EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113753/2021

Held in Edinburgh via Cloud Video Platform (CVP) on 16-20 & 23-26 January 2023

Employment Judge M Sangster
Tribunal Member M Watt
Tribunal Member S Cardownie

Ms L Buchan	**Claimant** **In person**
Lothian Health Board	**Respondent** **Represented by** **Mr D James** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The respondent failed in their duty to make reasonable adjustments for the claimant. The respondent is ordered to pay the claimant sum of **£ 11,571.51** including interest, by way of compensation for injury to feelings.

- The claimant's complaints of harassment related to disability, discrimination arising from disability and unfair dismissal are not successful and are dismissed.

REASONS

Introduction

1. The claimant presented complaints of unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability.

2. The respondent resisted the claim.

3. At a case management preliminary hearing, held on 1 September 2022, it was agreed that the final hearing would be conducted remotely, by CVP, as an adjustment for the claimant. The hearing accordingly took place remotely, by CVP.

4. A joint bundle of documents, extending to 1,858 pages was lodged in advance of the hearing. A further 3 page document was added by the claimant, with consent, at the commencement of the hearing.

5. An agreed joint statement of agreed facts was also lodged.

6. The claimant gave evidence on her own behalf and led evidence from her partner, Linda Bamford (**LB**).

7. The respondent led evidence from 10 witnesses, namely:

   a. Janis Butler (**JB**) Director of HR and Organisational Development;
   b. Noreen Clancy (**NC**), Head of Employee Relations;
   c. Caroline Cleland (**CC**), Clinical Nurse Manager;
   d. Norah Grant (**NG**), Programme Manager for Diabetic Eye Screening Programme for NHS Lothian & Borders and claimant's line manager;
   e. David Hood (**DH**), General Manager;
   f. Daniela Knox (**DK**), Acting Assistant Clinical Service Manager;
   g. Dr Alastair Leckie (**AL**), Director of Occupational Health and Safety;
   h. Tracey McKigen (**TM**), Services Director REAS;
   i. Gill Wilkie (**GW**), Clinical Service Manager; and
   j. Fiona Wilson (**FW**), Director of Health and Social Care, East Lothian NHS Care Partnership.

8. The other individuals referenced in this judgment are as follows:

   a. Claire Couper (**CC2**), Senior Employee Relations Practitioner;
   b. Elaine Hickey (**EH**), HR Manager'
   c. Alex Joyce (**AJ**), Employee Director for the respondent (now retired);

d. Ruth Kelly (**RK**), Deputy Director of HR;
e. Karen McCabe (**KM**), Service Manager;
f. Carol McCue (**CM**), Head of Administration; and
g. Lynn Struthers (**LS**), Clinical Nurse Manager.

Issues

9. At the commencement of the hearing, the issues identified at a case management preliminary hearing, held on 1 September 2022, were discussed. The parties confirmed that these remained the issues to be determined, subject to the following points:

a. The respondent had intimated, on 22 September 2022 that, whilst it conceded disability status in relation to the claimant's physical impairment, it only did so from 18 June 2020;

b. Disability status in relation to the claimant's partner was conceded by the respondent; and

c. The claimant confirmed that she no longer sought a recommendation as a remedy.

10. The issues to be determined at the hearing were accordingly as set out below.

Unfair dismissal

11. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**)? The respondent asserts that it was a reason relating to the claimant's capability, failing which it was for some other substantial reason, namely the claimant's absence levels.

12. If so, was the dismissal fair or unfair in accordance with s 98(4) ERA? This will involve consideration of whether dismissal for capability/SOSR fell within the band of reasonable responses open to the employer in the circumstances.

*Disability Status – s6 Equality Act 2010 (**EqA**)*

13. Was the claimant a disabled person in accordance with the EqA because of a physical impairment prior to 18 June 2020 (the respondent accepts the claimant was a disabled person from that date)?

14. Was the claimant a disabled person in accordance with the EqA at all relevant times because of a mental impairment?

Discrimination Arising from Disability – s15 EqA

15. Was the claimant treated unfavourably by the respondent, by being dismissed?

16. If so, was this due to something arising in consequence her disability, namely her absence from work?

17. If so, was the treatment a proportionate means of achieving a legitimate aim, the legitimate aim being managing sickness absence levels?

Reasonable Adjustments – s20 & 21 EqA

18. The claimant relies on 7 separate provision, criteria or practices (**PCP**s). Namely:

    a. A requirement for regular attendance or alternatively the requirement to undertake the duties of her job.

    b. Delaying organisational processes beyond reasonable timescales and not communicating with the claimant regarding the progress of these processes or alternatively failure to protect claimant from work associated stress causing a detrimental impact on her health.

    c. The inconsistent application of attendance management policy including Occupational Health Referral Policy.

    d. Separation of linked issues to be dealt with by different management teams i.e. Attendance, Grievance, Accident, Injury Allowance and the claimant not being able to discuss with other management teams the

cumulative impact these linked issues were having on the claimant's mental health and potential physical recovery.

e. Reducing pay to half then to zero.

f. Acting outwith policies e.g. Promoting Attendance at Work, injury allowance, injury allowance appeal, Attendance Policy, Grievance and most recently appeal against dismissal.

g. Requirement to attend formal meetings/hearings in order to address issues raised e.g. Grievance, Stage 3 Attendance Hearing, appeal against dismissal.

19. Did the respondent have such PCPs?

20. Did any such PCP put the claimant at the substantial disadvantage she asserts, in relation to a relevant matter, in comparison with persons who are not disabled at any relevant time?

21. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

22. If so, would the steps identified by the claimant have alleviated the identified disadvantage?

23. If so, would it have been reasonable for the respondent to have taken those steps at any relevant time and did they fail to do so?

Harassment – s26 EqA

24. Did the respondent engage in unwanted conduct related to disability, as follows:

a. NG made repeated inappropriate disclosures of claimant's private medical/personal information 29 April 2019, 9 May 2019 and 11 April 2020.

b. NG incorrectly stating to the claimant that her (the claimant's) health issues were "due to her being a carer" on 29 April 2019.

c. NG provided inaccurate information about the claimant to RK on 3 December 2019 in relation to the claimant's Injury Allowance application.

d. RK chose to accept this information as fact despite the claimant providing evidence that proved otherwise.

e. NG also provided inaccurate information to the NHS Lothian litigation team on an unknown date around April 2020.

f. NG chose not to follow the attendance policy in relation to the claimant's sickness absence and chose not to follow the correct procedure in relation to Adverse Events including not reporting the claimant's accident to HSE.

g. JB and AJ chose not to follow injury allowance appeal procedure by taking medical advice from the same doctor who provided advice to the injury allowance panel.

h. AL provided inaccurate medical advice in relation to the claimant on 6 February 2020 then again on 9 June 2020 without considering all the available medical information.

i. DK chose not to follow attendance policy on 24 September 2020. DK formally invited the claimant to an Attendance Meeting where the claimant was told (at the start of the meeting) that her partner could not take part in the meeting, that she could not discuss any of the other relevant organisational processes, even though they were impacting on the claimant's health, and told the claimant she could be dismissed.

j. DK then ignored reasonable queries raised by the claimant on 14 October 2020.

k. NC unreasonably delayed the outcome of the claimant's re-run of her Injury Allowance Appeal which commenced in August 2020 and was

eventually upheld on 11 March 2021 after obtaining independent medical advice from an OHS Consultant in NHS Forth Valley.

l. Following conclusion of the claimant's re-appeal for injury allowance, NC stopped the claimant's extended half pay at the end of March 2021 creating financial hardship

m. CC delayed re-referring the claimant to OHS contrary to their recommendations and failed to undertake a review prior to the claimant's sick pay being reduced to zero in March 2021.

n. CC also unreasonably delayed a meeting with the claimant following receipt of an OHS report from 14 May 2021.

o. CC dismissed the claimant on 25 August 2021 and confirmed this by letter dated 3 September 2021 stating that "all reasonable adjustments had been considered" however, at the Appeal against dismissal hearing on 13 December 2021 CC stated that she did not know what reasonable adjustments were considered.

p. GW unreasonably delayed outcome of grievance investigation (which is against Acas code) until January 2021 and the subsequent review of the investigation until 7 June 2021 and failed to communicate with claimant regarding progress of this investigation including delays.

q. GW provided evidence at a Stage 1 Grievance hearing on 23 September 2021 and 29 September 2021 which had not been fact checked and was subsequently found to be inaccurate.

r. At the same hearing GW expressed her disbelief that the claimant had never met LS.

s. DH did not respond to claimant within agreed extended deadlines the outcome of her Stage 1 Grievance Hearing (18 October 2021) and failed to communicate with the claimant regarding this delay.

t. TM chose to act outwith policy by not having a non-executive director on the panel at appeal against dismissal hearing on 13 December 2021.

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

Time bar/Jurisdiction

26. Have the claims for failure to make reasonable adjustments and harassment related to disability been presented within the time limits stated in s123 EqA, or such other period as the Tribunal thinks just and equitable?

Findings in Fact

27. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

28. The respondent is an NHS Health Board providing services for Edinburgh and the Lothians. It employs approximately 26,000 staff.

29. The claimant was diagnosed with anxiety and depression in November 1995. She was prescribed anti-depressants until 1999. Her medical condition resolved in 1999 and she had no ongoing symptoms thereafter.

30. The claimant is a carer for her partner, LB.

31. The claimant was employed by the respondent as a Retinopathy Screener from 20 May 2013. She worked as part of a team of 7 and her line manager was NG.

32. At the time the claimant commenced employment with the respondent, they operated a Promoting Attendance at Work Policy. This detailed that long term sickness absence was certified absence lasting more than 4 weeks in length. It stated that *'regular reviews should be carried out to assess and monitor staff when they are off sick'* and managers were referred to a Traffic Light System appended to the policy, as a good practice tool. That identified that individuals

with 10 days' absence in a 12 month rolling period would be flagged as 'red'. The steps to be taken in relation individuals flagged as red were specified. Those steps included regular documented meetings with the employee, with the assistance of the ER department if necessary, and seeking advice from the ER department if there is no improvement after providing support for 3 months.

33. The claimant raised a grievance in 2016 in relation to a meeting held with her on 25 February 2016. The meeting was conducted by NG and LS. The claimant's grievance was upheld and it was determined that the meeting had been conducted inappropriately.

34. Prior to March 2019, the claimant developed lower back pain and numbness in her fingers. She attended an assessment with the respondent's Occupational Health Service (**OHS**) in relation to this in March 2019. This did not however impact her ability to attend work and indeed, at this point, the claimant had not had any periods of absence due to sickness during her employment with the respondent.

35. The claimant was injured in a workplace accident on 23 April 2019. When she opened one of the back doors of the van she used for work, the wheelchair ramp extended rapidly, of its own volition, opening the other door. She understands this was caused by a broken hydraulic oil pipe. She was hit in the process and fell to the ground. Whilst the claimant was injured in the accident, she did not, initially, take time off work.

36. The claimant completed a Datix form, to record the fact of the accident, the following day and submitted this to NG. In the form, she recounted the circumstances of the accident and stated *'existing problems with left arm have worsened – pins and needles, pain and increase numbness.'*

37. On 29 April 2019, the claimant saw NG for the first time since the accident. The claimant explained to her that she had hurt her neck, shoulder and arm in the accident and was experiencing ongoing generalised pain. She also explained that her back was sore, mentioning that she had a pre-existing condition with lower back pain. NG stated in response that the claimant's pre-existing back

problems were probably due to her lifestyle, as she is a carer, and asked whether the claimant lifted her partner and what sort of aids she had to facilitate this. The claimant was upset that NG had made an assumption that her back problems were due to her lifting her partner, which she did not in fact do.

38. Later that day, NG approached the claimant in the grading room, where another member of staff was also present, and spoke to the claimant about referring her to OHS. The claimant asked NG not to discuss personal matters in front of her colleagues. NG responded that everyone knew that the claimant had had an accident at work.

39. An OHS referral was subsequently made and OHS decided that the claimant would be seen by a physiotherapist.

40. The claimant sent an email to NG on 29 April 2019, raising concerns that:

    a. Colleagues appeared to be aware of her injuries and medical condition, despite the claimant not sharing this information with them and it only being disclosed to NG;

    b. NG had informed her in front of others that she would be referred to OHS; and

    c. NG had instructed the claimant to conduct grading duties only following the accident, but the claimant felt it would be beneficial to revert to her normal duties, to allow her to keep moving.

41. On 1 May 2019, the claimant sent an email to LS, raising concerns NG had breached the claimant's confidentiality and in relation to NG suggesting that her back problems were due to her being a carer. She highlighted that she had raised concerns with NG on 29 April 2019, but NG had not responded.

42. The claimant was assessed and treated by the OHS physiotherapist on several occasions in May and June 2019. The physiotherapist telephoned NG during an assessment with the claimant on 9 May 2019. During that call NG mentioned to the physiotherapist that the claimant was a carer and rode a motorbike. The claimant was upset at NG disclosing this personal information

and believed that she was inferring that other things may have caused the claimant's symptoms. The OHS physiotherapist sent a report to NG on 13 May 2019.

43. On 14 May 2019, NG closed the Datix process. No report was made to HSE and the respondent's processes in relation to 'Significant Adverse Events' (which include near miss events, which had the potential to lead to serious harm but did not on this occasion), were not followed.

44. The claimant continued working for several weeks following the accident – initially as she did not want to let patients down by cancelling appointments and latterly on the advice of the OHS physiotherapist. She was in pain throughout that period, but thought she could 'push through', particularly as she had been advised by OHS that continuing to work would be the best course of action for her. It was difficult for her to do so. At times she was in tears between patients, due to the pain. It was difficult for her to undertake her duties: she did not have a full range of movement in her neck or left arm and she struggled to hold things with her left hand, including the camera she used for work. At evenings and weekends she was unable to do anything other than sleep.

45. Due to continuing and increasing pain, the claimant commenced sickness absence on 18 June 2019. The claimant attended her GP on 24 June 2019. She was certified as unfit to work until 8 July 2019 as a result of shoulder pain and prescribed gabapentin. The claimant informed NG of this and forwarded the Statement of Fitness for Work to her.

