issues 29 and 30: Workload from 4 December 2017

341. The claimant had returned to lab work on a phased basis from 9 October 2017. There was an OH report of 30 November (page 585) which recorded that the claimant was at work in her full-time capacity and advised regular meetings to discuss her workload.

342. On 4 December the claimant was moved to the Tissue section, whilst working on Enterics as well. Following a discussion with Ms Ryan on 7 December the claimant was taken off the Tissues work, which required more twisting and reaching for plates, and instead worked on Enterics and Gynae.

343. She had concerns about her workload which she sought to raise with Ms Ryan in early January and which were mentioned at the regular safety huddles. This allegation concerned this period and the proposition that the claimant was given too much work to do because of something arising in consequence of her disability in a way that could not be justified.

344. We noted that there had not been the monitoring of the claimant's workload by regular meetings as OH had recommended. It was also evident that the claimant had been raising the matter from early January in the safety huddles and elsewhere. Finally, we noted the important concession by Ms Fish in cross examination that the work required of the claimant would by her estimate involve about eight hours a day, exceeding a full day of 7.5 hours. Further, that did not take into account the additional work the claimant was having to do, which became more pronounced and which featured in a later allegation. Although the claimant herself considered that the work in total would amount to ten hours per day, the degree by which it exceeded a full workload was not crucial.

345. We were satisfied that this allegation succeeded on the merits. Giving the claimant more work than she could do could reasonably be seen as unfavourable treatment. The reason was something which arose in consequence of her disability, namely the fact that she was allocated to two different sections because her disability prevented her using the microscope.

346. As far as justification was concerned, although the aim formulated in paragraph 30 of the List of Issues was plainly a legitimate one, allocating a disproportionate share of work to a disabled employee cannot be a proportionate means of achieving a reasonable and efficient workload. We therefore rejected the justification defence.

347. Subject to the question of time limits, which we will address below, there was a contravention of section 15 on this point.

Issues 31 and 32: Restriction of sections

348. This allegation concerned the same period from December 2017 when the claimant was restricted to working on the Gynae and Enterics sections. Mr Boyd invited us to conclude that this was not unfavourable treatment: instead it was a sensible and agreed interim step to help the claimant with a return to the full range of lab duties.

349. This arrangement was discussed between the claimant and Ms Ryan on 7 December 2017. In her witness statement (paragraph 255) the claimant gave an account of that meeting. It was agreed that there would be no microscopy until the next neurology review in March 2018, some three months away. There was then a discussion about which section the claimant would work on. From the claimant's witness statement her concern was about an excessive workload, not a concern that she would not be working on more than two sections.

350. In cross examination the claimant did explain that there was a concern about being deskilled by not working on other sections. When Mr Matovu cross examined Ms Ryan he put to her two other sections on which he said the claimant could have worked in this period. The first was Serology, but Ms Ryan said that there was a lot of manual handling in Serology because racks and samples had to be carried to and from the blood sciences room where the samples were analysed. The second was in Blood Cultures, but Ms Ryan said that was a section with significant microscopy required.

351. Overall we concluded that this allegation failed.

352. Firstly, we were not satisfied that it amounted to unfavourable treatment. Although in hindsight the claimant might have wished to have had exposure to more sections in this period, at the time it was a temporary holding measure until a review three months later to see whether she could return to using the microscope safely. For that relatively short period it would be unreasonable to see the fact she was only working on two sections as a detriment, particularly given her complaint about the level of work.

353. Secondly, even if this was unfavourable treatment, we concluded that it would have been justified as a proportionate means of achieving the legitimate aim articulated in the List of Issues. This was a holding measure so the respondent could investigate fully what adjustments would be reasonable so as to enable the claimant safely to undertake other types of work. This allegation therefore failed.

Issues 33-35: Support with microscope work

354. In the claimant's witness statement and Mr Matovu's submissions this issue was traced to a point made by the claimant in a meeting on 2 February 2018 at page 612. However, the suggestion made there was not about someone specifically for her microscopy, but rather a general point: "a microscopy BMS for the afternoon work in the lab". It was effectively the suggestion that another BMS be allocated solely to microscopy work each afternoon. That did not happen.

355. The claimant was, we concluded, entitled to regard as unfavourable treatment the fact that there was no-one specifically allocated to do her microscopy. She explained in cross examination how that caused delays in her work and meant that timescales were missed. As a conscientious professional she could reasonably view that as a detriment.

356. However, the reason that no-one else was allocated was more difficult to identify. This point was not put squarely to the respondent's witnesses in cross examination and we did not have a direct answer to it from any of them. From the totality of the evidence in this case we found that there was no spare capacity in the lab and no indication that it would have been possible for a BMS to have been reallocated to microscopy work alone each afternoon. This was not something which arose in consequence of the claimant's disability: it was simply a reflection of the nature of the work in the lab and the shortage of BMSs. We concluded that this allegation of a breach of section 15 failed on causation: the claimant had not proven facts from which we could conclude that there was the required causal link to her disability.

Issues 36 and 37: Additional tasks December 2017 to July 2018

357. This allegation concerned a period of just over six months between the claimant being allocated to two sections in December 2017 and going off sick in July 2018. The claimant maintained that the unfavourable treatment was the allocation of too many items of non laboratory work which resulted in her being overloaded. In truth this allegation essentially related to the period from April 2018 onwards,

because prior to that the claimant was working on two sections and therefore engaged predominantly on lab work.

