



EMPLOYMENT TRIBUNALS

Claimant: Mr S Ellis

Respondent: University Hospitals Dorset NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton

On: 9, 12, 13, 14, 15, and 16 August 2024
Members meeting 25 September 2024

Before: Employment Judge Gray **and Members:** Mr Evans and Mr Flanagan

Appearances

For the Claimant: Mr K Aggrey-Orleans (Counsel)

For the Respondent: Mr D O'Dempsey (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the Claimant's complaints of unfair constructive dismissal, direct sex discrimination, something arising from disability, indirect discrimination, failure in the duty to make reasonable adjustments and harassment related to disability and sex all fail and are dismissed.

The complaint of direct disability discrimination was withdrawn by the Claimant during closing submissions and is therefore dismissed.

REASONS

1. This liability only final hearing is to determine the liability issues in the claim submitted by Mr Ellis on the 14 April 2022 against the Respondent now named University Hospitals Dorset NHS Foundation Trust.
2. The Claimant alleges that he was constructively unfairly dismissed because of a breach of the implied term of mutual trust and confidence. Also, that he was discriminated and harassed because of his Crohn's disease (it is not in dispute the Claimant is disabled at the material times in this claim by reason of Crohn's disease) and his sex.
3. The Respondent denies all the complaints made and does not concede that it had knowledge of the extent of the symptoms that the Claimant asserts he was suffering from due to his Crohn's disease.
4. This claim has been the subject of three case management preliminary hearings at the first of which (before Employment Judge Rayner on the 11 January 2023) the issues to be determined were agreed.
5. The duration and timetabling of this final hearing had also been previously agreed with the parties before the start of this final hearing, most recently at the case management preliminary hearing before Employment Judge Roper on the 2 May 2024.
6. At the start of this hearing the Tribunal was provided with:
 - a. A hearing bundle consisting of 803 pages.
 - b. A witness bundle with the following witness statements on behalf of the Claimant:
 - i. The Claimant
 - ii. Tom Anderson (TA)
 - iii. Pamela Ellis (PE)
 - iv. Alison Williams (AW)
 - v. Marie Grieve (MG)
 - vi. Anna Greening (AG)
 - c. And on behalf of the Respondent:
 - i. Helen Pope (HP)
 - ii. Barry Alborough-Duell (BAD)
 - iii. Lisa Pigott (LP)
 - iv. Lisa White (LW)
 - v. Abigail Daughters (AD)
 - d. An agreed cast list.
 - e. An agreed chronology

- f. An agreed essential reading list.
7. The liability issues were discussed with the parties at the start of the hearing and then confirmed as follows with the changes as agreed to the version agreed with Employment Judge Rayner (at the case management preliminary hearing before her on the 11 January 2023) highlighted in bold italics:

1. Time limits

- 1.1 The claim form was presented on 14 April 2022. The Claimant commenced the Early Conciliation process with ACAS on 15 December 2021 (Day A). The Early Conciliation Certificate was issued on 25 January 2022 (Day B). Accordingly, any act or omission which took place before **15 December 2022** (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.
- 1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
 - 1.2.2 If not, was there conduct extending over a period?
 - 1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - 1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.2.4.1 Why were the complaints not made to the Tribunal in time?
 - 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?
- 1.3 ***[These paragraphs were deleted as the unfair dismissal complaint was made within time].***

2. Constructive unfair dismissal

- 2.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express / implied term of the contract relating to mutual trust and confidence. The breaches were as follows;
 - 2.1.1 All matters relied on as discrimination set out below;

- 2.1.2 **On return** to work the Claimant had no office to return **to**;
- 2.1.3 in respect of his complaint of 11 January 2021:
- 2.1.3.1 The Respondent failed to follow a proper procedure
 - 2.1.3.2 The Respondent failed to make a decision on the Claimant's complaint
 - 2.1.3.3 The Respondent delayed in processing the complaint
 - 2.1.3.4 There was a lack of impartiality by the investigating officer
 - 2.1.3.5 During the course of investigation the Claimant was not provided with responses to his questions;
 - 2.1.3.6 The Claimant's key witnesses were not interviewed. The Claimant is to confirm which potential witnesses he is referring to [***this is at page 84 of the bundle***]
 - 2.1.3.7 The Respondent failed to treat the written complaint as a grievance
 - 2.1.3.8 The Respondent failed to send the decision and outcome of the complaint on the 3 December 2021 as they purported to do;
 - 2.1.3.9 The outcome of the process was to close it without any Resolution;
 - 2.1.3.10 Helen Pope obtained statements from nurses in retaliation for the Claimant having made complaints against her;
 - 2.1.3.11 None of the issues which caused the Claimants absence which were to do with the location of the office were addressed despite the recommendations of the occupational health report of the 17 December 2021;
 - 2.1.3.12 The Claimant was denied a right of appeal because the Respondents dealt with his complaint under the dignity at work policy;
- 2.1.4 [Paragraphs 2.1.4 and 2.1.4.1 were deleted as they relate to matters that arose after the resignation].**