46. The claimant attended a further appointment with OHS physiotherapy on 27 June 2019 and a report was sent to NG on 28 June 2019. This report indicated that the claimant would remain unfit for work for approximately two weeks. It stated that, while it was likely that the claimant would make a full recovery and would be able to return to her full duties in due course, the nature of this type of musculoskeletal problem could be recurrent and therefore further episodes could not be ruled out future.

47. Via email dated 28 June 2019, the claimant provided an update to NG. She stated that the physiotherapist had been unable to establish the cause of the claimant's pain and was now uncertain whether physiotherapy would assist the claimant. The claimant indicated that she was being referred for a second opinion and would also discuss matters with her GP.

48. The claimant continued to be certified as unfit to work by her GP every three weeks, as a result of shoulder and neck pain. The claimant updated NG, by email, after each appointment.

49. Under the respondent's policies, the claimant's absence became long term on 18 July 2019, when she had been off work for a month. NG had no experience of managing anyone on long term absence. She did not refer to the respondent's Promoting Attendance at Work Policy, or associated guidance, to assist her to do so.

50. On 1 August 2019, the OHS physiotherapist wrote to the claimant's GP suggesting she consider referring the claimant on for further investigations should her symptoms persist.

51. A further OHS physiotherapy report was completed on 13 September 2019 and sent to NG. This indicated that the claimant would remain unfit for work for a further 4-6 weeks and an update would be provided once the outcome of further investigations requested by the claimant's GP were known.

52. On 11 October 2019 the claimant was certified as unfit to work by her GP, as a result of shoulder and neck pain, until 22 November 2019. The claimant updated NG, by email, after the appointment, indicating that the OHS physiotherapist did not want to see her again until she had a diagnosis and that she may be referred to a neurologist. The claimant asked NG for confirmation of what would happen in relation to her pay if she was absent for more than 6 months, indicating that she understood that her pay should not reduce to half pay as she was absent due to a workplace injury.

53. On 14 October 2019, the OHS physiotherapist wrote to the claimant's GP to ask her to consider referring the claimant for a neurological review.

54. On 22 November 2019 the claimant was certified as unfit to work for 8 weeks due to shoulder and neck pain. (She continued to be certified as unfit for this reason, in 8 week intervals, from then until July 2020). She called NG that day to update her. She also asked about her pay, as NG had not responded to her email of 11 October 2019. NG stated that she would look into an application for injury allowance for the claimant. Following that call NG sent the claimant injury allowance application forms for completion, and apologised for not sending these sooner. She also stated *'I think it would be a good idea for us to meet up. Is it easier for you to get to St John's than come into Edinburgh? Let me know and I'll see if I can arrange a room.'* The claimant had been absent from work for over five months at this point. This was the first time any sort of discussion, under the respondent's Promoting Attendance at Work Policy, had been suggested by NG. In an email sent later that day, the claimant suggested a meeting in the first or second week of December, stating that she was happy to come to Edinburgh, as she presumed that would suit NG better. The claimant also returned her completed injury allowance application forms to NG that day.

55. NG sent an email to the claimant on 4 December 2019, suggesting a meeting on Thursday 12 December 2019 at 11:30. In response to a question from the claimant regarding whether it was an informal catch up, or she should be accompanied by a representative, NG clarified that the meeting would be held under the respondent's Promoting Attendance at Work Policy and stated *'I had thought it would just be you and me, however if you'd rather bring someone that's fine. In that case I can always make it the 19th if that is going to be easier?'.* The claimant responded to NG later that afternoon by email stating *'Thanks for confirming that it will just be you and I. In that case I'm happy to come alone and 12 Dec @ 1130 for a catch up is fine.'*

56. The claimant drove from her home to the Eye Pavilion in Edinburgh (a journey time of around an hour, plus time to find somewhere to park near to the Eye Pavilion) to meet with NG, as scheduled, on 12 December 2019. When she arrived she was informed that NG was not there. The claimant required to telephone NG to ask where she was. She was embarrassed to do so as

colleagues were in the vicinity and they were aware that the claimant was expecting to meet with NG, but she was not there. NG indicated that she was in a different location, so would be unable to meet the claimant that day. She apologised, stating that she had thought the meeting was scheduled for 19 December 2019. The claimant was extremely upset. She had been nervous about meeting. She had stopped taking her medication around a week prior to the meeting, to ensure she had a clear head that day, so was in a considerable amount of pain. She had to stop the car when driving home, as she developed shooting pains and migraine.

57. On 3 December 2019, NG signed off the claimant's injury allowance application form. She stated on the form, when asked for the 'Reason for Absence', *'shoulder pain and numbness in hand'*. Injury allowance tops up sick pay to 85% of pay, if an employee has an injury, disease or other health condition which is wholly or mainly attributable to their NHS employment.

58. In the same month, the claimant moved on to half pay.

59. The meeting under the promoting attendance policy, which had been arranged for 12 December 2019, was rescheduled to 17 December 2019 and was conducted by telephone, rather than in person. There was no ER representative present during the discussion. At the meeting the claimant explained that she was still experiencing significant pain and also now had numbness in her left leg. She indicated that she was waiting to hear from orthopaedics and neurology, following referrals to them. NG stated that she would make a further referral to OHS. A letter dated 20 December 2019, summarising the discussion was sent to the claimant.

60. The claimant emailed NG on 23 December 2019, disagreeing with some issues outlined in the letter. In her email, she also stated *'I still have to do all the everyday things that most people have to do, which aggravates my condition. You mentioned about driving and I confirmed that I do still drive albeit shorter distances before my pain is aggravated. I am lucky that I have an automatic car as it makes this task much easier. Everyday tasks are completed much more slowly now as I have to pace myself to stop my pain getting too high. This*

can make simple things like showering more of a challenge than before. My medication is also knocking me for six with side effects including loss of concentration, speech difficulties, fatigue and sleepiness.'

61. By letter dated 6 January 2020, RK acknowledged receipt of the claimant's injury allowance application and advised her that further occupational health advice was being sought. She requested advice from AL, in relation to whether the claimant's injury had been caused by a workplace accident, on the same day.

62. The claimant sent a letter to RK on 22 January 2020. In the opening paragraphs, on the first page of her 4 page letter, the claimant requested a copy of to her injury allowance application form, including the section completed by NG, as her line manager. The rest of the letter set out in detail a number of concerns which the claimant had in relation to:

    a. Her injury allowance application;

    b. The general management of her case;

    c. Various breaches of confidentiality by NG, which led to the claimant feeling wary of passing personal information to her;

    d. NG asserting that the claimant's back problems were due to the claimant being a carer;

    e. Being singled out by NG for a manual handling assessment;

    f. The fact that she had attempted to raise some of these concerns with NG's line manager (i.e. in her email of 1 May 2019 to LS), but that she believed they had now moved on (without providing any substantive response);

    g. The fact that NG had still not held a face to face meeting with her in relation to her absence;

h. The fact that NG not attend the meeting scheduled for 12 December 2019, which the claimant travelled to Edinburgh to attend, and the impact this had on the claimant; and

i. The fact that, on checking her bank account that day, the claimant noticed that her pay had been reduced significantly, but she had not received any formal notification of this.

63. The claimant concluded the letter by stating *'I do not have a clue what is happening and this is terrifying. This is also my first period of absence in my career with NHS Lothian so I would have benefitted from further support and assurance that my personal welfare was a consideration. I could go on and on with, in my opinion, practices that deviate from HR best practice and show inconsistency and poor leadership. For me, the accumulation of all the issues mentioned have left me feeling unsupported and undervalued at a very vulnerable time in my life. I currently don't know what my recovery will be and how this will affect my career and lifestyle/well being moving forward. I also feel that there has been a breakdown in trust between myself and my line manager due to the above breaches and how this incident has been handled…I still have restricted movement in my left arm and hand (which I did not have pre-accident) and I have lots of neuropathic pain. I now have numbness in some of my left side toes and my left leg sometimes gives way on me. I am also getting pain in my right shoulder too. All of which I did not have before the accident. I am sure you will understand what a worrying and stressful time this is for me….I would ask that you address the points I have made within this letter, and I look forward to hearing from you in due course.'*

64. On 31 January 2020 RK responded to the claimant's email of 22 January 2020 providing a copy of the full injury allowance application form, as requested, and stating *'In terms of the remainder of your letter, I have mentioned some of the concerns you have raised to my colleague Noreen Clancy, Head of ER. It would appear that you have not had the appropriate support during your current period of absence and this is something that Noreen and the ER Team will need to address with the service and ensure arrangements are put in place*

now to support hopefully a return to work in the future for you. I have therefore forwarded your letter onto Noreen and she will arrange for one of the ER Team to be allocated to the case and follow up the concerns that have been raised and someone will be in touch with you in due course.'

65. The claimant was not contacted by NC, or any other member of the ER Team, in relation to the concerns she raised in her letter of 22 January 2020.

66. By letter dated 4 February 2020, AL advised RK of his view that *'current difficulties with [the claimant's] shoulder is more likely to be related to pre-existing condition and is not directly as a result of the injury sustain in April 2019'.* AL also confirmed that he had not seen the claimant himself.

67. RK then informed the claimant, by letter dated 25 February 2020, that she had been unsuccessful in her application for injury allowance. RK stated that, in considering matters, the panel had taken into account the claimant's application (attached to which were the Datix form, occupational health reports and job description), the occupational health reports to date and the further guidance obtained from occupational health.

68. In a letter dated 4 March 2020, addressed to JB, the claimant appealed against the injury allowance decision. In her letter, the claimant also raised wider concerns about the respondent's response to the accident and the management of her absence, noting that she had had no welfare support since her absence commenced. She enclosed copies of the concerns she had raised with LS on 1 May 2019 and with RK on 22 January 2020, highlighting that no action had been taken in relation to these. She reiterated the concerns previously raised. She stated *'All of the above issues have again added to my anxiety, stress and are resulting in a deterioration in my mental health as well as showing a disregard from my employer for my welfare…I attended my first neurology consultant appointment on 12th March 2020…The neurologist was very concerned about the stress I am under at the moment as a direct result of this incident (i.e. on-going lack of support from my employer, being on half pay, being declined injury allowance payment, having to prepare an appeal for injury allowance payment, not being able to provide the same level of care for my*

partner that I was able to pre-injury and seeing a deterioration in their condition as a result of this) and that these factors may be hampering my recovery.' The letter extended to 13 typed pages plus 20 attachments.

69. The claimant received a letter from JB dated 18 March 2020 acknowledging receipt of her injury allowance appeal. The other issues raised were not mentioned at that time. There was no acknowledgment of the wider issues raised until 15 May 2020.

70. The claimant was certified as unfit to work for a further 8 weeks, as a result of neck and shoulder pain, on 13 March 2020. She informed NG of this by email. 24 March 2020 was the first day of 'lockdown' in Scotland, as a result of the Covid-19 pandemic.

71. In March 2020, the respondent adopted the NHS Scotland Workforce Attendance Policy (the **Attendance Policy**). This became the appliable absence management policy for all of the respondent's staff, in place of the Promoting Attendance at Work Policy. The Attendance Policy provided for a number of stages, including supportive contact, a documented meeting when absence continues beyond 29 calendar days, followed by a 3 stage formal procedure. The Attendance Policy contained links to standard letter templates for use by managers, as well as a flowchart for guidance. A detailed Guide for Managers, to support them in following the Attendance Policy, was also available.

72. Managers did not require to undertake any mandatory training on the new Attendance Policy, or the associated guidance and documentation. NG was entirely unaware that a new Attendance Policy had been introduced, so was unaware of its terms and did not undertake any training in relation to this. This remained the case throughout the period she was responsible for managing the claimant's absence. NG accordingly took no steps, under the Attendance Policy, to support the claimant or manage her absence.

73. On 11 April 2020 NG emailed the OHS physiotherapist to request copies of all information in relation to the claimant's accident, stating that the claimant *'has*

now engaged a firm of solicitors and NHS Lothian's litigation team are looking for all paperwork related to the incident.'

74. In April 2020, NG provided information to the NHS Lothian litigation team for the purpose of defending a personal injury claim which the claimant had brought against the respondent. The claimant obtained sight of this, in information provided in response to a subject access request, in July 2020. This stated that the claimant worked shorter days following the accident, which was not correct. The claimant also believed it did not properly reflect the information from the Datix form and her subsequent medical assessments.

75. The claimant attended for an assessment with a neurologist on 12 March 2020. They provided a report dated 14 April 2020, which the claimant provided to JB. The claimant asked for the content of the report to be taken into account in her injury allowance appeal. The report described the symptoms the claimant had experienced since the accident, namely *'persistent neck pain and shooting pains down her left arm. She also has new pins and needles in her left thumb. She sometimes has pain over the left side of her head. She's developed pain over the left jaw, which seems to be localised to the gums. This was fairly constant at onset and is now slightly improved. She has seen her dentist who hasn't identified any clear explanation for this. She's also struggling with a sensation in a lump of her throat at times.'* The neurologist stated *'I would hope that her symptoms will improve in the future but clearly being in a very stressful work situation may have an adverse impact on this.'*

76. By letter dated 26 May 2020, GW asked the claimant to contact her to arrange a meeting to discuss the concerns she raised in her letter dated 4 March 2020. The meeting was to be held in accordance with NHS Scotland's Workforce Policies Investigation Process.

77. Contrary to the respondent's Injury Allowance Procedure, which states, in relation to appeals, that *'should further Occupational Health advice be required this will be requested from an Occupational Health Physician not involved to date in the case.'* JB asked AL (the doctor who had provided advice in relation to the original application) to provide his opinion to the appeal panel also. Given

that injury allowance appeals were relatively rare, JB was not familiar with the terms of the Injury Allowance Procedure and thought it would be acceptable to do so, but did not check whether this was the case. In a letter dated 9 June 2020, AL advised JB of his conclusion that the claimant *'had a pre-existing condition to explain her symptoms and that the incident as recorded did not have a significant contribution to her symptoms.'* In reaching this conclusion AL again did not meet with the claimant or discuss matters with her GP. He did however, on this occasion, also have access to the report from her treating neurologist.

78. On 11 June 2020, the claimant attended a meeting with GW and EH to discuss the claimant's letter to JB dated 4 March 2020. In advance of this meeting, the claimant submitted a document entitled 'Lynne Buchan Statement and Timeline 5 June 2020' in order to assist the investigation team.