358. The Trust disputed that the claimant was overloaded in this period, although it accepted that if she was overloaded, it was because of something which arose in consequence of her disability. In that event the Trust would rely on the justification defence. As indicated above, if there was an overload of work it is difficult to see how that can be a proportionate means of achieving the legitimate aim of a fair distribution of work. We concluded that this dispute was essentially a dispute of fact as to whether the claimant was overloaded with work in this period by means of the 12 items which were set out in the List of Issues. Understandably, neither side cross examined in detail about each of those 12 items; some of them were highlighted in cross examination whilst others were subsumed within the general point. We therefore do not propose to deal with each of them in turn in reaching our conclusion on this matter.

359. We reviewed the factual information. In April 2018 the claimant was restricted to working on Enterics only and more managerial tasks of the kind identified in paragraph 36 of the List of Issues were allocated to her. We noted that the Trust had not put in place any system for regular monitoring of the claimant's workload, but equally the claimant accepted in cross examination that she had never directly said that she was being overloaded in the period from April 2018. We accepted that she had formed that perception by the time of the incident between herself and Ms Fish in July 2018 which caused her to go off on sick leave, but having considered all the evidence available to us we concluded that the claimant had not proven facts from which we could conclude that she was subjected to unfavourable treatment in the amount of work allocated to her. The difficulty was that although there were many different items of managerial work allocated, the amount of time taken for each one varied significantly, and many of them were not subject to any pressing deadline. The fact that numerous pieces of work were allocated to the claimant from different managers without any overall oversight was regrettable, but did not of itself mean that the claimant must have been allocated more work than was appropriate. There was room for a genuine difference of opinion between managers and the claimant as to how much work she could be expected to deal with. There was no precise quantification of the amount of time these tasks required, and the dates given in the subparagraphs in the List of Issues show that they were spread over the period between April and July 2018. Given that the claimant was undertaking a very limited amount of laboratory work in this period, we concluded that she had not been overloaded with other work even though that was her genuine perception by the end of this period. This allegation therefore failed on the facts.

Issues 38 and 39: Flu training February/March 2018

360. The claimant alleged that the fact she was excluded from flu training in this period amounted to unfavourable treatment because of a perception that she was a problem, that perception being said to arise in consequence of her disability.

361. This point was put to Ms Fish. She gave an answer which was in accordance with the amended grounds of resistance (page 204), which was that the flu virus

work was being done on early, late and weekend shifts and therefore employees who worked such shifts (which the claimant did not) were prioritised for the training.

362. We accepted this and were satisfied that the claimant could not reasonably see this as unfavourable treatment. The work of testing for the flu virus was not work which she was going to be required to do until such time as she returned to working full shifts, and it was unreasonable to see the fact that she was not trained at this time as detrimental. This allegation failed.

Issues 46-48: 2018 Appraisal

363. This allegation concerned the end of year review held on 29 June 2018. The claimant was asked by Ms Fish to revise her paperwork to combine documents from the review 12 months earlier.

364. A difficulty for the Tribunal was that neither side cross examined the other on this point. Ms Fish was asked about the 2018 review but not pressed on why she required the documents from a year earlier to be factored in. The clearest account was given in the claimant's further particulars (page 64) where she said she was asked to combine documents from the mid year review (which had taken place in June 2017) even though there was a 12 month gap. She submitted those documents two weeks later but then went on sick leave, never to return.

365. In the absence of cross examination as to why this decision was taken, and because it did not feature in the witness statement of Ms Fish, we were in some difficulty on this matter. However, it seemed apparent to the Tribunal that the end of year review ought to take account of the previous mid year review. In this case (for reasons analysed above) the previous mid year had been 12 months earlier rather than six months earlier. In the circumstances we did not consider that the claimant could reasonably regard this as detrimental treatment, but even if it was then it would be justified as a proportionate means of achieving the aim of having a well structured and fair appraisal. This allegation failed.

Issue 52: Dismissal

366. We will deal with dismissal in a separate section below.

Discussion and Conclusions: Direct disability discrimination

367. The first and third allegations contained in paragraph 53 of the List of Issues were withdrawn in written submissions. That left us with the question of dismissal, which we will address below, and two other matters.

Issue 53(2): No MALDI training in November 2016

368. We addressed above the complaint about not providing the claimant with MALDI training before her surgery. This allegation of direct discrimination concerned the failure to provide that training when she returned.

369. In identifying the reason for this treatment we were required to compare how the claimant was treated with how a comparator who was not disabled but who had

the same capabilities would have been treated. The evidence from both Ms Fish and Ms Ryan in cross examination was that using the MALDI machine involved bending right over and placing a strain on the neck similar to using a microscope. They decided that the claimant would be relieved of that training for fear that she would injure her neck.

370. It was unfortunate that this was not properly explained to the claimant at the time. However, we were satisfied that this was the reason, and although it related to her disability it was not an instance of direct disability discrimination. A non disabled comparator with the same capabilities (for example, with a short-term restriction to movement of her neck) would have been treated in exactly the same way and not required to carry out MALDI training.

371. The Trust's witnesses accepted that the position had moved on by June 2018 when Ms Briody reported on the MALDI machine at page 767, but that was over 18 months later and did not render the decision in late 2016 directly discriminatory. This allegation failed.

Issue 53(4): Requiring the claimant to work full days

372. We considered the circumstances of the comparators on whom the claimant relied. A number were in circumstances which were materially different, and therefore not a valid comparator under section 23. Some of them (Ms Fraser, Ms Ryan) were more senior to the claimant and not required to undertake lab bench work. Others were in more junior roles and doing a different kind of work, such as Ms Chinta, Ms Royle and Ms Cuffaro. Ms Storey had worked until 5.20pm, and in any event that appeared to be ten years earlier.

373. That left two comparators who were at the same level as the claimant: BMS at Band 6. Ms Lakhani did work until mid afternoon until she left the Trust in October 2014, but the Trust had inherited her hours of work under TUPE in 2012. That was a material difference between her situation and that of the claimant. Jessica Kervella was allowed to work shorter hours but did not finish before 5.00pm. Again that was a material difference between her circumstances and those of the claimant.