2.1.4.1 The Respondents did not provide any resolution to the Claimant's complaint up to the point of the Claimant's resignation; [**to now be 2.1.3.13**]

2.1.4.2 On **24** January 2022 the Claimant was notified by the Trust that they would be closing the investigation. [**to now be 2.1.3.14**]

(the last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

2.2 The Tribunal will need to decide:

2.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

2.2.2 Whether it had reasonable and proper cause for doing so.

2.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end. The Respondent will respond to these matters in their amended ET3

2.4 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

3. **Disability**

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

3.1.1 Whether the Claimant had a physical or mental impairment. He asserts that he is disabled by reason of

3.1.1.1 Crohn's disease [**not in dispute**].

3.1.1.2 Work related stress, anxiety and PTSD and Depression [this and the remaining paragraphs, 3.1.2 to 3.1.5 are no longer relevant to this claim as the Claimant confirmed he does not rely on this asserted disability in any of his disability complaints].

4. **Direct disability and/or sex discrimination (Equality Act 2010 section 13)**

4.1 The Claimant alleges he is disabled, and the Claimant is a man

4.2 Did the Respondent do the following things:

4.2.1 on 11 January 2021 Helen Pope had an altercation with the Claimant in which she shouted at the Claimant; threw keys on a desk and slammed a door;

4.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator with no disability or a different disability or in the case of sex discrimination a hypothetical woman.

4.4 If so, was it because of disability and/ or sex?

4.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability and/or sex?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the Respondent treat the Claimant unfavourably by:

5.1.1 Allocating an area outside the Claimant's office as a changing area for nurses **restricting his access to the toilets at certain times.**

5.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that because of Crohn's disease the Claimant **needs the toilet at certain times and the Claimant needing to shield because of his disability?**

5.3 Was the unfavourable treatment because of that thing? Did the Respondent allocate the area outside the Claimant's office as a changing area **because of the Claimant needing to shield because of COVID and because the Claimant needs the toilet at certain time?**

- 5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent will identify its legitimate aims in its amended ET3 [**page 93 of the hearing bundle, paragraph 44**]:
- 5.5 The Tribunal will decide in particular:
 - 5.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - 5.5.2 Could something less discriminatory have been done instead;
 - 5.5.3 How should the needs of the Claimant and the Respondent be balanced?
- 5.6 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6. Indirect discrimination (Equality Act 2010 s. 19)

- 6.1 A “PCP” is a provision, criterion or practice. Did the Respondent have or apply the following PCPs:
 - 6.1.1 *Needing to move between an inner office and an outer room to use the toilets.***
- 6.2 Did the Respondent apply the PCP to the Claimant?
- 6.3 Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic, or would it have done so?
- 6.4 Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom he did not share the characteristic?
- 6.5 Did the PCP put the Claimant at that disadvantage in that the Claimant required unimpeded access to the toilet at all times?
- 6.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent will set out any legitimate aims it relies upon in its amended ET3 [**page 94 of the hearing bundle, paragraph 48**].
- 6.7 The Tribunal will decide in particular:
 - 6.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;
 - 6.7.2 Could something less discriminatory have been done instead;

6.7.3 How should the needs of the Claimant and the Respondent be balanced?

7. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

7.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

7.2.1 The necessity of the Claimant going through the nurses changing area to access a toilet;

7.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant required unimpeded access to the toilet at all times because of his Crohn's disease?

And/or

7.4 Did a physical feature, namely but the location of the changing area for nursing staff, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that when in use it impeded his access to and from the toilet?