79. By letter dated 15 June 2020, JB advised the claimant that her injury allowance appeal had been unsuccessful. The claimant received the letter on 18 June 2020 and was devastated by the decision. The claimant was extremely concerned about the potential of her pay being reduced to nil, as she had, on that date, been absent for one year.

80. Later that day the claimant attended a further meeting with GW and EH, to discuss her grievances. She found it difficult to engage with the meeting, as she was so upset about the decision regarding her injury allowance appeal.

81. That evening, the claimant sent an email to JB pointing out the error in the process used for the injury allowance appeal and highlighting that a different occupational health doctor should have been used for advice at the appeal stage. She received no response to that email.

82. Given that the claimant had been absent for a year, and no final review meeting for long term absence had taken place, the claimant was entitled, under sections 14.9-14.12 of the Agenda for Change Terms and Conditions, to remain on half pay until the date of a final review meeting. The claimant was unaware of this and raised her concerns about moving to nil pay with EH on

18 June 2020. Rather than confirm to the claimant that she was entitled to have her half pay continued, EH indicated that she would extend the claimant's pay until the end of July 2020, and then arrange for her to take her accrued holiday entitlement.

83. In an email from EH to the claimant, dated 22 June 2020, she stated *'it is recognised you need support with your health and well-being with a view to supporting a return to work. On that basis [GW] has asked [CC] to support you with this and I have asked that [CC] makes contact with you this week.'* CC did not make contact with the claimant that week. The next contact the claimant received in relation to her absence was from DK in August 2020 (addressed below).

84. The claimant's partner was becoming increasingly concerned about the claimant's mental health during 2020. She felt that the impact of the accident, and the respondent was failing to support the claimant, was having a severe detrimental impact on the claimant, leading to the claimant socially isolating herself, remaining in bed most of the time, neglecting personal hygiene, crying a lot and lacking the ability to focus.

85. On/around 22 June 2020, the claimant consulted her GP and was prescribed antidepressants. In an email to EH on 25 June 2020 she stated *'I spoke to my doctor earlier this week and as I had a complete break down after last weeks letter and I have been put onto anti depressants to try and treat the breakdown in my mental health as a result of everything that has been going on for so long with no support from my employer.'*

86. In the same email, the claimant requested that she could attend a different health board for occupational health advice and support. It was subsequently agreed that the claimant would be referred to Salus Occupational Health Service (**Salus**) going forward and a referral was made to them on 13 July 2020.

87. By letter dated 13 July 2020, the claimant submitted a formal grievance to JB in relation to the error in the process used for the injury allowance appeal, given

that she had received no response to her email dated 18 June 2020. JB responded the same day, acknowledging and apologising for the error. JB appointed NC to re-run the appeal and seek independent OH advice, from an individual who should meet with the claimant. JB confirmed, in response to a further query from the claimant, that her half pay would continue during that process.

88. On 16 July 2020, a further meeting was held with the claimant, GW and EH, to discuss the claimant's grievances. The claimant confirmed she wished to proceed to formal investigation.

89. By email correspondence dated 21 July 2020, between GW and her line manager, GW suggested that responsibility for investigation of the claimant's grievance be handed to somebody else, indicating that while there had been two meetings with the claimant so far, the investigation had not yet commenced.

90. At the start of August 2020, NC determined that responsibility for managing the claimant's absence would be passed to DK. At the time, the claimant had been absent for over a year and there had only been one discussion under the respondent's policies with her, which was held by telephone. NG stated in her evidence that she found the claimant difficult to manage – stating that she found her to be 'defensive and prickly'. She stated that, on reflection, she had simply avoided contact with the claimant as a result. During the claimant's absence, NG did not seek advice from her managers, or the respondent's ER department, in relation to how to address the difficulties which she felt she had in managing the claimant generally. She accepted that she had no experience in managing long term absence cases, was not familiar with the relevant policies and did not refer to these when managing the claimant's absence. Despite this, she only sought advice from the respondent's ER department on one occasion, at the start of December 2019, in relation to how best to manage the claimant's absence, when they recommended that NG arrange a meeting with the claimant. She sought no further advice from the ER department, or her

managers, in relation to how best to manage the claimant's absence and provide support to her.

91. DK had no experience of managing long term absence cases. There was no handover from NG to DK, or indeed any discussion between the two about the claimant's absence. The claimant was advised that DK was now managing her absence and sent her medical certificates to DK thereafter.

92. The claimant was assessed by Salus on 5 August 2020. They produced a report on 11 August 2020, which was provided to DK. The report indicated that the claimant was unfit for work and there were no work modifications which would facilitate a return at that time. The report stated *'The current impact is pain which is constant in nature but variable in intensity and is exacerbated by movement and is preventing a return to work at this time. In my opinion this is having a negative impact on her psychological wellbeing. She is currently being supported and treated by her GP and with her agreement I can disclose that her treatment has recently been changed which is unfortunately causing adverse side effects.'* A further report from neurology, dated 6 August 2020, which was also provided to the respondent, confirmed that the claimant had been taking Citalopram, but this had recently changed to Duloxetine, both of which are anti-depressants. That report also noted that, at that stage, the claimant was *'continuing to struggle with tasks such as chopping food, computing and driving'.*

93. By email dated 3 September 2020, EH advised the claimant that responsibility for investigating the claimant's grievance investigation had passed from GW to KM. The claimant objected to KM being involved and, on 29 September 2020 GW informed the claimant that she had been reinstated as investigating officer and would be progressing the investigation with EH.

94. In September 2020, DK asked the claimant to attend a meeting under the respondent's Promoting Attendance at Work Policy (which was in fact no longer applicable). In email correspondence dated 17 September 2020, the claimant stated that she was nervous about the promoting attendance at work

meeting. DK stated in response *'Please don't feel nervous, this is a supportive meeting.'*

95. The formal absence management meeting took place on 24 September 2020. This was the first formal meeting the claimant had been asked to attend in relation to her absence. She had been absent from work for over 15 months at this stage. The claimant attended with her partner, for emotional support. DK, not having conducted a meeting of this nature before, prepared a script in advance, with input from the ER team, which she read from at the start of the meeting. That included statements that the claimant's absence was unsustainable, that she was at risk of dismissal on capability grounds and that the meeting was in relation to the claimant's absence, so she could not discuss any other workplace processes in the meeting, such as the Grievance or Injury Allowance Procedures. The claimant was shocked and overwhelmed at the possibility of dismissal being mentioned at the start of what she had understood would be a supportive meeting, and that limits were placed on what she could discuss at the meeting. She became upset as a result.

96. During the meeting the possibility of temporary alternative work in the department was discussed, for example admin work in the Eye Pavilion. The claimant indicated that she did not envisage being able to so do, but suggested the possibility of undertaking grading working from home in the future (the claimant was not fit enough to commence this at that time). It was agreed that further occupational health advice would be sought and these options could be considered further, once occupational health indicated that the claimant may be in a position to return, in some capacity.

97. Immediately after the meeting, the claimant sent an email to DK stating *'Sorry if I was a bit vague during our chat but I was thrown when you mentioned capability dismissal due not being able to sustain my level of absence. This is my first absence since being employed by NHS Lothian and as you are aware I am absent because of an accident at work that caused my injury. I have also had very little support from line manager so I was quite shocked that at my first absence meeting dismissal was referred to.'* She went on, in her email, to

indicate that she would like to explore the option of working from home, that she felt she would be able to manage her symptoms if she were able to do so.

98. DK responded on 1 October 2020, stating *'I'm happy to support in any way I can with any adjustments once you feel ready to return to work and also once OHS are happy with you returning. I understand that grading at home would mean you would be returning to your own job role and we can explore this option first and see if we can set this up for you from home.'*

99. DK referred the claimant to Salus via a referral document dated 30 September 2020. In that document she indicated *'we would be happy to support and make adjustments for [the claimant] returning to work and working from home if this was supported by OHS.'*

100. The claimant sent a further email to DK on 14 October 2020, raising a number of concerns and asking for clarification of the stage of the absence policy DK felt they were at. She highlighted that she had been being treated for depression since June 2020 and that *'my mental health is not as resilient as it used to be due to stress related to my work situation (i.e the ongoing investigations into the management of my absence and accident and the re-run of my injury allowance appeal due to non-adherence with the policy) and the impact on my lifestyle of coping with a disability due to an accident at work. My depression is not yet stabilised with medication still being titrated. The medication does have an impact on my levels of alertness and concentration e.g this email has taken me several hours to write.'*

101. DK did not respond to the claimant's email. The claimant sent a further email to DK on 23 October 2020, as she had not received a response. Again, she received no response to that email. She then called DK on 30 October 2020, at which point DK informed her that she was no longer managing the claimant's absence, CC was. She indicated that she had understood that the claimant had been informed of this, and apologised if that had not been done. The claimant sent an email later that day to DK stating *'Can you please confirm who will now be supporting my absence and who will be addressing the issues I raised to you via email on 14th October 2020 and 23rd October 2020? I*

confirm that I have had no contact from anybody regarding the new arrangements and I am very concerned about the lack of communication surrounding this. This breakdown in communication has left me in limbo and has led to a further deterioration in my mental health for which I spoke to my GP this morning.'

102. In October 2020, responsibility for managing the claimant's absence was moved to CC.

103. Salus prepared a report, dated 23 October 2020, following their consultation with the claimant on 8 October 2020. This was provided to the respondent. The report noted that the claimant's chronic pain was impacting her mood and management of that pain would likely result in an improvement of her mental health symptoms, which were being managed by an increased dose of medication. The report also stated *'taking into account the adjustments suggested in the referral letter, including the possibility of modifying duties for an alternative role, it is my opinion that consideration can be given to a return to reduced duties initially, for example carrying out grading duties at home, as her recovery progresses.'* They recommended obtaining a further report from the claimant's physiotherapist and stated they would provide an update on receipt of that report. They stated that they would *'then recommend further OH review in 6-8 weeks, if this is feasible, to reassess [the claimant] with the benefit of the information in the physiotherapy report.'* It was not clear from this whether the further OH review was to be in 6-8 weeks of that date, or the date of receipt of the physiotherapy report. It was however clear that the OH review should not take place before receipt of the physiotherapy report. CC read the report and noted that Salus intended to obtain a specialist report from a physiotherapist, and would provide further advice, including timescales for a return to work, after having received it

104. By email correspondence between the claimant and CC2, dated 4 to 10 November 2020, the claimant attempted to establish what stage of the Attendance Policy she had reached. She stated that the way her absence had been managed was causing her a high level of stress and was impacting on

her mental health and not knowing the stage she was at under the Attendance Policy was causing her further anxiety. CC2 responded, on 12 November 2020, confirming that *'as you have not been managed in accordance with the policy before now it would seem appropriate to start at the supportive contact stage within the policy"*

105. The claimant contacted CC on 5 November 2020. She guessed her email address, as she had not been provided with contact details for her. When CC confirmed that the claimant had the correct address, the claimant provided an update to her, in a relation to her recent medical appointments, which CC acknowledged. The claimant continued to provide updates to CC thereafter. On 27 November 2020 she indicated that her medication had been titrated again to see if that helped with her pain and mental health symptoms.

106. By the end of November 2020, the claimant was becoming increasingly frustrated. She had been absent for 17 months, with no meaningful management of her absence, her application for injury allowance, which she applied for in November 2019 had still not been determined and the concerns which she raised in January and March 2020 remained outstanding. She contacted Acas and they suggested she raise a further grievance, which she did by letter to EH dated 3 December 2020. The claimant did not discuss the possibility of making an Employment Tribunal claim with Acas and the time limits for doing so were not mentioned. The letter opened with the following statement *'I wish to formally evoke the grievance procedure in relation to the management my absence, lack of support from management and failure to follow the NHS Lothian Attendance policy from the start of my absence and up to the current date. This failure has caused a further deterioration and a breakdown in my mental health. I have raised the deterioration of my mental health with you and others previously and in relation to the ongoing investigation of my grievances into several management failures and breaches to policy as the combination of these have left me broken.*' The claimant's concerns were then detailed.

107. EH responded on 7 December 2020, suggesting that the points raised in the claimant's letter be considered in conjunction with the claimant's existing grievance.

108. On 15 January 2021 EH sent the claimant a copy of the grievance investigation report. The claimant met with GW and EH on 29 January 2021 to discuss the findings. The claimant was given a couple of weeks to consider the report and provide her response. She was informed that the next stage, if she disputed the findings, was for each of them to present their position to a stage 1 grievance panel. The claimant indicated that she would find this difficult. In recognition of this, it was agreed that GW and EH would, in the first instance, review the claimant's comments and consider whether it would be appropriate to revise their report in light of them. The claimant provided her comments on the grievance findings on 11 February 2021, by providing a 6 page cover document and also inserting her comments in the grievance findings.

109. The claimant attended an appointment with Dr Kalman, Occupational Health Physician at Forth Valley Royal Hospital regarding the re-run of her injury allowance appeal on 2 December 2020. The claimant provided him with extracts from her GP records, medical reports and photographs of the accident scene. A letter dated 18 December 2020, with Dr Kalman's report, was sent to NC. She received this on/around 5 January 2021. Dr Kalman concluded that an accident did take place, that the claimant was injured, and that her ongoing symptoms related directly to that accident. Dr Kalman recommended that the claimant be awarded injury allowance. Dr Kalman also noted in his report that *'the letters from NHS Lothian to the appellant indicate an acknowledgement that the appellant may not have had appropriate support during her period of absence and this is something that will need to be addressed. In parallel, the neurological assessments indicate the adverse impacts which stressful situations may have in relation to improvement in symptoms such as this.'*

110. The claimant did not see Dr Kalman's report until 29 January 2021, following an email she sent to OHS at Forth Valley chasing for this. NC had not informed her it had been received. The claimant asked NC, by email dated 29 January

2021, if she had received the report. NC responded to the claimant 3 weeks later, on 19 February 2021, indicating that she had received the report, it had been reviewed by the panel and her appeal had been successful. NC expressed her *'sincere apologies for the delay'* stating that she had been focusing on rolling out staff testing for Covid-19, so had not been in a position to undertake her 'day job'. (NC was leading this initiative for the respondent and, from Autumn 2020 to that point, she had been co-ordinating the roll out of lateral flow testing to the respondent's 18,000 patient facing staff). She indicated that she was trying to ascertain what the implications were for the claimant's pay, given that it had been agreed that the claimant's half pay be extended to allow for the appeal to be re-run. She indicated that she would write to the claimant formally to confirm the outcome and pay situation, once she had the information she required. The claimant responded indicating that the extension of half pay was due to the respondent's breach of process and should not be taken into account.