374. Overall we concluded that the claimant had not proven facts from which we could determine that there was any direct disability discrimination. The circumstances of the comparators were materially different and did not support her case on causation. Alternatively, if the burden of proof had shifted we were satisfied that the respondent had shown that there was a non-discriminatory reason for any treatment of the claimant which was less favourable than those comparators enjoyed. We were satisfied that the reason the claimant was not allowed to work short days was because of the workflow in the laboratory and the difficulty of recruiting to cover late afternoons only. That allegation was properly pursued as a breach of the duty to make reasonable adjustments; it did not amount to direct disability discrimination.

Discussion and Conclusions: Harassment related to disability

375. There were four allegations of harassment which were recorded in the agreed List of Issues. The first in time was 31 May 2018. The List of Issues agreed during

the hearing recorded that the second was a conversation with Sue Fraser on 11 October 2018. In paragraph 149 of his written submission Mr Matovu applied for permission to amend the claim so as to allege instead that it was a conversation with Kate Ryan on 8 March 2018. He suggested that the respondent would not be prejudiced as the allegation had been put in the claimant's witness statement and the respondent's witnesses had been able to address it. In his response to the claimant's written submission Mr Boyd raised no objection to this amendment. We agreed that it could be permitted without any prejudice to the respondent as Ms Ryan had been questioned about the discussion on 8 March 2018. We therefore granted permission to the claimant to amend the second issue.

376. We then addressed the four allegations in date order.

Allegation (ii): A conversation with Kate Ryan on 8 March 2018

377. Before applying the law to this we had to make a factual finding on the discussion in question.

378. We had the benefit of the claimant's log at page 637. This was a difficult discussion. The claimant believed that she had been overloaded with work since December 2017 (a perception which in our view was correct – see above). Ms Ryan had a different view, and this was the first proper discussion between them about the workload position. Although Ms Ryan did not address this matter in her witness statement, which would have been prepared before she saw the claimant's statement, she was cross examined on this point by Mr Matovu and readily accepted that she had told the claimant that the work she was doing accounted for no more than 2% of the laboratory work. She explained that she was referring only to the laboratory work expected of a BMS, and not to the additional tasks which the claimant had been given to make up her non laboratory work. In response to questions from the Tribunal she clarified that this was just an estimate. We found as a fact that Ms Ryan did tell the claimant on 8 March 2018 that she was only doing up to 2% of the work of a BMS.

379. We then turned to apply the law. This comment amounted to unwanted conduct. The claimant did not want to be told that her contribution to laboratory work was viewed in such a limited way.

380. The comment was also related to her disability. It was a comment about the restrictions on her capabilities resulting from her disabling condition.

381. We concluded that the comment was not made with the purpose of creating a humiliating or offensive environment. This was a difficult discussion between an employee and a manager who had different views of the workload issue. We were satisfied that Ms Ryan was not intending to cause any offence or hurt to the claimant: she was attempting to explain the management perspective on the effect on the department of the restrictions under which the claimant was working.

382. We then considered whether this comment had the effect of creating that environment. In deciding that we had to take into account the claimant's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect.

383. The perception of the claimant was not as clear as it might have been. Her witness statement described this comment as "hurtful". However, the log she made at the time (page 637) did not record that comment being made. Nor was there any evidence at the time of the claimant having raised a concern about this comment informally by email, let alone by any formal grievance. We considered that if the comment had been as hurtful as the claimant said it would have featured in the log, which was otherwise scrupulously detailed.

384. The other circumstances of the case included that this was a difficult discussion because the claimant and Ms Ryan had differing views about the workload issue. The claimant was unhappy with how she had been treated since December 2017. Ms Ryan was trying to explain to the claimant the management perspective on the impact that her restrictions were having upon the work of the laboratory.

385. Finally, we concluded that it was not reasonable for a comment of this kind to have the proscribed effect. The comment was not saying that the claimant was making a 2% contribution overall, with the implication that 98% of her time was worthless. It was saying that the proportion of BMS laboratory work which she could do was very limited indeed. Nor was Ms Ryan saying that the non laboratory work being done by the claimant was worthless, although it may be that the claimant misunderstood this comment. In any event we were satisfied that it was not reasonable for a comment of this kind, given the circumstances of the discussion, to have the proscribed effect.

386. We therefore concluded that this did not amount to a contravention of section 26 and this allegation failed.

<u>Allegation (i): Conversation with Sue Fraser 31 May 2018</u>

387. Dealing firstly with the factual position, this meeting occurred at the end of May 2018 following receipt of the OH report of 9 May 2018 at pages 689-690. The claimant had been restricted to working on Enterics only at the beginning of April, but in this period believed that she was becoming overloaded with other non laboratory work. The meeting was called by Sue Fraser to discuss the OH report.

388. There was no management note of this meeting, nor (unusually) any log completed by the claimant. We did not hear any evidence from Ms Fraser. However, it was plain that a comment was made. The claimant gave an account in paragraph 311 of her witness statement, and the comment was itself confirmed by Ms Fraser in her subsequent letter of 8 June 2018 at page 702. The letter said:

> **"…I explained that the role you were now undertaking meant you were reading only one bench which formed only 1% of your contractual duties and the rest of your hours were used to update SOPs and occasional audits. I reminded you that this wasn't a long-term arrangement because that job did not exist and there was no job description, or need in microbiology for such a role. I said that your contract was a Band 6 BMS which was the role needed by the service."**

389. Our analysis of this was effectively the same as for the previous matter. The comment was unwanted conduct and it was related to disability, but it was not made with the purpose or effect of creating the proscribed environment. Although the

claimant took issue with it in her witness statement, there was no evidence of any complaint at the time even though the comment had been confirmed in writing to her. Paragraph 315 of her witness statement showed that she had misunderstood the comment in any event: it was not a comment about the full day work of 7.5 hours which she was doing at the time, but a comment about the proportion of her work which was the laboratory work required of a Band 6 BMS. We were therefore satisfied that this comment either did not have the proscribed effect, or if it did it was not reasonable for it to have done so. This allegation of harassment failed as well.