7.5 Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

7.6 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

7.6.1 Relocating the changing area;

7.7 Was it reasonable for the Respondent to have to take those steps and when?

7.8 Did the Respondent fail to take those steps?

8. Harassment related to disability and/or sex (Equality Act 2010 s. 26)

8.1 Did the Respondent do the following things:

8.1.1 locate the nurses' changing area outside the Claimant's office meaning he had to go through the area in order to access toilet;

- 8.1.2 On the 11 January 2021 Helen Pope had an altercation with the Claimant in which she shouted at him; threw keys on a desk and slammed a door;
 - 8.2 If so, was that unwanted conduct?
 - 8.3 Did it relate to the Claimant's protected characteristic, namely disability or sex?
 - 8.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
 - 8.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
8. A slightly revised hearing timetable was agreed to allow for a full day of reading on day 1 and then submissions to be delivered in the afternoon of day 5. However, evidence continued into day 6 (with LP being recalled addressing new disclosure, being her notes from her investigation). Submissions were then delivered in the afternoon of day 6. Judgment was then reserved.

THE FACTS

9. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.
10. We would observe that there were not many factual disputes in this claim, and we had the benefit of an agreed chronology that reflected that position.
11. On the 14 December 2009 the Claimant commenced his position as Consultant in Restorative Dentistry with the Poole Hospital NHS Foundation Trust. We were provided with a copy of the Claimant's contract (pages 123 to 135).
12. It was on the 1 October 2020 that University Hospitals Dorset NHS Foundation Trust was formed following a merger with Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust.
13. We were provided with a copy of the Respondent's Dignity at Work (DAW) Procedure (pages 149 to 188) – it notes page 155 ... **"The differences between allegations of bullying and grievance** ... Please note that if an employee perceives that they have been treated differently from other employees in relation to their working environment, or terms and conditions of service then they should refer to the Trust's grievance procedure.

14. The DAW procedure refers to a mediation process (page 163) which notes ...
“Most importantly, mediation can help both parties understand each other’s point of view and work together to find ways in which their working relationship can be improved.
15. It also sets out the role of the investigating officer (pages 171 to 172) and refers to 60 days to complete the investigation (page 171). It also details the investigation outcome and what it should contain, including details of the individuals interviewed (dates, times, names of those present during the interviews) and that transcripts of all interviews and any other relevant documents should be included as appendices.
16. It also describes the appeal process (pages 174 to 175). It says ... “If you are dissatisfied with the actions confirmed to be taken as a result of an investigation, or have queries regarding the investigation itself, you should first raise your concerns with the appropriate Commissioning Manager who made the decision.” Then after that an appeal can be lodged within 14 days with the Head of Workforce Information.
17. We were also provided with a copy of the Handling of Grievances policy (pages 189 to 199). We note from that at page 192 ... “Where the complaint is about the behaviour / relationship with another member of staff this would normally be addressed by recourse to the Dignity at Work policy.”.
18. Also included in the bundle were copies of the Handling Grievance Procedure (pages 200 to 216), the Civility, Respect and Dignity at Work Policy (pages 217 to 241), and an extract from the Uniform and Appearance Policy (pages 242 to 246).
19. It is not in dispute that the Claimant is disabled as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about by reason of Crohn’s Disease. Whether the Claimant is a disabled person by reason of work-related stress, anxiety, PTSD and depression is no longer a relevant issue in this claim as the Claimant does not rely on that asserted disability as a reason for any of the complaints of disability discrimination.
20. The Claimant says he has suffered from Crohn’s Disease since 2005 (paragraph 2 of his witness statement). In October 2015 the Claimant was hospitalised and underwent major surgery as a result of his Crohn’s Disease (page 734). The Claimant had sick leave returning to work on the 1 February 2016.
21. The Claimant asserts that the following arise in consequence of that disability:
 - a. That he needed to shield due to his disability during COVID. As the Claimant describes in paragraph 3 of his witness statement ... “The day after the Covid-19 Lockdown was announced on 23 March 2020 I had a telephone consultation with my consultant gastroenterologist who advised that my February 2020 blood results showed I was still

immunosuppressed months after discontinuing the immunosuppressant medication. Given the level of Covid-19 infections and hospitalisations and the severe problems that were occurring at the time, I was advised that working in the hospital would put me at significant risk. It was agreed with hospital management and the Head and Neck Cancer MDT that I would work from home and use remote technology and telephone to communicate with patients and colleagues whilst I “shielded”. I received a formal Department of Health and Social Care document labelling me as “extremely clinically vulnerable” and was advised to shield.”. In May 2020 the Claimant asks his GP to run repeat blood tests so he could return to work if he was no longer immune suppressed. The Claimant was able to return to work on the 19 May 2020 (paragraphs 5 and 6 of his statement).