111. On 26 February 2021, the claimant wrote to CC stating as follows *'I feel quite distraught just trying to write this email. This sounds very melodramatic which is really not me! I have pretty much had enough. I'm quite an easy going, extremely honest, considerate person who goes the extra mile to make things happen particularly regarding anything that affects our patients. I'm finding it really hard to trust NHS Lothian at this time. I have asked for help so many times and we have just ended up with a mess that more and more people are being drawn into. Not a reflection on you as one of the poor people who has been drawn in. I have been told that my injury allowance appeal has been successful but this does not feel like a victory as my feeling is that it has been a very long and unnecessary battle that I should not have had to fight. I first applied for this in November 2019 and I still don't have any final confirmation of what is happening regarding this. I have also found that the HR professional involved has been sitting on this information since before Christmas without giving me any indication as to what was happening further adding to my stress. This gives me the feeling that I don't matter.'*

112. By letter dated 11 March 2021, the claimant was formally told that her injury allowance application had been successful. This entitled her to 85% of pay for 12 months from when she reduced to half pay (i.e. and additional 35% of pay for the period from December 2019-December 2020). She was informed that this would be paid to her as a lump sum, and that this would not be set off against the extension to her half pay, which was agreed for the duration of the re-run of the appeal process. She was also informed that her half pay would end that month, now that the re-run appeal had concluded.

113. On 22 April 2021 EH informed the claimant that the investigation team were intending to meet with further witnesses in week commencing 10 May 2021. This was in relation to the claimant's grievance and in response to the comments submitted by the claimant on 11 February 2021.

114. In an email of 30 April 2021, the claimant indicated to CC that she was *'not doing great at the moment'* and was *'finding it really difficult to keep on top of everyday things and no longer seem to have coping strategies to deal with much else'.* She indicated that her GP had titrated her medication again

115. On 24 February 2021, Salus advised the respondent that they had received the physiotherapy report they were waiting for, in respect of the claimant, and required to undertake a further telephone consultation with her. They provided confirmation of the cost of doing so and asked for confirmation that they could proceed. The email requesting authority to proceed was overlooked by the OHS Administrator and therefore no authority was given. The oversight was not identified until 28 April 2021, at which time authority was given. The claimant then attended a telephone appointment with Salus on 7 May 2021.

116. Following that appointment, Salus provided a further report, dated 14 May 2021, to the respondent. The report indicated that the claimant was unfit to work due to '*persisting symptoms of nerve pain in her left arm and mental health symptoms due in combination to chronic pain and unresolved organisational issues. Resolution of those stressors is likely to be important, in my opinion in terms of allowing [the claimant] to manage her mental health symptoms and participate in chronic pain physiotherapy management'*. In

relation to her mood, this was stated to be low *'with difficulties with additional symptoms of tiredness, reduction in concentration and memory, as well as difficulties with speech when tired.'* The report stated that there were no workplace modifications which would enable her to return at that time. It stated that the claimant was unlikely to be able to return in the next 3-6 months and the prognosis beyond that was uncertain. It stated that the claimant was likely to meet the criteria for Tier 2 ill health retirement.

117. A final version of the grievance investigation report was issued on 7 June 2021. The claimant was advised that the next stage of the grievance process, if she remained dissatisfied with the findings, would be for the claimant to present her grievance to a Stage 1 Panel. The claimant indicated, by letter dated 21 June 2021, that she wished to proceed to a grievance hearing. She asked, on 29 June 2021, whether the panel would be independent of the Eye Pavilion and was informed, on 30 June 2021, that it would be.

118. The claimant was informed, by letter dated 30 July 2021, that the Stage 1 grievance hearing would take place remotely, via Teams, on 17 August 2021, and would be chaired by the General Manager of the St John's Eye Pavilion. The claimant objected to the composition of the panel, as the chair was not independent of the Eye Pavilion. The hearing was cancelled to enable the respondent to source an independent chair. By email dated 10 August 2021, JB stated *'I am sorry that your initial request re an independent panel chair was not respected and this has caused a further delay, I appreciate that this is not of your making and something that could have been avoided.'*

119. By letter dated 1 August 2021, the claimant was invited to an Attendance Meeting with CC and CC2, to take place on 11 August 2021. The claimant had been absent for over two years at this point. This was the first formal meeting which CC had sought to arrange with the claimant since she took over managing her absence in October 2020. There had only been one formal meeting with the claimant in relation to her absence prior to this, namely on 24 September 2020.

120. The Attendance Meeting took place, by video, on 11 August 2021. The claimant was accompanied by her partner, for emotional support. At the meeting the claimant indicated that her current health was not great, stating that her physical health was similar, but her mental health was declining and work processes were impacting that. She agreed with the terms of the Salus report dated 14 May 2021. She stated that she remained unfit to undertake any work and it remained the case that there were no adjustments which would enable her to return to work in any capacity. Ill health retirement was discussed. The claimant confirmed that she had discussed this with Salus and understood that Salus felt she may qualify for Tier 2/lower tier benefits, but a decision in relation to any award could only be made by SPPA. The application process was explained. It was explained that the decision to terminate employment or not on grounds of capability is not linked to or subject to ill-health retirement, as stated in the Attendance Policy. The claimant was emotional during the meeting, as she was aware her employment was coming to an end, and broke down a few times. It was noted that the next stage would be a formal meeting, before a panel, at which the potential of termination of the claimant's employment would be considered. The claimant asked for the next meeting to be held soon, due to the stress caused by this and the other ongoing organisational issues. It was agreed that, to accommodate this request, the requirement for the next meeting to be held before a panel would be dispensed with. No notes/outcome letter were sent to the claimant in relation to the meeting on 11 August 2021. A further meeting was arranged for 25 August 2021, but the claimant was not sent a formal letter inviting her to this.

121. The claimant completed and signed her application for ill health retirement on 12 August 2021. This was provided to Salus, so they could collate supporting documentation and then submit the application to SPPA.

122. At the meeting on 25 August 2021 the claimant was again accompanied by her partner for emotional support. CC chaired the meeting and was supported by CC2. The claimant was informed at the meeting that CC had reached the decision that her employment should be terminated on grounds of capability, as she would be unable to achieve and maintain the expected standard of

attendance in her current role, or any other role, and that all reasonable adjustments had been considered. In reaching this decision, CC took into account the needs of the service and the work difficulties created by the claimant's absence, particularly the fact that colleagues were covering the claimant's duties and a permanent replacement could not be recruited while the claimant remained employed.

123. A letter was sent to the claimant dated 3 September 2021 confirming the termination of her employment. The letter confirmed that her last day of employment, following her notice period, would be 16 November 2021 and she would receive payment of her accrued but untaken annual leave. It stated that, whilst the respondent would support the claimant's application for ill health retirement, they had no influence over whether this would be awarded or not. The claimant was sent a copy of that letter by email on 3 September 2021. She thanked CC for sending this and raised a query about how her holiday pay would be paid, which CC agreed to look into.

124. At the time her employment terminated, the claimant's salary was £30,720.

125. A stage 1 grievance hearing took place on 23 and 30 September 2021. It was chaired by DH and took place by video. The claimant was accompanied by her partner. At the hearing EH indicated that the claimant's colleagues were aware of her injuries as a result of an email from the claimant. This was not correct, as the claimant's email to her colleagues following the accident did not reveal any details of the injuries she had sustained. There was also a discussion about the meeting in 2016, which the claimant required to attend with LS and NG. The claimant indicated that she had never met LS prior to the meeting. GW expressed surprise at that, indicating that LS was a well-established and well known Clinical Nurse Manager. At the end of the hearing, the claimant was informed that she would receive an outcome by 15 October 2021.

126. By letter dated 15 October 2021, Scottish Public Pensions Agency informed the claimant that she was not being granted ill health pension benefits.

127. On 18 and 28 October 2021, the claimant contacted DH's PA to advise she still did not have a response to her grievance. The claimant was informed, on 28 October 2021, that she would receive a response by the end of the following week i.e. 5 November 2021. On 5 November 2021, she was informed that she would receive the grievance response by 8 November 2021. The claimant received the outcome of her stage 1 grievance on that date. 9 out of 13 of the claimant's grounds for her grievance were upheld, including:

    a. The claimant's concerns about the management of her absence and her application for injury allowance;

    b. Failure to follow guidance in relation to adverse events and Datix regarding the claimant's accident; and

    c. NG inappropriately sharing the claimant's personal information.

128. On 9 December 2021, the SPPA confirmed that the decision not to grant her any ill health retirement pension benefits had been reviewed and she would be awarded Tier 2 ill health retirement benefits, meaning that they had determined that she would be permanently unfit to work as a Retinopathy Screener, but may be able to undertake some form of alternative employment in the future.

129. The claimant was offered a right of appeal against dismissal. Whilst she was late in exercising that right, NC confirmed, by email dated 27 October 2021, that the appeal would be allowed to proceed, due to the claimant's poor mental health at the time of her dismissal. The claimant set out her grounds of appeal in a letter dated 1 December 2021. She indicated in that letter that she was seeking clarity on a number of issues, including:

    a. Whether her employment required to be terminated in order to progress her application for ill health retirement;

    b. What reasonable adjustments were considered prior to dismissal and whether more could have been explored to enable her to remain in employment; and

c. Whether the panel felt she would have been dismissed if she had been properly supported from the commencement of her absence and/or appropriate procedures followed.

130. A dismissal appeal hearing took place on 13 December 2021. It was held by video. At the beginning of the hearing, and at various times during the hearing, the claimant told the appeal panel that she did not wish to be re-employed in her original post, or any other post with the respondent, as an outcome of the appeal. Rather, she indicated that she was looking for clarity on the matters set out in her letter of 1 December 2021. The claimant repeatedly confirmed at the dismissal appeal hearing that she was currently unfit to work in any capacity, and that this was likely to be the case for the foreseeable future. LB indicated that she felt that the claimant would be permanently unfit for work. In relation to the claimant's dismissal, she stated that the claimant *'recognises that although it was a devastating decision, it was the right decision.'*

131. The dismissal appeal outcome was sent to the claimant on 17 December 2021. It set out the panel's responses to each of the points the claimant was seeking clarity on, acknowledging the lack of support at the start of the claimant's absence in June 2019, stating this was *'unfortunate',* that it *'undoubtedly had a direct impact on [the claimant's] mental health'* and that *'the panel do not underestimate the impact the protracted process had on both [the claimant's] physical and mental health.'* Notwithstanding those findings, the panel felt it was difficult to predict whether the claimant would have been able to return, had there been appropriate early intervention during the claimant's absence. They concluded that the decision to dismiss was fair and proportionate, taking into account the position at the time the decision to dismiss was taken.

132. By email dated 27 January 2022, the claimant asked TM why there was no non-executive director present at her dismissal appeal hearing, as outlined the NHS Scotland Workforce Formal Hearing Guide, which was introduced in March 2020. By letter dated 22 February 2022, TM stated that *'standard practice in NHS Lothian is that only conduct dismissal appeals are held at Board level and all other appeals e.g. attendance, capability etc are held in line*

with the scheme of delegation'. The respondent's position is that the NHS Scotland Workforce Formal Hearing Guide contains an error in this respect and steps are being taken to correct this.

133. On 17 November 2021, the claimant appealed against the stage 1 grievance findings – both against the 4 grounds which were not upheld and, in relation to the 13 which were, on the basis that the findings *'failed to acknowledge the impact of all these issues on me, even though the results on my health, wellbeing and the breakdown in my mental health have been repeatedly confirmed by my occupational health service(s) and myself - in asking for support and help. I was left unsupported to sustain this impact over a prolonged period of time i.e. more than 2 years'.* FW was appointed as chair of the stage 2 grievance panel. The stage 2 grievance was conducted as a paper based review, in accordance with the respondent's policies, given that the claimant was no longer employed by the respondent.

134. FW confirmed the stage 2 grievance outcome by letter dated 8 April 2022. The conclusions reached were the same as those at stage 1, but a significant number of recommendations were made as to how the issues identified should be addressed. It was acknowledged that the time taken to conclude the grievance investigation was extremely lengthy, that this was not acceptable, and that 9 out of 13 heads of grievance being upheld demonstrated there were a range of issues which had not been managed or dealt with to the standards expected.

135. The claimant had raised in her stage 2 grievance that she now understood that, under sections 14.9-14.12 of the Agenda for Change Terms and Conditions, she had been entitled to half pay until the date of a final absence review meeting, so her pay should not have been reduced to nil with effect from 1 April 2021. FW confirmed in the stage 2 outcome letter that this was correct and a retrospective payment would be made to the claimant, covering the period from 1 April to 11 August 2021. By letter dated 19 April 2022, NC confirmed that that retrospective payment had been processed.

136. Early conciliation took place from 18 October to 22 November 2021.

137. The claimant took legal advice in December 2021 and was informed about time limits for making an Employment Tribunal claim at that point. She lodged her claim with the Employment Tribunal on 17 December 2021.

Submissions

138. The parties lodged written submissions, which were taken as read. The respondent's submission, extending to 23 pages, was provided to the claimant and the Tribunal at 14:46 on 25 February 2023, following the conclusion of the evidence. The claimant was given until 12 noon the next day to submit her written submission (which she indicated was her preference), before the Tribunal resumed at 13:00.

139. In her submission, which extended to 16 pages, the claimant provided her submission and then moved on to provide a response to the respondent's submission. She stated however that she did not feel she had sufficient time to fully digest the respondent's submission and provide a more considered response.

140. When the hearing resumed to discuss the parties' submissions, at 13:00 on 25 February 2023, the claimant was offered additional time, should she wish, to consider the respondent's submission and provide an updated submission in response. She indicated that she did not wish this and was content for the Tribunal to proceed on the basis of her written submission, which she did not orally supplement.

141. Mr James made a brief additional submission orally, responding to the points raised in the claimant's written submission.