<u>Allegation (iv): Sam Fish chasing the claimant for completion of tasks April – July 2018</u>

390. We decided to deal with this allegation next because it preceded the final allegation of harassment about the meeting on 16 July 2018.

391. The thrust of this allegation was contained in paragraph 349 of the claimant's witness statement. This was a period when the claimant considered that she was being overloaded with additional tasks, something which was discussed at the end of year review meeting on 29 June 2018. Some of the items in question had a deadline of 20 July. The claimant thought that the appraisal discussion had resulted in Ms Fish understanding that the claimant needed to be left alone to get on with the outstanding tasks, but she then found that she was being chased up over them.

392. For example, on 3 July (page 775) Ms Fish sent the claimant (and others) a spreadsheet showing all the outstanding SOPs that needed to be reviewed. On 4 July (page 803) Ms Fish emailed the claimant alone to ask for an update with progress on the MSDS and kit inserts. On 6 July Ms Fish spoke to the claimant about a Datix matter, and after discussion they agreed to meet on 20 July. On 16 July (page 817) Ms Fish emailed the claimant about the MSDS sheets again. The claimant thought that this was premature given the agreement to meet four days later, and indeed this email immediately preceded the discussion on 16 July which formed the final allegation of harassment.

393. It appeared to us that these exchanges reflected the difference in perception between the claimant and her managers. She thought she was being overloaded with too many additional tasks and put under undue pressure to complete them. Managers did not consider that she was overloaded and were keen to make sure that she got through the work in accordance with the timescales with which they had to comply.

394. Viewed in that light, we were satisfied that this did not amount to harassment related to disability. The emails and verbal chasing of the claimant were plainly unwanted conduct, but we were satisfied it was not related to her disability. The tasks which the claimant had to do were tasks of the kind that were also allocated to other BMSs, as it evident from the fact that the email with the spreadsheet of 4 July was sent to a number of different people, not solely the claimant. This was just an example of management checking that matters were in hand in accordance with the relevant timescales.

395. Further, even if it was related to the claimant's disability, insofar as the claimant had been allocated some of those tasks because she was restricted in lab

work, we were satisfied that it was not reasonable for it to have the proscribed effect, taking into account all the circumstances. The emails were not inappropriate in tone. They did not seek to upbraid the claimant or take her to task for not having done the work. They were requests for updates on progress. By this stage the claimant's perception of the interventions of her managers was coloured by the fact that she felt under undue stress and pressure because of the workload, and therefore she was liable to react to well-intentioned interventions in a way which others might not have done. From the claimant's perspective one can understand how she saw this as inappropriate, unnecessary and tending to create an intimidating environment for her. However, section 26(4) required us to take an objective view looking at all the circumstances, not simply the claimant's subjective perception. This allegation therefore failed.

Allegation (iii): Discussion with Sam Fish 16 July 2018

396. This discussion took place on a Monday when the agreed deadline for completion of the MSDS sheets was Friday 20 July. We heard evidence from the claimant and Ms Fish about this meeting and each of them had prepared a note which appeared in the bundle between pages 818 and 822. We also had the benefit of a brief note prepared by Christine Chorlton at page 820, although we did not hear evidence from her in our hearing. We concluded that the incident developed as follows.

397. The claimant had not seen the email at page 817 about the MSDS sheets, and Ms Fish had not deliberately sought out the claimant to have a discussion with her about that matter. The claimant was in discussion with Christine Chorlton about another matter when Ms Fish came in to see Ms Chorlton and took the opportunity to ask the claimant about how she was getting on with that task, mentioning that she had emailed her about it.

398. From the claimant's perspective this was an unwelcome intervention. They had had a detailed discussion about workload at the end of year review at the end of June, and it had been agreed that she had until the end of the week to complete the task. She already felt overloaded with all this additional work on top of the bench work in the Enterics section, and management appeared to be unwilling to recognise that this was the case. This was affecting her view of how management were behaving.

399. From a management perspective, however, the work allocated to the claimant was appropriate and there were concerns that she was not getting through it as quickly as she could. Managers faced deadlines of their own and the informal queries with the claimant about how she was getting on were intended to help ensure that she did complete the work within the time required.

400. From those differing perspectives the discussion was of a very different nature. To the claimant this was inappropriate and unwanted additional pressure. From the perspective of Ms Fish it was a casual enquiry, not seeking to take the claimant to task or to impose a shorter deadline than the one which had been agreed.

401. Importantly, however, we found as a fact that it was the claimant's behaviour during this meeting which escalated matters and turned it into a serious disagreement between the two of them. That was evident from Ms Chorlton's note which said that the claimant became "very agitated" and said she had not completed the work which was needed for Friday. She later described the claimant as becoming very angry when Ms Fish disagreed with the proposition that the claimant had not had enough time to do the work because of her bench work on Enterics. The fact the claimant became agitated and then angry in this meeting was, we concluded, a reflection of her state of mind given the pressure which she had been under in the months leading up to it.

402. It is right to say that Ms Fish could have recognised that the situation was deteriorating and brought the meeting to a close sooner than happened. She was not as attuned to the claimant's sensitivities as she might have been. The result was that the meeting ended rather abruptly when the claimant left to get a drink of water because she had become upset, and then was unable to continue. The consequences of this meeting were serious: the claimant was certified unfit for work due to stress, and that remained the position until April of the following year. Of course, it was not this meeting in isolation which caused that to be the case, this meeting being the final straw.

403. Factually, however, we were satisfied that the initial enquiry by Ms Fish was well intentioned, that the meeting deteriorated because the claimant became agitated and then angry, and that Ms Fish failed to manage the situation as well as she might have done by sensing the claimant's distress and bringing the meeting to an orderly conclusion at the earliest opportunity.

404. Applying the law to those factual conclusions we considered the following.

405. Firstly, being asked again about the MSDS sheets when the deadline was the end of that week was unwanted conduct as far as the claimant was concerned. So was the suggestion that she had enough time to complete all this additional work as well as doing her bench work on the Enterics section.

406. Secondly, it appeared to us that although the claimant's disability and its consequences formed the context for this discussion, the enquiry made of the claimant about progress was not itself related to her disability. Similarly, although the meeting degenerated and no doubt would not have done so had the claimant not had her disability and its effects, the fact it deteriorated was not itself related to the physical disability but rather to the claimant's mental state. Mr Matovu argued in his written submission that this was an incident provoked by Sam Fish and that she was the aggressor, but we rejected that for the reasons set out above. He suggested that the incident was related to disability in that all the pressure of work being piled on the claimant was disability related. Again, we rejected that. For reasons set out above we did not conclude that the claimant was overloaded with work in this period even though that was her genuine perception. Broadly we concluded that the discussion was not related to disability.

407. In case we were wrong about that, on the basis that the claimant's mental state was related to her physical disability, we considered whether it had the proscribed effect.

408. We were satisfied that the claimant perceived it as creating an intimidating or humiliating environment for her. The discussion about where she was up to was undertaken in front of Ms Chorlton, and from the claimant's perspective it completely ignored the pressure she was under with what she regarded as an unacceptable workload.

409. The other circumstances of the case included the fact that the claimant was aware of the deadline and had been reminded of it by email, but also that Ms Fish and Ms Fraser were concerned by the apparent lack of progress as the deadline of 20 July grew ever closer.

410. Ultimately, however, we considered that it was not reasonable for this conduct to have had the proscribed effect. This was not a situation where Ms Fish was the instigator of an aggressive attack on the claimant, or where she harangued her, as Mr Matovu invited us to conclude. Although the query about where the claimant was up to was relatively casual, and perhaps should not have been undertaken in front of another manager, and although Ms Fish should have brought this discussion to a close as soon as it became apparent it was getting out of hand, the escalation of the discussion was a consequence of the claimant's response to the query about progress. In those circumstances, however upsetting this discussion came to be for the claimant by the end of it, it was not reasonable to regard it as having the proscribed effect.

411. Accordingly we concluded that this final allegation of harassment also failed and was dismissed.

Discussion and Conclusions: Dismissal

412. There were three different legal complaints about the dismissal: direct disability discrimination, discrimination arising from disability, and unfair dismissal. Before addressing each of those there were two preliminary matters we needed to resolve: whether the right policy was used, and the reason for the decision to dismiss the claimant.

<u>Long-term Sickness Policy?</u>

413. In paragraphs 171-174 of his written submission Mr Matovu argued that from April 2019 the claimant was no longer on sick leave, that her absence did not meet the definition of “long-term sickness” under the LTS policy, and therefore that pursuing the matter under that policy up to and including dismissal was inappropriate, and in fact was a false pretext for dismissing the claimant on “ill health” grounds when the respondent was aware that the claimant was not sick or suffering from long-term illness. That point underlay much of the legal analysis that followed, and we considered it in detail.

414. It was clear that from July 2018 the claimant was unfit for work and on long-term sick leave. Her fit note following the incident with Ms Fish on 16 July 2018 (page 825) was for stress at work. The long-term sickness review procedure began in October 2018, in the period during which the claimant was on long-term sick leave.

415. On 7 March 2019 an OH report from Dr Mijares (pages 905-906) recorded no change in the physical position but indicated that the main issue was the failure to agree that there could be 20 working hours per week over part days. The report mentioned other adjustments such as manual handling activities and an ergonomic chair, together with a phased return.

416. The claimant emailed Kate Ryan (page 920) on 11 April. The position in relation to her fit note had changed. The email did not declare that the claimant was fit to return to work; it simply said:

> **"Please find attached today's sick note, with recommendations for my return to work plan."**

417. The fit note itself appeared at page 918. It said that the claimant may (our emphasis) be fit for work taking account of the following advice, and then mentioned the adjustments recommended by Dr Mijares in the report of 4 March 2019. The word "may" appeared again in the comments inserted by the doctor. The fit note was said to extend from 11 April to 13 May 2019 and indicated that the doctor would not need to assess the claimant again at the end of that period.

418. Mr Matovu pointed out that the LTS policy at page 1417 said:

> **"Absence will be regarded as continuing until such time as fitness to return is declared by the employee."**

419. He invited us to conclude that on 11 April 2019 the claimant had declared fitness to return and therefore that her absence was no longer continuing. He argued that the fact she was not in work after that date was attributable to management's failure to make the adjustments in question, and should not be regarded as a continuation of her sick leave.

420. We rejected that argument. The fit note did not declare that the claimant was fit for work. Nor did her covering email. The fit note said that she may be fit for work if certain conditions were satisfied. Those conditions were not satisfied. It followed that the claimant remained unfit for work and therefore within the terms of the policy on managing long-term sickness.

421. Of course, if those conditions should have been satisfied, because they amounted to adjustments which should reasonably have been made, then the claimant would have succeeded in the reasonable adjustments complaints, which would then have consequences for the complaints about the dismissal. However, for reasons explained above we concluded that the adjustments sought at this stage went beyond what were reasonable and therefore management were entitled not to take action so as to meet the conditions which would enable the claimant to return to work. In our judgment it was appropriate for management to deal with this case under the LTS policy.