Relevant Law

Disability Status

142. Section 6(1) EqA provides:

'A person (P) has a disability if —

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

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

143. Schedule 1 EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

'The effect of an impairment is long-term if-

(a) it has lasted at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.'

144. Paragraph 5 of the schedule states:

'5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –

(a) measures are being taken to treat or correct it; and
(b) but for that, it would be likely to have that effect…

145. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the **Guidance**) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

146. The Guidance at paragraphs A7 and A8 states *'It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa. It is not necessary to consider how an*

impairment is caused… What is important to consider is the effect of an impairment, not its cause.'

147. The Guidance at paragraph B1 deals with the meaning of '*substantial adverse effect'* and states *'The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.'*

148. Paragraphs B4 and B5 state that:

'An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.

For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.'

149. Paragraph B1 should be read in conjunction with Section D of the Guidance, which considers what is meant by *'normal day-to-day activities'*.

150. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

151. Paragraph D3 Provides that:

'In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.'

152. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

153. The Equality and Human Rights Commission: Code of Practice on Employment (2011), at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that '*There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.'*

154. At paragraph 16 it states '*Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).'*

155. In ***Goodwin v Patent Office*** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

    a. Does the person have a physical or mental impairment?
    b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
    c. Is that effect substantial?
    d. Is that effect long-term?

156. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

Discrimination arising from disability

157. Section 15 EqA states:

"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

158. Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it was highlighted that 'arising in consequence of' could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

159. There is no need for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).

160. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

'the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The

second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

161. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601). The Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant (***Land Registry v Houghton and others*** UKEAT/0149/14). There is, in this context, no 'margin of discretion' or 'band of reasonable responses' afforded to respondents (***Hardys & Hansons v Lax*** [2005] IRLR 726, CA).

Failure to make reasonable adjustments

162. Section 20 EqA states:

"Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A."

163. Section 20 EqA sets out three requirements, the first of which is relevant to this case. 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."*

164. Section 21 EqA provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

165. Schedule 8, Part 3, EqA states that the duty is not triggered if the employer did not know, or could not reasonably be expected to know, that the claimant had

a disability and that the provision, criteria or practice is likely to place the claimant at the identified substantial disadvantage.

166. *'The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions'* (The Equality and Human Rights Commission: Code of Practice on Employment (2011) (the **EHRC Code**), paragraph 6.10).

167. The Court of Appeal in ***Ishola v Transport for London*** [2020] IRLR 368 considered the term 'provision, criterion or practice', noting that it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. In context, all three words carried the connotation of a state of affairs indicating how similar cases were generally treated or how a similar case would be treated. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done.

168. A substantial disadvantage is one that is more than minor or trivial (paragraph 6.15 of the EHRC Code). The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's (paragraph 6.16 of the EHRC Code).

169. What is a reasonable step is to be considered objectively having regard to all the circumstances of the case. Paragraph 6.28 of the EHRC Code provides that *'The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take: whether taking any particular steps would be effective in preventing the substantial disadvantage; 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; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.'

Harassment

170. Section 26(1) EqA states:

'(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.'

171. Section 26(4) EqA states:

'(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.'

172. There are accordingly 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) which relates to a relevant protected characteristic and (iii) that has the proscribed purpose or effect.

173. The Equality and Human Rights Commission: Code of Practice on Employment (2011) explains, at paragraphs 7.9-7.11, that 'related to' has a broad meaning. It occurs where there is a connection with the protected

characteristic. Conduct does not have to be 'because of' the protected characteristic.

174. Not all unwanted conduct will be deemed to have the proscribed effect. In ***Richmond Pharmacology v Dhaliwal*** 2009 ICR 724, EAT, Mr Justice Underhill stated '*not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'*

175. Mr Justice Langstaff affirmed this view in ***Betsi Cadwaladr University Health Board v Hughes and ors*** EAT 0179/13, stating *'The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'*

176. An 'environment' means a state of affairs. A one-off incident may amount to harassment, if it is sufficiently serious to have a continuing effect (***Weeks v Newham College of Further Education*** EAT 0630/11).

Burden of proof

177. Section 136 EqA provides:

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

178. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, as explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of discrimination, harassment or victimisation by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

179. In ***Madarassy***, it was held that the burden of proof does not shift to the respondent simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal 'could conclude' that on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Jurisdiction – Time Bar

180. Section 123(1) of the Equality Act 2010 (**EqA**) states that complaints may not be brought after the end of:

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

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

181. Section 123(3) EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it. Section 123(4) EqA states that: *'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.'

182. The burden of proof is on the claimant to establish that it is just and equitable to extend time, as explained in ***Robertson v Bexley Community Centre*** [2003] IRLR 434, in which the Court of Appeal said, at para 25:

    "When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

183. In ***British Coal Corporation v Keeble*** [1997] IRLR 336 the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act 1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised, such as:

    (a) the length of and reasons for the delay;

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

    (c) the extent to which the party sued had cooperated with any requests for information;

    (d) the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action; and

(e) the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

184. In ***London Borough of Southwark v Afolabi*** [2003] IRLR 220 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640, the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA ('such other period as the Employment Tribunal thinks just and equitable') that Parliament chose to give Employment Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

Unfair Dismissal

185. S94 ERA provides that an employee has the right not to be unfairly dismissed.

186. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that that it is a potentially fair reason falling within s98(1) or (2) ERA.

187. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):

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

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

188. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law, as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

189. An employer is not precluded from dismissing an employee on the grounds of capability where it has caused or exacerbated the employee's ill-health, although it may be reasonable in the circumstances for it to have gone further in supporting the employee than it would otherwise be required to do (see ***McAdie v Royal Bank of Scotland*** [2007] IRLR 895, CA).

Discussion & Decision

Disability Status

190. The Tribunal considered each of the questions posed in ***Goodwin v Patent Office***, when considering whether the claimant was a disabled person as a result of a physical impairment and reached the following conclusions:

    a. **Did the claimant have a physical impairment?** From the date of the accident, the claimant experienced persistent neck pain and shooting pains down her left arm, as well as intermittent pain elsewhere on the left hand side of her body. As a result, she experienced restricted movement in her left arm and hand, and that her left leg sometimes gave way on her.

The Tribunal accepted that this amounted to a physical impairment, from the date of the accident.

b. **Was there a substantial, adverse effect on the claimant's ability to carry out day to day activities?** Whilst the claimant remained at work for 2 months following the accident, on the advice of the occupational health physiotherapist, she was in considerable pain throughout that period and found computer work and driving particularly difficult. She had restricted movement in her neck and left arm and struggled to hold things with her left hand, including the camera she used for work. She was certified as unfit to work in June 2019 as a result of shoulder pain. In December 2019 she explained that her condition meant she was only able to drive short distance, she completed everyday tasks more slowly than before and found showering challenging. The claimant's condition continued to impact her ability to carry out day to day activities thereafter, with the neurologist noting, in July 2020, that the claimant was '*continuing to struggle with tasks such as chopping food, computing and driving.'* The Tribunal concluded, as a result, that the claimant's physical impairment had an adverse effect on her ability to carry out normal day to day activities, from the date of the accident. The Tribunal also concluded that that effect was substantial, i.e. it was more than minor or trivial.

c. **Was that effect long term?** The Tribunal concluded that, by 12 March 2020, it was clear that the substantial adverse effects of the claimant's physical impairment were likely to last for 12 months. She had been experiencing them since the accident and she was certified as unfit to work for a further 8 week period, due to ongoing neck and shoulder pain, on that date. The effect was accordingly, by 12 March 2020, long term.

191. For these reasons the Tribunal concluded that the claimant was a disabled person, as a result of a physical impairment, from 12 March 2020. Given the information available to them, the Tribunal concluded that the respondent knew, or ought to have known, that the claimant had a disability from that date.

192. The Tribunal then considered the claimant's asserted mental impairment. The Tribunal did not accept that the fact the claimant had depression and anxiety from 1995 to 1999 meant that she had a mental impairment throughout the period she was employed by the respondent. The evidence was that the claimant's medical condition resolved in 1999 and she had no ongoing symptoms thereafter. There was no evidence to suggest that she was likely to experience anxiety and depression again in the future. Whilst she may have had a disability in the past, she did not assert that she was discriminated against due to a past disability.

193. The Tribunal considered the questions posed ***Goodwin v Patent Office***, when considering whether the claimant was a disabled person as a result of a mental impairment. In doing so, the Tribunal took into account the guidance given by the EAT in the case of ***J v DLA Piper UK LLP*** [2010] IRLR 936, namely that in some cases it will be appropriate to start by making findings about whether the claimant's ability to carry out normal day to day activities was adversely affected on a long-term basis, and to consider the question of impairment in light of those findings. The Tribunal accordingly started by considering whether the claimant's ability to carry out normal day-to-day activities was adversely affected and, if so, whether that adverse effect was substantial and long term.

    a. **Was there a substantial, adverse effect on the claimant's ability to carry out day to day activities?** The Tribunal was mindful that, in considering that question, any medical or other treatment should be discounted, and the impairment should be taken to have the effect it would have had without such treatment. The Tribunal accepted that the claimant's mental health deteriorated in 2020. The claimant's partner described that, in that period, there was an increasing detrimental impact on the claimant's mental health. The claimant was anxious socially isolated herself, remained in bed most of the time, neglected personal hygiene, was tearful and lacked the ability to focus. In June 2020, the claimant was prescribed anti-depressants, as a result of having a 'complete break down' in her mental health. From that point onwards, the OH and other medical reports in relation to the claimant noted that the

claimant's mental health/psychological wellbeing continued to deteriorate, notwithstanding that she continued to take antidepressants and, indeed that the dosage was increased on a number of occasions. By 14 May 2021, Salus noted that her mood was low, *'with difficulties with additional symptoms of tiredness, reduction in concentration and memory, as well as difficulties with speech when tired'*. Salus stated, at that point, that the claimant was unlikely to be able to return to work in the next 3-6 months. There was, accordingly an adverse effect on the claimant's ability to carry out normal day to day activities, from at least June 2020 onwards. Had the claimant not been taking anti-depressants from that date onwards, that effect would have been more significant. The Tribunal was satisfied that the adverse effects on the claimant's ability to carry out day to day activities in that period were substantial i.e. they were more than minor or trivial.

b. **Was that effect long term?** By 14 May 2021, the claimant had been suffering from these substantial adverse effects on her ability to carry out day to day activities since at least June 2020. Salus did not envisage any significant improvement in the foreseeable future. They were likely to continue until at least the following month, The substantial adverse effects on the claimant's ability to undertake day to day activities were accordingly, as at 14 May 2021, long-term.

c. **Did the claimant have a mental impairment?** In light of the findings in relation to the effect on the claimant's ability to carry out day to day activities, the Tribunal was satisfied that the claimant did have a mental impairment at that time.

194. For these reasons the Tribunal concluded that the claimant was a disabled person, as a result of a mental impairment, from 14 May 2021. Given the information available to them, the Tribunal concluded that the respondent knew, or ought to have known, that the claimant had a disability from this date.

Reasonable Adjustments

195. The duty to make reasonable adjustments arises when an employer knows, or ought to know, that the employee had a disability *and* that the provision, criteria or practice ("PCP") is likely to place the employee at the identified substantial disadvantage. The respondent did not dispute that they knew that the claimant was a disabled person in relation to both impairments relied upon and the Tribunal concluded that this concession was appropriately made.

196. In relation to complaints of failure to make reasonable adjustments, the onus is on the claimant to show that the duty arises, i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not disabled, and to identify some steps which could have alleviated that disadvantage. If the Tribunal is satisfied of this, the burden then shifts to the employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified and/or that it would not have been reasonable to make that adjustment.

197. In relation to the effectiveness of the adjustments proposed, the Tribunal was mindful that there does not require to be absolute certainty, or even a good prospect, of an adjustment removing a disadvantage. Rather, a conclusion that there would have been a chance of the disadvantage experienced by the claimant being alleviated or removed is sufficient.

198. The Tribunal considered these points in relation to each of the PCPs asserted.

199. **A requirement for regular attendance or alternatively the requirement to undertake the duties of her job.**

a. The Tribunal accepted that the respondent had such a PCP. This did not appear to be disputed by the respondent.

b. The Tribunal then considered whether the PCP put the claimant at a substantial disadvantage, in relation to a relevant matter, in comparison

with persons who were not disabled at any relevant time. The substantial disadvantage asserted by the claimant was that she was at risk of being, and was ultimately, dismissed. The Tribunal accepted the claimant's evidence that she was unable to attend work and undertake the duties of her job as a result of her physical and mental impairments. This was supported by the medical evidence which the Tribunal was referred to. She was at risk of being, and was ultimately, dismissed as a result of that absence. The Tribunal accordingly determined that the PCP put the claimant at a substantial disadvantage, in comparison to with people who were not disabled and were able to attend work and undertake the duties of their job, without absences.

c. The Tribunal concluded that the respondent knew that the PCP was likely to place the claimant at the identified substantial disadvantage.

d. The Tribunal then considered the adjustments proposed by the claimant to ascertain whether or not they could have alleviated the identified disadvantage and, if so, it would have been reasonable for the respondent to have taken those steps. The Tribunal's conclusions in relation to this are as follows:

i. **Wait longer/postpone the meeting on 25 August 2021 to obtain further medical advice.** The claimant asserted that the respondent ought to have waited longer, rather than deciding, on 25 August 2021, that she should be dismissed. The Tribunal concluded that this would not have alleviated the disadvantage. At that time there was no prospect of the claimant returning to work, which the claimant herself confirmed. She remained unfit to work in any capacity at the dismissal appeal hearing in December 2021 and had, at that point, been granted ill health retirement benefits. Waiting or postponing to obtain further medical advice would simply have delayed the decision, it would not have alleviated the disadvantage of dismissal, or the risk of this.