Reason for dismissal

422. The second preliminary matter was for us to make a factual finding about the reason for the dismissal.

423. The respondent submitted that the reason for dismissal was that summarised in the dismissal letter of 21 February 2020 at page 1053. Essentially the reasoning in that letter was as follows:

- Advice from the GP and OH was that a return to work was possible only with adjustments;
- The adjustments required could not be accommodated;
- The duties which the claimant said she could undertake without adjustments did not fit within the scope of (i.e. amount to) her substantive role, so
- [Implicitly] there was no prospect of a return to her substantive role.

424. Mr Matovu contended in paragraph 167 of his written submission (dealing with unfair dismissal) that capability by reason of ill health was not the real or genuine reason for the dismissal. However, that argument was based on the proposition at paragraph 170 that the claimant was not off sick after April 2019. He argued that the real reason was the failure to make adjustments. For reasons set out above we rejected that contention.

425. Whilst the characterisation of the reason is a matter to be considered in the unfair dismissal section below, we decided that as a question of fact the reason for dismissal was that the Trust considered it could not carry on employing the claimant when she would be fit to return to her contractual role only with adjustments which went beyond what was reasonable, and when the duties that she could do without such adjustments were too limited to be sustainable in the long-term.

426. Having made that finding of fact we turned to the analysis of the three legal complaints about dismissal.

<u>Direct disability discrimination – Issue 53(5)</u>

427. Mr Matovu began his submissions by inviting us to conclude that this was not a case where the Tribunal had to consider the mental processes of the decision maker, but rather one where the protected characteristic of disability formed part of the criterion or ground for the treatment. He referred to comments made about this kind of case in **Interserve FM Ltd**.

428. We rejected that contention. The claimant was not dismissed because she was a disabled person. A non-disabled comparator in the same material circumstances – i.e. a person without a disability but who had been absent from work from July 2018, and who would remain absent unless the Trust took steps beyond what was reasonable – would have been treated in exactly the same way. The circumstances of the hypothetical comparator constructed by Mr Matovu at paragraph 147 of his written submission did not meet the requirements of section 23 of the Equality Act, because a material circumstance was that the claimant was on sick leave from April 2019.

429. The complaint of direct disability discrimination in relation to dismissal failed and was dismissed.

Discrimination arising from disability – Issue 52

430. We next considered the complaint that the decision to dismiss contravened section 15. It was common ground that it amounted to unfavourable treatment, and that the reason for dismissal (as we found it to be) arose in consequence of disability. The sole question was whether the dismissal was justified as a proportionate means of achieving a legitimate aim.

431. The legitimate aim was formulated in the List of Issues based upon page 333 of the bundle, which was a letter from the Trust's solicitors in March 2021. The legitimate aim was said to be ensuring that its employees could perform their contractual duties, with reasonable adjustments as required, and that they could do so safely. Mr Matovu did not suggest that this aim was not a legitimate one.

432. The only issue for us to decide, therefore, was whether the Trust had established that dismissing the claimant was a proportionate means of achieving that aim. We reminded ourselves of the balancing exercise required by **Hampson** and the provisions of the Code. If that aim could have been achieved in a less discriminatory way (i.e. without dismissing the claimant), the dismissal would not be justified.

433. Both advocates recognised that this issue was at least in part linked to the question of reasonable adjustments. Mr Matovu argued (paragraph 121 onwards in his written submission) that the justification defence could not be maintained if there had been a failure to make reasonable adjustments. However, for reasons set out above we concluded that there had been no breach of that duty by the respondent. Insofar as the decision to dismiss was based on the view that the Trust could not reasonably make the adjustments sought by the claimant in relation to working hours, a high chair with castors and/or provision of an alternative microscope, it was on a sound foundation.

434. However, Mr Matovu also relied on what the claimant was saying by the time of the final decision, which appeared in the table (first supplied as at page 1022) where she identified roles she said she could perform without any adjustments.

435. There were no notes kept of the final LTS hearing on 14 November before Ms Elliott and Ms Chadwick, although there was an outcome letter at pages 1031-1032 which confirmed that no decision would be taken but instead there would be questions put to OH. Ms Chadwick suggested in her evidence that the claimant performed a "U-turn" at the end of the meeting: it began with discussion of the adjustments needed for the claimant to return to work, but it was suggested that the claimant changed her position and said towards the end that she could return without any adjustments. That was recorded in the outcome letter at page 1032 by saying the claimant presented new information about her current health and wellbeing and that she may be able to undertake restricted duties at her Band 6 role without the adjustments. Reference was made to the table prepared by the claimant.

436. That resulted in the question being put by Ms Elliott to Dr Mijares on whether the position had changed on the adjustments relating to the chair etc., and whether returning to work without those adjustments would cause a risk to the health of the claimant. In his draft reply Dr Mijares declined to provide any such confirmation. He did not formally provide that advice to Ms Elliott because he understood that the claimant had declined consent to release it. However, the claimant did provide Ms Elliott with the draft reply she had received from Dr Mijares, so his position was known to Ms Elliott.

437. That resulted in the email correspondence in January 2020 where the claimant was asked to clarify if she wanted adjustments to return to her substantive position or not. The claimant's initial response was of 27 January at page 1046. Her position was that she could work on most of the lab benches without the adjustments recommended by the doctors and Access to Work.

438. The position was still not clear enough to management and Katie Chadwick emailed the claimant on 29 January 2020 (page 1045) asking the claimant to confirm what adjustments she felt were required to return to work to her substantive role. The reply of 31 January 2020 at page 1045 identified a number of adjustments which had previously been considered, including an ergonomic chair "ideally with lockable castors", digital microscopy and working at an adjustable or low height bench. The claimant submitted an updated copy of the table (Page 1051) in which she listed as requested all the lab sections that could be worked on without adjustments.

439. The claimant's position was that although adjustments would be required to return to work on some sections, for other sections they would not be required and her view was that working on those sections would amount to fulfilling the duties of her substantive role at Band 6. That is why in her email of 31 January she made the point that she would be "as productive as my colleagues" who did not always have to cover all the benches themselves.

440. In response Ms Elliott explained in the dismissal letter, if briefly, that the range of duties the claimant felt she could undertake without adjustments did not amount to a substantive role of a Band 6 BMS. These duties had been discussed at the hearing and she recorded that Ms Ryan had said that the reception duties on the low bench there were essentially a Band 2 role, with the Band 6 BMS role being only supervisory. Further, some of the matters in the left-hand column in the table (benches at which the claimant said she could work without adjustments) were high benches where the same issues would be encountered about a chair with castors and use of the microscope.

441. Putting these matters together we were satisfied that, short of replacing the claimant, there was no way of achieving the legitimate aim of having the postholder perform the contractual duties of a Band 6 BMS in a safe manner. The adjustments the claimant would need to perform the role in its entirety went beyond what would be reasonable, and the parts of the role which she maintained she could perform without adjustments fell short of amounting to a Band 6 role. Although the impact on the claimant of dismissal from her Band 6 role was extremely significant, in the absence of a suitable role for redeployment the aim could not be achieved by

keeping her in employment with such limitations. There was no less discriminatory way of achieving the aim.

442. We were satisfied that the decision to dismiss her was a proportionate means of achieving the legitimate aim, and therefore the complaint under section 15 failed.

<u>Unfair Dismissal – Issues 58 and 59</u>

443. That left the Employment Rights Act complaint of unfair dismissal.

444. The first matter in dispute was the reason for dismissal. The respondent had pleaded that it was a potentially fair reason relating to the capability of the claimant, namely her long-term ill health absence. Mr Matovu argued that this was not the real or genuine reason for the dismissal, saying in paragraph 170 of his written submissions that the real or principal reason was "the lack of adjustments which the employer was unwilling to make". He suggested that this would, if potentially fair, amount to "some other substantial reason" rather than a reason relating to capability.

445. As indicated in dealing with the preliminary point about dismissal above, we rejected this as a matter of fact and of law. We found as a fact that the reason for dismissal was that set out in the dismissal letter. It was that the claimant was on long-term sick leave, that the adjustments she needed to return to her full role were beyond what it would be reasonable to make, and that the parts of the role to which she could return without adjustments did not amount to the role of a Band 6 BMS. There was no prospect of a return to full Band 6 BMS duties in the foreseeable future. That was a reason which related to the capability of the employee, and it was a potentially fair reason. We therefore moved to consider the question of fairness.

446. The legal framework for most dismissals for long-term sickness absence was summarised above. The three points of importance in most cases are whether the employer can reasonably be expected to wait any longer for the employee to recover, whether the employee has been consulted, and whether reasonable steps have been taken to identify the medical position. On the face of it these three elements were all present in this case. The claimant had been on sick leave since April 2018, almost two years by the time of the decision to dismiss her, and more than two years at the time of the appeal decision in May 2020. She had been consulted during the LTS procedure meetings and had had a fair opportunity to have her say and argue her case to avoid dismissal. The medical information available to the employer included up-to-date information from OH as well as the information from the GP on which the claimant placed great store. The decision to dismiss was delayed in late 2019 whilst a further query was put to OH.

447. Even so, Mr Matovu argued that the dismissal should be regarded as unfair because of nine points which were set out in paragraph 175 of his written submission. We addressed each in turn:

(a) The first argument was that dismissal was not by reason of ill health and therefore a reason related to capability. We rejected that for the reasons set out above.

(b) The second argument was that it was wrong of the respondent to apply the LTS policy to the claimant when it was not applicable. We rejected that for the reasons set out above. Applying the LTS policy to the claimant was within the band of reasonable responses.

(c) The third argument was that the LTS policy had been used as a pretext for terminating employment when the respondent did not have an honest or reasonable belief that the claimant was incapable by reason of her health. We rejected that argument. We were satisfied there was a genuine belief that the claimant was not capable of the full range of contractual duties of a Band 6 BMS without adjustments which went beyond what it would be reasonable to implement, and that the remainder of the role which could be done without adjustments did not amount to a Band 6 role. Further, we were satisfied that both of those conclusions were reached on reasonable grounds. This was not a case where management dismissed the claimant's proposals out of hand: this dismissal was the culmination of a period extending over several years where the adjustments sought by the claimant were investigated and explored, and where management took account not only of the claimant's desired adjustments but also of the impact of such adjustments on the proper functioning of the laboratory.

(d) The fourth argument was that the dismissal was in breach of the Equality Act 2010, but we rejected that for the reasons set out above.

(e) The fifth argument was the admission by Ms Elliott that the disability policy was not taken into account. It is right to say that there was a failure by the respondent to make express reference to that policy in its decision making, although the LTS policy itself (unlike the Flexible Working Policy) expressly acknowledged the need to take account of disability in clause 5 on page 1414. But as far as the unfair dismissal complaint was concerned, part of the issue for managers to decide at the dismissal stage related to the adjustments, and the OH advice consistently said that the claimant was a person disabled under the Equality Act. It was within the band of reasonable responses to conclude that the adjustments sought by the claimant went beyond what was reasonable even without making reference to the disability policy.

(f) The sixth argument was that dismissal could have been avoided by making reasonable adjustments. We rejected the contention that there was any failure to make reasonable adjustments in this case.