ii. **Resolve the stressors.** The claimant indicated a number of stressors which she felt the respondent ought to have resolved, including the claimant being on zero pay from April 2021, poor communication regarding the progress of organisational processes and the ongoing grievance process. Each of these were causing the claimant considerable stress, as she repeatedly highlighted to the respondent. The Tribunal concluded that there was a chance that the respondent taking actions to resolve these issues and to address the grievance sooner may have allowed the claimant to return to work. The claimant's neurologist stated in April 2020 that stressful work situations may adversely impact on the claimant's physical recovery. This was reiterated by Dr Kalman in December 2020 and, in the Salus report of 14 May 2021 it was stated that *'resolution of the stressors [i.e. the unresolved organisational issues] is likely to be important in terms of allowing [the claimant] to manage her mental health symptoms and participate in chronic pain physiotherapy management'*. Resolving the stressors at an earlier stage may therefore have enabled the claimant to have recovered both mentally and physically (an improvement in physical symptoms would also likely, in turn, to have improved her mental health in relation to those symptoms arising from the pain). Such an improvement may have allowed the claimant to return to work in some capacity. In light of those conclusions, the Tribunal found that the claimant had demonstrated sufficient to reverse the burden of proof. The Tribunal concluded that the respondent has not demonstrated that the disadvantage would not have been eliminated or alleviated by the adjustment identified. No such assertion has or could be made. It is uncertain. Similarly, the respondent has not demonstrated that it would not have been reasonable to make the adjustment proposed. It is clear that, in relation to pay, the claimant was in fact entitled to half pay, so it cannot be said that resolving that stressor was not a reasonable

adjustment. It cannot be asserted that it would not have been reasonable step to appropriately communication with the claimant in relation to progress of organisational processes, in accordance with the terms of those processes. The respondent failed to do so on several occasions. In relation to the grievance, issues were first raised on 22 January 2020, then a formal grievance was submitted on 4 March 2020. The grievance was not acknowledged until 15 May 2020. As at 21 July 2020 the investigation had not commenced and, in August 2021 when the decision was taken to terminate the claimant's employment, she still did not have the stage 1 outcome. Notwithstanding the challenges faced by the respondent as a result of Covid during this time, the Tribunal do not accept that the respondent has demonstrated that taking action to resolve this stressor sooner was not a reasonable step. A period of nearly 2 years from raising a grievance to a stage 1 outcome is entirely unreasonable, whatever the circumstances. Given these conclusions, the Tribunal found that the respondent failed in their duty to make reasonable adjustments.

iii. **Case review with OHS in August 2021, and/or explore, identify and discuss with the claimant alternatives to ill health retirement, such as home working or part time work at that stage.** The Tribunal concluded that this would not have alleviated the disadvantage. The claimant confirmed, in August 2021, that there was no prospect of her returning to work in any capacity in the foreseeable future and no adjustments could be made to enable her to do so, as stated in the Salus report dated 14 May 2021. She remained unfit to work in any capacity at the dismissal appeal hearing in December 2021 and had, at that point, been granted ill health retirement benefits. Considering other options at that time would not have alleviated the disadvantage of dismissal, or the risk of this.

200. **Delaying organisational processes beyond reasonable timescales**

a. While the claimant's assertion of this PCP contained further elements (namely 'and not communicating with the claimant regarding the progress of these processes or alternatively failure to protect claimant from work associated stress causing a detrimental impact on her health') she then focused solely on the first part in bold above, when setting out how she was placed at a substantial disadvantage etc. The Tribunal therefore similarly focused its deliberations.

b. The Tribunal accepted that the respondent delayed organisational processes beyond reasonable timescales and that this constituted a PCP. It was clear that, notwithstanding the fact that different people were involved, the timescales for almost every issue involving the claimant were beyond what would be deemed reasonable. Further, it was not suggested that the claimant's case was an anomaly. Rather, a number of the respondent's witnesses spoke of the pressures the covid pandemic placed on them and asserted that it would not have been possible to address matters more quickly as a result. These points lead to the conclusion that similar cases were, and would be, dealt with in the same way and that this constituted a PCP.

c. The Tribunal then considered whether the PCP put the claimant at a substantial disadvantage, in relation to a relevant matter, in comparison with persons who were not disabled at any relevant time. The substantial disadvantage asserted by the claimant was that the stress associated with the delays negatively impacted her physical disability and, latterly her and mental health disability and increased her risk of dismissal, whereas a non-disabled worker in similar circumstances would simply experience stress. The Tribunal accepted that this was the case and that the respondent knew or ought to have known that the stress was detrimentally impacting the claimant's physical and mental health. The claimant's neurologist stated in April 2020 that stressful work situations

may adversely impact on the claimant's physical recovery. This was reiterated by Dr Kalman in December 2020 and, in the Salus report of 14 May 2021, it was stated that *'resolution of the stressors [i.e. the unresolved organisational issues] is likely to be important in terms of allowing [the claimant] to manage her mental health symptoms and participate in chronic pain physiotherapy management'*. In addition the claimant repeatedly stated that the delays were adversely impacting her physical and mental health, for example in her grievance of 4 March 2020 (see paragraph 68 above), her email to EH on 25 June 2020 (see paragraph 85 above), her emails to DK on 14 & 30 October 2020 (see paragraphs 100 & 101 above), her email to CC2 dated 4 November 2020 (see paragraph104 above), her further grievance dated 3 December 2020 (see paragraph 106 above).

d. The Tribunal then considered the adjustment proposed by the claimant to ascertain whether or not it could have alleviated the identified disadvantage and, if so, it would have been reasonable for the respondent to have taken that step. The Tribunal's conclusions in relation to this are as follows:

i. **Deal with the concerns raise by the claimant more timeously.** This overlaps with the points made at paragraph 199.d.ii. above. For the reasons stated in that paragraph, the Tribunal concluded that there was a chance that the respondent taking actions to address the claimant's concerns sooner may have allowed the claimant to return to work and that the claimant has demonstrated sufficient to reverse the burden of proof. Also for the reasons stated in that paragraph, the Tribunal concluded that the respondent has not demonstrated that the disadvantage would not have been eliminated or alleviated by the adjustment identified or that it would not have been reasonable to make the adjustment proposed. The Tribunal concluded that it was practicable for this step to be taken, despite the ongoing pressures of the covid pandemic. It did not

involve any cost and would result in limited disruption to the respondent. It would therefore have been reasonable for the respondent to have taken this step. Given these conclusions, the Tribunal found that the respondent failed in their duty to make reasonable adjustments.

201. **The inconsistent application of attendance management policy, including Occupational Health Referral Policy.**

a. The Tribunal accepted that the respondent did not consistently apply the Attendance Policy and this constituted a PCP. The claimant was not managed in accordance with this and the evidence before the Tribunal was that there was no mandatory training on the Attendance Policy, which was introduced in March 2020. NG was entirely unaware it had been introduced and only sought guidance from the respondent's ER department on one occasion in the 14 months she had been responsible for managing the claimant's absence. These points lead to the conclusion that similar cases were, and would be, dealt with in an inconsistent manner and that this constituted a PCP.

b. The Tribunal then considered whether the PCP put the claimant at a substantial disadvantage, in relation to a relevant matter, in comparison with persons who were not disabled at any relevant time. The substantial disadvantage asserted by the claimant was that the stress associated with the inconsistent application of attendance management policy negatively impacted her physical disability and, latterly, her and mental health disability and increased her risk of dismissal, whereas a non-disabled worker in similar circumstances would simply experience stress. For the reasons stated in paragraph 200.c. above, the Tribunal accepted that this was the case. The Tribunal also found that that the respondent knew, or ought to have known, that the PCP was likely to cause the claimant stress – she repeatedly informed them of this – and that this

stress would detrimentally impact the claimant's physical and mental health (see again in paragraph 200.c. above).

c. The Tribunal then considered the adjustments proposed by the claimant to ascertain whether or not they could have alleviated the identified disadvantage and, if so, it would have been reasonable for the respondent to have taken those steps. The Tribunal's conclusions in relation to this are as follows:

i. **Make a referral to OHS to determine if the claimant's injuries and absence were due to a workplace accident in July 2019.** The claimant was not a disabled person in July 2019. The duty to make reasonable adjustments accordingly did not arise at that point.

ii. **Ascertain if the claimant was eligible for ill health retirement before dismissing her.** This step would not have alleviated any disadvantage suffered by the claimant as a result of the application of the PCP, namely the inconsistent application of the Attendance Policy. The decision taken by the respondent to proceed to dismiss the claimant notwithstanding the fact that her application for ill health retirement had not yet been determined was entirely consistent with the Attendance Policy, which states that *'the decision to terminate employment is not linked to or subject to ill-health retirement'*. This cannot therefore constitute a reasonable adjustment.

iii. **Explore alternatives to ill health retirement.** The Tribunal concluded that this would not have alleviated the disadvantage. At that time ill health retirement was being considered, there was no prospect of the claimant returning to work, which the claimant herself confirmed. She remained unfit to work in any capacity at the dismissal appeal hearing in December 2021 and had, at that point, been granted ill health retirement benefits. There were no

alternatives to ill health retirement, so exploring this would not have alleviated the disadvantage of dismissal, or the risk of this.

202. **Separation of linked issues to be dealt with by different management teams i.e. Attendance, Grievance, Accident, Injury Allowance and the claimant not being able to discuss with other management teams the cumulative impact these linked issues were having on the claimant's mental health and potential physical recovery.**

a. The Tribunal accepted that it was the respondent's practice to separate linked issues and have these dealt with by different management teams. JB accepted that this was the case in her evidence and that that practice had now changed, to ensure that one individual was actively overseeing linked issues.

b. The Tribunal then considered whether the PCP put the claimant at a substantial disadvantage, in relation to a relevant matter, in comparison with persons who were not disabled at any relevant time. The substantial disadvantage asserted by the claimant was that the stress associated with this negatively impacted her physical disability and, latterly, her and mental health disability and increased her risk of dismissal, whereas a non-disabled worker in similar circumstances would simply experience stress. For the reasons stated in paragraph 200.c. above, the Tribunal accepted that this was the case. The Tribunal also found that that the respondent knew, or ought to have known, that the PCP was likely to cause the claimant stress – she informed them of this – and that this stress would detrimentally impact the claimant's physical and mental health (see again in paragraph 200.c. above).

c. The Tribunal then considered the adjustment proposed by the claimant to ascertain whether or not it could have alleviated the identified disadvantage and, if so, it would have been reasonable for the

respondent to have taken that step. The Tribunal's conclusions in relation to this are as follows:

i. **Have a member of the respondent's management team overseeing all of the processes applicable to the claimant.** The Tribunal concluded that there was a chance that the respondent having one individual actively overseeing all of the processes in relation to the claimant would have alleviated the substantial disadvantage which she suffered. The claimant has demonstrated sufficient to reverse the burden of proof. The Tribunal concluded that the respondent has not demonstrated that the disadvantage would not have been eliminated or alleviated by the adjustment identified or that it would not have been reasonable to make the adjustment proposed. Such an arrangement was practicable, would have cost nothing and involved very limited disruption to the respondent's activities. It would therefore have been reasonable for the respondent to have taken this step. Given these conclusions, the Tribunal found that the respondent failed in their duty to make reasonable adjustments.

203. **Reducing pay to half then to zero.**

a. The Tribunal accepted that the respondent had a policy of reducing pay to half pay then zero pay. They do so when an employee is absent from work due to illness. This was not disputed by the respondent. The Tribunal concluded that this constituted a PCP.

b. The Tribunal then considered whether the PCP put the claimant at a substantial disadvantage, in relation to a relevant matter, in comparison with persons who were not disabled at any relevant time. The substantial disadvantage asserted by the claimant was that the stress associated with this negatively impacted her physical disability and, latterly her and mental health disability and increased her risk of dismissal, whereas a

non-disabled worker in similar circumstances would simply experience stress. For the reasons stated in paragraph 200.c. above, the Tribunal accepted that this was the case. The Tribunal also found that that the respondent knew, or ought to have known, that the PCP was likely to cause the claimant stress – she made it clear to them that she was very concerned about her pay reducing - and that this stress would detrimentally impact the claimant's physical and mental health (see again in paragraph 200.c. above).

c. The Tribunal then considered the adjustment proposed by the claimant to ascertain whether or not it could have alleviated the identified disadvantage and, if so, it would have been reasonable for the respondent to have taken that step. The Tribunal's conclusions in relation to this are as follows:

i. **Extend sick pay at full pay from December 2019.** The claimant was not a disabled person in July 2019. The duty to make reasonable adjustments accordingly did not arise at that point.

204. **Acting outwith policies e.g. Promoting Attendance at Work, injury allowance, injury allowance appeal, Attendance Policy, Grievance and most recently appeal against dismissal.**

a. While the Tribunal accepted that the respondent acted outwith a number of their policies on a number of occasions in their dealings with the claimant, the Tribunal did not conclude that the claimant has demonstrated that this constituted a PCP (other than in relation to delaying processes beyond reasonable timescales, which is already covered at paragraph 200 above and in relation to the failure to follow the Attendance Policy, which is already covered at paragraph 201 above). While the claimant has demonstrated that a number of policies were not adhered to on a number of occasions, by a number of different individuals, there was nothing to suggest this was how similar cases

were, or would be, treated. Rather, explanations were provided on each occasion, demonstrating that these were one-off acts in the course of dealing with the claimant. Taking into account the guidance given by the Court of Appeal in ***Ishola v Transport for London,*** the Tribunal concluded that the claimant had not demonstrated a provision, criterion or practice, as asserted.

b. Given that the claimant has not demonstrated a PCP, her complaint in relation this element of her claim does not succeed.

205. **Requirement to attend formal meetings/hearings in order to address issues raised e.g. Grievance, Stage 3 Attendance Hearing, appeal against dismissal.**

a. The Tribunal accepted that the respondent required attendance at formal meetings/hearings in order to address issues raised. This is provided for in their policies. This constituted a PCP.

b. The Tribunal then considered whether the PCP put the claimant at a substantial disadvantage, in relation to a relevant matter, in comparison with persons who were not disabled at any relevant time. The substantial disadvantage asserted by the claimant was that the stress associated with this negatively impacted her physical disability and, latterly her and mental health disability and increased her risk of dismissal, whereas a non-disabled worker in similar circumstances would simply experience stress. The Tribunal accepted that this was the case and that the respondent knew or ought to have known that the claimant would find attendance at formal hearings stressful (she had informed EH and GW of this – see paragraph 108 above) and, for the reasons set out in paragraph 200.c. above, knew that stress would detrimentally impact the claimant's physical and mental health.

c. The Tribunal then considered the adjustments proposed by the claimant to ascertain whether or not they could have alleviated the identified disadvantage and, if so, it would have been reasonable for the respondent to have taken those steps. The Tribunal's conclusions in relation to this are as follows:

i. **Change the process to something less intimidating, for example written submissions.** The Tribunal concluded that there was a chance that a less intimidating format for formal hearings may have alleviated the substantial disadvantage which she suffered. The claimant has demonstrated sufficient to reverse the burden of proof. The Tribunal concluded that the respondent has demonstrated that it would not have been reasonable to conduct matters solely in written format, as it was not practicable to properly and efficiently explore the issues in a written format. However there are other types of 'less intimidating' formats than an adversarial process, where management and the claimant require to present their cases, to consider a grievance or appeal. The respondent could have, for example, simply met with the claimant to discuss her grievance/appeal and then investigate this. Many employers adopt this procedure for considering grievances/appeals. Adjusting the process in this manner would have cost nothing and involved no disruption to the respondent's activities. It would have been reasonable for the respondent to have taken this step in relation to the grievance and appeal hearings. The Tribunal accordingly found that the respondent failed to comply with its duty to make reasonable adjustments in relation to this. For the avoidance of doubt, no such finding was made in relation to the Stage 3 Attendance Meeting, where appropriate adjustments were made to ensure the meeting was not held before a panel and was accordingly less intimidating for the claimant.

ii. **Seek advice from OHS to consider how the claimant could be supported through a formal hearing.** Despite numerous referrals, no occupational health advice was sought on how best to support the claimant in relation to formal hearings and whether any adjustments were required to assist her in that process. The Tribunal concluded that there was a chance that the respondent asking OHS to consider how the claimant could be supported through a formal hearing may have alleviated the substantial disadvantage which she suffered. The claimant has demonstrated sufficient to reverse the burden of proof. The Tribunal concluded that the respondent has not demonstrated that the disadvantage would not have been eliminated or alleviated by the adjustment identified or that it would not have been reasonable to make the adjustment proposed. Doing so was practicable, would have cost nothing and involved no disruption to the respondent's activities. It would therefore have been reasonable for the respondent to have taken this step. The Tribunal accordingly found that the respondent failed to comply with its duty to make reasonable adjustments in relation to this.

Time Limits

206. Having concluded that the respondent failed in its duty to make reasonable adjustments, the Tribunal then considered the respondents assertion that those complaints are time-barred. The Tribunal concluded that the acts were distinct acts, rather than a continuing course of conduct – they involved different people, processes and time periods.

207. In ***Kingston upon Hull City Council v Matuszowicz*** [2009] IRLR 288, the Court of Appeal noted that failure to make reasonable adjustments is an omission, not an act. They stated that, in claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission either when an inconsistent act is

undertaken, failing which it requires consideration of when, if the employer had been acting reasonably, it would have made the reasonable adjustments.

208. The Tribunal considered when time started to run in relation to each of the occasions which the Tribunal concluded that the respondent failed to make reasonable adjustments and reached the following conclusions.

a. **Resolving the stressors/deal with the concerns raised by the claimant more timeously** (paragraph 199.d.ii. and 200.d.i). The claimant raised grievances on 4 March and 3 December 2020, highlighting her concerns and the impact on her. The failure to resolve these issues was not a deliberate failure to comply with the duty to make reasonable adjustments and there was no inconsistent act. The Tribunal accordingly require to consider when, if the respondent had been acting reasonably, it would have taken action to address the grievance and thereby resolve the stressors. The Tribunal concluded that a period of three months was a reasonable period to do so. Time accordingly started running from 3 June 2020 and 2 March 2021 in respect of these aspects. In relation to the separate stressor re pay, time in respect of this ran from the date the claimant's pay reduced to zero, namely from 1 April 2021.

b. **Have a member of the respondent's management team overseeing all of the processes applicable to the claimant** (paragraph 202.c.i.). The Tribunal concluded that the failure to take this step was not a deliberate failure to comply with the duty to make reasonable adjustments and the respondent should be taken to have decided not to do so on 24 September 2020. That is the date on which DK informed the claimant, having taken advice from the ER Department that she could not raise other workplace issues and constituted an inconsistent act. Time accordingly started to run from that point.

c. **Changes processes to something less intimidating** (paragraph 205.c.i.). This relates to the procedure for the grievance and appeal hearings and deliberate decisions in relation to those hearings. Time starts to run from the date of the meetings, namely 30 September and 13 December 2021.

d. **Seek advice from OHS re how to support the claimant through a formal hearing (paragraph 205.c.ii).** The Tribunal concluded that the failure to take this step occurred on 7 May 2021. That is the last date the claimant attended Salus, at which point formal hearings were envisaged but no advice sought in relation to how the claimant may be supported in relation to these. Time accordingly started to run from that point.

209. The claimant initiated early conciliation on 18 October 2021. This proceeded until 22 November 2021 and the ET1 was lodged on 17 December 2021. All of the complaints, other than in relation to the grievance and appeal hearings (paragraph 208.c.) are raised outside the requisite times limits.

210. The Tribunal has a wide discretion to allow claims to proceed, notwithstanding the fact that they are not submitted within 3 months of the date of the act to which the complaint relates, where the Tribunal is satisfied that they are submitted within *'such other period as the employment tribunal thinks just and equitable'* (s123(1)(b) EqA). The Tribunal noted that the claimant's mental health was declining during this period and that the claimant raised formal grievances in March and December 2020 in relation to the respondent's actions and was awaiting the response to those. Whilst she contacted Acas in November/December 2020, they did not discuss the possibility of raising Employment Tribunal proceedings at that stage, or explain the time limits for doing so. She only became aware of the requisite time limits in December 2021 and lodged her claim on 17 December 2021. The Tribunal considered these factors and the prejudice each party would suffer as a result of allowing or refusing an extension of time. The Tribunal noted that the claimant would be denied a right of recourse and that the respondent was able to respond to each of the allegations levelled against them, notwithstanding the fact that they were raised outwith the requisite time period. Taking into account the prejudice which each party would suffer as a result of refusing an extension of time, and having regard to all the circumstances, the Tribunal was satisfied that it was appropriate

Harassment

211. The Tribunal considered each allegation of harassment, considering whether there was unwanted conduct, whether it related to disability and, if so, whether the conduct had the proscribed purpose or effect. There is no requirement to identify an actual or hypothetical comparator in complaints of harassment, but the burden is initially on the claimant show evidence from which the Tribunal could reasonably conclude that the unwanted conduct complained of was 'related to' disability and it had the proscribed purpose or effect. A prima facie case in respect of all three aspects must be demonstrated to shift the burden of proof to the respondent. The mere fact that unwanted conduct occurs at a time when a claimant satisfies the definition of a disabled person will not necessarily mean that it is related to disability. Something more will be required to demonstrate this.

212. The Tribunal reached the following findings in relation to each alleged act of harassment.

a. **NG made repeated inappropriate disclosures of claimant's private medical/personal information 29 April 2019, 9 May 2019, 11 April 2020.** It was not disputed by the respondent that NG spoke to the claimant about a referral to OHS in an open plan office on 29 April 2019, that NG informed the OHS physiotherapist that the claimant was a carer and rode a motorbike during a call on 9 May 2019 and that she disclosed that the claimant had engaged solicitors on 11 April 2020. The Tribunal accepted that that conduct was unwanted. No evidence was led however to suggest that NG doing so could be related to the claimant being a disabled person. Indeed, as the Tribunal have found, the claimant did not meet the tests set down in s6 EqA until March 2020. The first two instances relied upon must therefore, necessarily, fail. In relation to the third instance, no evidence was led to suggest that NG's conduct, in stating that the claimant had engaged solicitors, was related to disability. The claimant has accordingly not discharged the burden on her to provide

evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

b. **NG incorrectly stating to the claimant that her (the claimant's) health issues were "due to her being a carer" on 29 April 2019.** The Tribunal found that NG did state that the claimant's pre-existing back problems were probably due to her lifestyle, as she is a carer. The Tribunal accepted that this was unwanted conduct and that it was, self-evidently, related to the fact that the claimant's partner was a disabled person. The Tribunal found however that it did not have the proscribed purpose. There was no evidence to suggest this. The Tribunal also found it did not have the proscribed effect. While the claimant was upset by NG's assumption, she could easily have corrected her. Taking into account all the circumstances, a statement of this nature does not meet the high test of 'violating' dignity, nor does this single statement meet the threshold of creating an intimidating etc. environment. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

c. **NG provided inaccurate information about the claimant to RK on 3 December 2019 in relation to the claimant's injury allowance application.** NG stated in the reason for the claimant's absence was *'shoulder pain and numbness in hand'*. Whilst the medical certificates issued by the claimant's GP stated that her absence was due to shoulder and neck pain, the claimant had stated in the Datix form, completed in April 2019, that she was experiencing numbness. This was then mentioned in three subsequent referrals to OHS prior to the completion of the injury allowance application, without objection from the claimant. The Tribunal accordingly find that NG did not provide inaccurate information. Whilst the claimant was certified as being absent due to shoulder and neck pain, she also experienced numbness in her hand. Even if the Tribunal had not reached this conclusion however, the Tribunal have found the claimant did not satisfy the definition of a disabled

person until March 2020. The complaint would necessarily fall on that basis, as it cannot be said to be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed.

d. **RK chose to accept this information as fact despite the claimant providing evidence that proved otherwise.** The Tribunal did not accept that this conduct was established. As set out in paragraph 67 above, the panel considered all of the evidence presented to them, when reaching their decision. Again however, even if the Tribunal had not reached this conclusion, the Tribunal have found the claimant did not satisfy the definition of a disabled person until March 2020. The complaint would necessarily fall on that basis, as the decision in relation to the claimant's injury allowance was taken in February 2020, so cannot be said to be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed.

e. **NG also provided inaccurate information to the NHS Lothian litigation team on an unknown date around April 2020.** As set out in paragraph 74 above, the claimant asserted there were minor inaccuracies in the account which NG provided. Even if is accepted that there were inaccuracies, and this amounted to unwanted conduct, no evidence was led to suggest that NG doing so could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. Even if the Tribunal had not reached this conclusion, it would have held that NG's statement to the litigation team, and any minor inaccuracies within this, did not meet the high test of 'violating' dignity, nor does this single statement meet the threshold of creating an intimidating etc. environment. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

f. **NG chose not to follow the attendance policy in relation to the claimant's sickness absence and chose not to follow the correct**

procedure in relation to Adverse Events including not reporting the claimant's accident to HSE. The claimant was not a disabled person when NG responded to her Datix form in April/May 2019. Failing to follow the Adverse Events procedure, including not reporting the claimant's accident to HSE, cannot therefore be said to be conduct related to disability. This element of this complaint accordingly falls on that basis. In the period from March to August 2020, NG was however managing the claimant's absence at a time when she was a disabled person. The Tribunal found that NG did not follow the Attendance Policy in that period in relation to the claimant's sickness absence (see paragraph 72). This conduct was accordingly established, and the Tribunal accepted that it was unwanted. There was no evidence however to suggest that NG's conduct could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If the burden had transferred to the respondent, the Tribunal would have found that this conduct was as a result of NG avoiding contact with the claimant, as she found her difficult to manage (see paragraph 90) and was entirely unaware that of the Attendance Policy and its terms (see paragraph 72). It was entirely unrelated to disability. The complaint under s26 EqA in relation to this accordingly does not succeed.

g. **JB and AJ chose not to follow injury allowance appeal procedure by taking medical advice from the same doctor who provided advice to the injury allowance panel.** The respondent did not dispute that they failed to follow the injury allowance appeal. JB accepted responsibility for this when giving evidence and apologised again to the claimant for her error. The asserted conduct was accordingly established, and the Tribunal accepted that it was unwanted. There was no evidence however to suggest that JB's conduct could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If

the burden had transferred to the respondent, the Tribunal would have found that JB's conduct was as a result of her being unfamiliar with, and not checking, the Injury Allowance Procedure, which she very much regrets. It was entirely unrelated to disability. The complaint under s26 EqA in relation to this accordingly does not succeed.

h. **AL provided inaccurate medical advice in relation to the claimant on 6 February 2020 then again on 9 June 2020 without considering all the available medical information.** The Tribunal did not accept that AL provided inaccurate medical advice in relation to the claimant. AL provided his clinical opinion, based on the information before him. It cannot be said that that amounts to 'inaccurate medical advice' simply because another medical professional reached a different conclusion. To that extent, the conduct asserted was not established. It could however be said that he did not consider *all* the available medical information, as he could have requested additional information, for example from the claimant and her GP. To that extent therefore, the conduct asserted was established and the Tribunal accepted this was unwanted. There was no evidence however to suggest that AL's conduct, in not requesting all available medical information, could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If the burden had transferred to the respondent, the Tribunal would have found that AL did not request additional information as he did not feel it was necessary to do so: he discussed matters with the OHS physiotherapist who had met with the claimant on a number of occasions and did not feel that a discussion with the claimant or her GP would add to that. Whether that is correct or not, that was why he did not consider all available medial information. That was entirely unrelated to disability. The complaint under s26 EqA in relation to this accordingly does not succeed.