(g) The seventh argument was that the fault for not making the adjustments lay with the respondent, and that this could not be a potentially fair reason for dismissal. As explained above, this contention was flawed on two points: firstly, there was no “fault” in not making the adjustments as they went beyond what was reasonable, and secondly the reason for dismissal was not that failure in any event.

(h) The eighth point was that the appeal failed to cure the substantive flaws in the dismissal because it was only a review, rather than a re-hearing.

The problem with that argument for the claimant was that the original decision to dismiss her was not, in our judgment, flawed. The decision of Ms Elliott at the dismissal stage to terminate employment on the basis that the adjustments sought by the claimant went beyond what was reasonable was within the band of reasonable responses, and the decision of Mr Sleight to uphold that decision on appeal was also within the band of reasonable responses. The points of detail about the adjustments sought, and the trial of the digital microscope, were attempts to re-run arguments about reasonable adjustments which we have already rejected.

(i) The ninth and final reason given was effectively a summary of the previous points and did not take the matter any further.

448. We noted that Mr Matovu did not pursue any argument about the failure to find an alternative role for the claimant on redeployment. It is certainly correct that the redeployment exercise was bedevilled by poor communication on the part of the respondent. The claimant was not kept up to date about what was happening and the fact that she was still left "in the dark" at the end of July when her extended notice period expired was regrettable. Even after termination there was still a lack of clarity as to what had happened as far as redeployment was concerned.

449. Those, however, were points which did not undermine the fact that the decision to dismiss the claimant fell within the band of reasonable responses. The substantive significance of the redeployment process was that there was no trace of an alternative role as a Band 6 BMS which the claimant could perform. For perfectly understandable reasons she wanted to maintain her professional qualification and HCPC registration and was not pursuing vacancies which did not enable her to do that. There was no evidence from which we could conclude that an employer acting within the band of reasonable responses could have found the claimant an alternative role.

450. It therefore followed that the dismissal was fair; the complaint of unfair dismissal failed and was dismissed.

Equality Act Time Limits Issues 56 and 57

451. Having dealt with the dismissal we returned to the question of time limits under the Equality Act. Two complaints of discrimination arising from disability succeeded on the merits, subject to time limits.

452. The first was the failure to return rota duties to the claimant after her return from surgery in late 2016 (issues 23 and 24). We concluded that this was an allegation that was well out of time. It did not form part of any continuing act, and nor had the claimant established grounds on which it would be just and equitable to extend time. This contravention occurred in November/December 2016 and her claim form was not lodged until two years later. The reason for the delay and the ability of the claimant to access advice were not addressed in her evidence, and we were satisfied the delay had been likely to have affected the cogency of the evidence about the details of rota responsibility in late 2016, explaining why the Trust had no evidence about it.

453. The second potentially successful complaint was contained in paragraphs 29 and 30 of the List of Issues, being that the claimant was subjected to discrimination arising in consequence of her disability in the period from 4 December 2017 until April 2018 when she was given an unreasonable workload across two sections.

454. That complaint was brought outside the primary time limit. The claimant initiated early conciliation in her first claim on 12 October 2018, so anything before 13 July 2018 was out of time. Assuming in favour of the claimant that the unfavourable treatment ended on 2 April 2018 when the claimant was restricted to working only on Enterics, the primary time limit expired on 1 July 2018. Early conciliation did not commence and "stop the clock" until just over three months later.

455. We could not find that this was part of a continuing act of discrimination over a period which ended on 13 July 2018 or later because none of the later complaints of discriminatory treatment succeeded on their merits. The question was whether it would be just and equitable to extend time. Once again this had not been addressed by the claimant in her evidence. We did not know why she had not brought a claim at the time, or commenced early conciliation, or whether she had sought advice about doing so. The burden was on the claimant to establish that time should be extended and no grounds for doing so had been established.

456. It followed that the Tribunal had no jurisdiction to determine these two complaints and they were dismissed as well.

Discussion and Conclusions: Issue 60 - Holiday Pay

457. The money claims (including holiday pay) did not feature in the claimant's witness statement and the respondent's witnesses were not questioned about them. In the absence of any evidential basis we invited the parties to address those claims in written submissions. We hoped that they would be resolved by agreement or would become a remedy issue.

458. That happened in relation to two of the three claims, relating to arrears of pay and notice pay, but not the claim relating to holiday pay. Although the claimant put a calculation of the hours she said were due in the written submission, we had no evidence on the correct calculation and were unable to make a determination. This claim had not been proven and was dismissed.

Discussion and Conclusions: Written statement of reasons for dismissal Issue 61

459. Section 92(1) gives an employee the right to be provided with a written statement giving particulars of the reason for dismissal within 14 days of making a request. The claimant made such a request on 17 September 2020 (page 1143) and did not receive a reply within 14 days (or at all).

460. Was this a failure to provide a written statement? We concluded it was, in the sense that the right to a statement is triggered by the request, to which there was no reply.

461. However, we were satisfied it was not an unreasonable failure within section 93(1)(a). The claimant had been given written reasons for her dismissal in the letter of 21 February 2020 at pages 1053-1054. The extension to the termination date to enable redeployment to be explored was confirmed in the letter of 14 May 2020 at pages 1084-1086. Although communication during the redeployment period was poor, by letter of 7 September 2020 it was confirmed that employment had ended on 31 July 2020 as the Trust had been unable to find a suitable alternative. There was nothing more that could have been said about the reasons for dismissal, and the failure to comply with section 92 was not unreasonable.

462. This complaint was not well-founded and was dismissed.

Outcome

463. For the reasons set out above the Tribunal unanimously dismissed all the complaints brought by the claimant.

Regional Employment Judge Franey
12 July 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 14 JULY 2022

FOR THE TRIBUNAL OFFICE

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