i. **DK chose not to follow the Attendance Policy on 24 September 2020. DK formally invited the claimant to an Attendance Meeting where the claimant was told (at the start of the meeting) that her partner could not take part in the meeting, that she could not discuss any of the other relevant organisational processes, even though they were impacting on the claimant's health, and told the claimant that she could be dismissed.** The Tribunal did not accept that the DK failed to follow the Attendance Policy. That conduct was not established. Whilst the remaining conduct was established, and was unwanted by the claimant, it was, strictly, in accordance with the Attendance Policy. Whilst that does not preclude it also being related to disability, no evidence was led to suggest that DK's conduct could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. Even if the Tribunal had not reached this conclusion, the Tribunal would have held that DK's remarks, did not meet the high test of 'violating' the claimant's dignity, or the threshold of creating an intimidating etc. environment for her, nor was it reasonable for the conduct to have that effect in all the circumstances, given that DK was acting in accordance with the Attendance Policy and did not intend any offense, which ought to have been clear to the claimant. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

j. **DK then ignored reasonable queries raised by the claimant on 14 October 2020.** DK did ignore the claimant's email of 14 October 2020. The asserted conduct was accordingly established. The Tribunal accept it was unwanted. There was no evidence however to suggest that DK's conduct could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If the burden had transferred to the respondent, the Tribunal would have found that DK did not respond to the claimant's email as she was no longer managing

the claimant's absence and understood someone else would be responding to the claimant's email. This was entirely unrelated to disability. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

k. **NC unreasonably delayed the outcome of the claimant's re-run of her Injury Allowance Appeal which commenced in August 2020 and was eventually upheld on 11 March 2021 after obtaining independent medical advice from an OHS Consultant in NHS Forth Valley.** The outcome of the re-run of the claimant's injury allowance appeal was delayed. NC received the advice from the OHS Consultant in NHS Forth Valley on/around 5 January 2021, she informally confirmed the outcome to the claimant on 19 February 2021, with formal confirmation being given on 11 March 2021. The asserted conduct was accordingly established. The Tribunal accept it was unwanted. There was no evidence however to suggest that NC's conduct could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If the burden had transferred to the respondent, the Tribunal would have found that the reason the delay from 5 January to 11 March 2021 was due to NC's responsibilities in rolling out arrangements for staff testing, and clarifying what should happen in relation to the extended half pay the claimant had received. It was entirely unrelated to disability. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

l. **Following conclusion of the claimant's re-appeal for injury allowance, NC stopped the claimant's extended half pay at the end of March 2021 creating financial hardship.** NC did stop the claimant's pay at the end of March 2021. This conduct was accordingly established and the Tribunal accepted it was unwanted. The respondent subsequently acknowledged the claimant was entitled to half pay for the period from 1 April to 11 August 2021 and paid this sum to her. There

was no evidence however to suggest that NC's conduct could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If the burden had transferred to the respondent, the Tribunal would have found that the reason NC did so was due to lack of knowledge on NC's part about this particular provision and was entirely unrelated to disability. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

m. **CC delayed re-referring the claimant to OHS contrary to their recommendations and failed to undertake a review prior to the claimant's sick pay being reduced to zero in March 2021.** Salus received the claimant's physiotherapy report on 24 February 2021. There was a delay in the claimant being re-referred to Salus following that and no review was undertaken, as CC was awaiting the Salus report. The conduct asserted was accordingly established and the Tribunal accepted it was unwanted. There was no evidence however to suggest that the delay or lack of a review could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If the burden had transferred to the respondent, the Tribunal would have found that the reason for the delay was that the OHS Administrator overlooked the email from Salus requesting authority to proceed with the consultation with the claimant, and the review was not undertaken as CC was awaiting the (delayed) report from Salus. This was entirely unrelated to disability. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

n. **CC also unreasonably delayed a meeting with the claimant following receipt of an OHS report from 14 May 2021.** There was a delay following receipt of the Salus report dated 14 May 2021. A meeting did not take place until 11 August 2021. The conduct asserted was

accordingly established and the Tribunal accepted it was unwanted. There was no evidence however to suggest that the delay could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If the burden had transferred to the respondent, the Tribunal would have found that the reason for the delay was that the OHS Administrator overlooked the email from Salus requesting authority to proceed with the consultation with the claimant, and the review was not undertaken as CC was awaiting the (delayed) report from Salus. This was entirely unrelated to disability. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

o. **CC dismissed the claimant on 25 August 2021.** The claimant was dismissed. The asserted conduct was accordingly established. It was clearly related to disability. The Tribunal held however that this was not unwanted conduct. At the time of the dismissal meeting the claimant had already applied for ill health retirement and understood this was supported by occupational health. She agreed with the terms of the occupational health report which stated that there were no adjustments which could be undertaken to enable her to return to work, that she would be unlikely to be able to return in the next 3-6 months and the prognosis beyond that was uncertain. She accepted that it remained the case that she was unable to return to work in any capacity and there were no adjustments which could be made to enable her to return to work. She knew, going into the meeting that her employment would be terminated. She raised no concerns about this in emails with CC immediately following the meeting and only appealed against the decision when she was initially informed that SPPA had refused her application. She stated in her grounds of appeal, dated 1 December 2021, that she was simply seeking clarity in relation to a number of issues. By the time of her dismissal appeal hearing, the SPPA's decision had been reversed and the claimant indicated, at the dismissal appeal hearing, that she was not

seeking reinstatement or reengagement, that she was unfit for work and this would remain the case for the foreseeable future. For these reasons, the Tribunal also found that the conduct did not have the proscribed purpose or effect. The complaint under s26 EqA in relation to this accordingly does not succeed.

p. **GW unreasonably delayed outcome of grievance investigation (which is against Acas code) until January 2021 and the subsequent review of the investigation until 7 June 2021 and failed to communicate with claimant regarding progress of this investigation including delays.** The Tribunal accepted that there was a delay in investigating the claimant's grievances, which were initially raised on 22 January 2020, and that GW failed to communicate with the claimant in relation to this. The conduct asserted was accordingly established and the Tribunal accepted it was unwanted. There was no evidence however to suggest that the delay could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

q. **GW provided evidence at a Stage 1 Grievance hearing on 23 September 2021 and 29 September 2021 which had not been fact checked and was subsequently found to be inaccurate.** The claimant asserted that GW provided evidence at the grievance hearing that the claimant had shared information regarding her injuries with colleagues in April 2019. The Tribunal found GW did not do so, but EH did. The information was inaccurate. The Tribunal accepted that the conduct was established, albeit that the identity of the person making the statement was incorrect. The Tribunal accepted that it was unwanted. There was no evidence however to suggest that EH stating this could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal

could reasonably conclude that disability played any part in the treatment complained of. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

r. **At the same hearing GW expressed her disbelief that the claimant had never met LS.** GW expressed surprise that at the claimant's assertion that she had not met LS before the meeting in 2016. The conduct asserted was accordingly established. The Tribunal accepted that conduct was unwanted. There was no evidence however to suggest that GW stating this could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

s. **DH did not respond to claimant within agreed extended deadlines the outcome of her Stage 1 Grievance Hearing (18 October 2021) and failed to communicate with the claimant regarding this delay.** The claimant was informed that she would receive the grievance outcome by 15 October 2021. It was not received until 8 November 2021. DH did not communicate with the claimant in relation to the delay in issuing the outcome. The conduct asserted was accordingly established. The Tribunal accepted that conduct was unwanted. There was no evidence however to suggest that the delay or DH's failure to communicate this to the claimant could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

t. **TM chose to act outwith policy by not having a non-executive director on the panel at appeal against dismissal hearing on 13**

December 2021. The NHS Scotland Workforce Formal Hearing Guide stated that there should be a non-executive director on appeal panels. There was no non-executive director on the panel for the claimant's dismissal appeal hearing in December 2021**.** The conduct asserted was accordingly established. The Tribunal accepted that conduct was unwanted. There was no evidence however to suggest that the absence of a non-executive director could be related to the claimant being a disabled person. The claimant has not therefore discharged the burden on her to provide evidence from which the Tribunal could reasonably conclude that disability played any part in the treatment complained of. If the burden had transferred to the respondent, the Tribunal would have found that the reason a non-executive director was not on the panel was that the NHS Scotland Workforce Formal Hearing Guide, contained an error when it stated there should be a non-executive director present for all appeals. This is only done for conduct dismissal appeals. The error in that Guide is now being corrected. This was entirely unrelated to disability. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

Discrimination Arising from Disability

213. In relation to the complaint of discrimination arising from disability, the Tribunal started by referring to section 15 EqA.

214. The respondent accepted that the claimant was dismissed as a result of her absence from work, which arose in consequence of her disability. The only question for the Tribunal to determine was therefore whether the unfavourable treatment complained of was a proportionate means of achieving a legitimate aim, for the purposes of section 15(1)(b) EqA.

215. The legitimate aim relied upon was managing sickness absence. The Tribunal accepted that the respondent genuinely had that aim and that it was legitimate

216. The Tribunal then considered whether dismissing the claimant was a proportionate means of achieving that aim. In order to be proportionate the

measure has to be both an appropriate means of achieving the legitimate aim and also reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601). The Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant (***Land Registry v Houghton and others*** UKEAT/0149/14). There is, in this context, no 'margin of discretion' or 'band of reasonable responses' afforded to respondents (***Hardys & Hansons v Lax*** [2005] IRLR 726, CA).

217. The respondent's position was that they required to dismiss the claimant as she had been absent for over two years, remained unfit to work and there were no adjustments which would enable her to return to work, in any capacity, in the foreseeable future. The claimant's absences created workplace difficulties, as colleagues required to cover her work. The claimant required to be dismissed, so a permanent replacement could be sourced.

218. The Tribunal balanced the respondent's assertions against the effect on the claimant of dismissal, which was significant. The Tribunal concluded that the claimant's dismissal at that time was an appropriate means of achieving the legitimate aim and also reasonably necessary in order to do so. There were no other, less discriminatory alternatives to dismissal in the circumstances. At the time of her dismissal there were no reasonable adjustments which could be made to enable her to return to work in some capacity. The claimant had been absent for over two years at that point, with others covering her duties. It was not proportionate to wait any longer before taking the decision to dismiss, enabling a permanent replacement to be sourced.

219. For these reasons the claimant's complaint under s15 EqA does not succeed and is dismissed.

Unfair Dismissal

220. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(1) or (2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal

had to consider whether the respondent had established a potentially fair reason for dismissal.

221. The respondent asserted that the reason for dismissal was capability. The Tribunal accepted this was the case and that the respondent had accordingly demonstrated a potentially fair reason under s98(2) ERA.

222. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

223. The Tribunal's role in assessing whether the claimant was fairly dismissed as a result of capability was not to assess whether the respondent acted reasonably towards the claimant, whether the claimant was treated unfairly during her employment or whether the respondent's actions in fact caused or contributed to the claimant's absence. The question a Tribunal must decide in cases of unfair dismissal is the narrow question under s98(4) ERA of whether the employer acted reasonably in treating the reason shown as a sufficient reason for dismissing the employee.

224. Regardless of the cause of the absence (***McAdie v Royal Bank of Scotland***), the claimant had been absent from work for over two years at the time the

decision was taken to terminate her employment. There was no prospect of her returning to work in any capacity in the foreseeable future and no adjustments which could be made to enable her to do so. The respondent required to terminate the claimant's employment before recruiting a replacement for her. They could not, reasonably, be expected to wait any longer to do so.

225. The Tribunal found that the respondent adopted a fair procedure by obtaining occupational health advice in relation to the claimant's medical condition and prognosis, consulting with the claimant in relation to that advice and the possibility of dismissal and considering alternatives, albeit that there were no viable alternatives. Whilst there was a delay between obtaining occupational health advice in May 2021 and consulting with the claimant about that advice, given that the claimant indicated there had been no improvement in her medical condition (if anything her condition had deteriorated further), there was no requirement to obtain further medical advice before reaching a conclusion on whether the claimant's employment should be terminated.

226. The Tribunal considered the claimant's assertion that she had not received a formal letter inviting her to the dismissal meeting and advising that she could be dismissed at that meeting. Whilst the Tribunal found that this ought to have been done, it did not consider that the failure to provide this undermined the fairness of the dismissal. In ***Sharkey v Lloyds Bank plc*** *EATS 0005/15* Mr Justice Langstaff, then President of the EAT, observed that it will almost inevitably be the case that in any alleged unfair dismissal a claimant will be able to identify a flaw, small or large, in the employer's process, and that it is therefore for the Tribunal to evaluate whether that defect is so significant as to amount to unfairness. He stated: *'Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.'* It is important for Tribunals to consider the reasonableness of the whole procedure, including the decision to dismiss, in the round and consider procedural flaws in context when determining the overall reasonableness of the employer's decision to dismiss. In that context, the Tribunal find that the failure to provide a formal letter to the claimant inviting her to the dismissal meeting did not undermine the

fairness of the dismissal. The claimant was aware of the purpose of the meeting, and had asked the respondent to dispense with the requirement to have the meeting before a panel, so the meeting could progress sooner.

227. The fact that the respondent dismissed the claimant before the outcome of her application for ill health retirement was known does not impact the fairness of the dismissal. As the respondent made clear to the claimant prior to her applying for ill-health retirement, the respondent has no control over whether ill health retirement benefits are awarded or not. That decision is taken by SPPA, independently of the respondent. Similarly, the decision on whether to terminate the claimant's employment was taken by the respondent independently of whether she was entitled to ill health retirement benefits or not. This was in accordance with the terms of the Attendance Policy.

228. For these reasons, the Tribunal concluded that the respondent's decision to dismiss the claimant fell within the range of reasonable responses of a reasonable employer in those circumstances. Given these findings, the claimant's complaint of unfair dismissal does not succeed and is dismissed.

Remedy

229. Having found that the respondent failed to comply with their obligation to make reasonable adjustments the Tribunal moved on to consider remedy.

230. The claimant gave oral evidence relevant to injury to feelings, often with reference to the correspondence she sent to the respondent at the time. The Tribunal's findings in relation to this are set out at paragraphs 95, 97, 101, 104, 106, 111 and 120. The Tribunal accepted that the claimant was significantly impacted by the respondent's failure to make reasonable adjustments, particularly the failure to resolve stressors/deal with the claimant's concerns more timeously and the failure to have a member of the respondent's management team overseeing all of the processes. She feels that had matters been appropriately addressed sooner, she may have been able to return to

work and a role that she enjoyed, rather than reaching the point that ill health retirement was the only viable option.

231. This was not a one off act of discrimination. The Tribunal found that there were a number of failures, on the part of the respondent, to make reasonable adjustments.

232. In the circumstances, the Tribunal was satisfied that an award at the lower end of the middle Vento band was appropriate, namely £10,000. Interest requires to be added to that at a rate of 8%. The Tribunal determined that it was appropriate to calculate interest from 8 March 2021 (the mid-point between the dates upon which the Tribunal found the respondent failed to make reasonable adjustments). The calculation is accordingly as follows:

Injury to feelings	£ 10,000.00
Interest from 8 March 2021 – 717 days @ 8%	£ 1,571.51
Total Award for Injury to feelings	**£ 11,571.51**

Employment Judge: M Sangster
Date of Judgment: 23 February 2023
Entered in register: 24 February 2023
and copied to parties