- b. That he required unimpeded access to the toilet at all times because of his Crohn's disease. The Claimant provides no details of this in his witness statement for this hearing. In oral evidence no examples were given either. The Claimant does reference in his disability impact statement (page 57, paragraph 8) ... “After being agonisingly constipated, I often experience diarrhoea for several hours after the blockage has passed, in a “floodgate” scenario. This is extremely difficult to manage whilst working or doing any daily activity that is far from a toilet. I experience anxiety and embarrassment if I do not manage this very carefully.”. The Claimant's evidence in his impact statement supports this being an intermittent event. The Claimant did not evidence that this was an issue for him when the outer office was being used and he couldn't pass through it. He presented no evidence to us that his Crohn's disease meant he needed the toilet at certain times when at work for the Respondent at times material to this claim. The only significant example of the Claimant being restricted in the use of his office at the Respondent is in relation to events on the 11 January 2021 when he was returning to his office having left to get a coffee.

22. HP confirmed in cross examination that she knew the Claimant was shielding but not that it was due to his Crohn's disease. HP did not know of the Claimant's toilet needs and this is not a surprise as the Claimant did not communicate this to the Respondent in writing or verbally while the outer office was being used as a changing area.

23. The Claimant's wife confirmed in cross examination that she was possibly the only person he would discuss such things with, following reference to paragraph 8 of her witness statement. That paragraph says ... “Of greater concern was that Simon told me the nurses had commandeered his office and the anteroom outside it whilst he was shielding. They seemed to resent letting him have his office back when he returned and they continued their new procedure of changing in the area outside of his office. This put Simon in a very uncomfortable position because in his view (which I shared) he should have had free access to his own office at all times without fear of interrupting colleagues in a state of undress, and more importantly, the ability to leave his office to go to the toilet because of his Crohn's. Simon had expressed his concerns to management and mentioned to me on several occasions that this was leaving him in a vulnerable position.”. The

Claimant's ability to leave his office to go to the toilet is not a matter that was raised with the Respondent at the material time.

24. So, considering as a matter of fact the knowledge the Respondent had of this particular issue. No evidence has been presented to this Tribunal from which we can find the Respondent had actual or constructive knowledge of the disadvantage, in that the Claimant required unimpeded access to the toilet at all times because of his Crohn's disease, while the outer office was being used for changing (for a period from March 2020 to around late 2021).

25. In this claim there are two key factual allegations that relate to the complaints of discrimination:

a. Allocating an area outside the Claimant's office as a changing area for nurses restricting his access in and out of his office and to the toilets at certain times (this relates to the arising from complaint and is also relevant to the complaints of indirect discrimination and failure in the duty to make reasonable adjustments). For the purposes of harassment, it is referred to as "locate the nurses' changing area outside the Claimant's office meaning he had to go through the area in order to access toilet".

b. On 11 January 2021 Helen Pope had an altercation with the Claimant in which she shouted at the Claimant; threw keys on a desk and slammed a door (which is asserted as direct disability or sex discrimination and harassment related to disability or sex). During his oral evidence when being asked about his complaint of direct discrimination the Claimant confirmed this altercation was a sex discrimination issue only and that he was not alleging HP did what she did because he had Crohn's disease. In closing submissions, it was confirmed the Claimant withdrew the allegation that this was direct disability discrimination or harassment related to disability.

26. Considering then those two factual allegations in turn:

27. At paragraph 5 of her witness statement HP says ... "Prior to COVID-19, Outpatients staff – doctors and nurses – got changed in Day Theatres. However, when the pandemic commenced in March 2020, we were no longer allowed to do this as in accordance with government guidelines, the Day Theatres Manager closed the area to everyone except their own staff, in order to protect staff and minimise the risk of spreading the virus. We therefore needed to find somewhere else for staff to change."

28. As is confirmed in the agreed chronology, on the 23 March 2020 the COVID 19 lockdown was announced. The Claimant was clinically vulnerable, and it was agreed with management that the Claimant would work from home while he shielded and communicate with his patients using remote technology and phone.

29. HP then explains in paragraphs 6, 7 and 9 of her witness statement...

“6. We needed changing facilities so we did not bring infections in and out of Outpatients and to adhere to social distancing rules. There were 9 nursing staff and 6 doctors in Outpatients and very limited space. Due to COVID-19, all staff going in to the OTC changed into scrubs, and went from wearing an apron and gloves to gowns, face masks and eye protection. These were changed throughout the day as necessary which could be 3 to 10 times in a day.”

“7. I spoke to the Trust's Infection Control team who deemed it inappropriate for staff to change in toilets. There was a business plan in place to create a changing room but Infection Control said this would need air conditioning which put it over budget and the plans were therefore cancelled, although I was not informed of this for several months.”

“9. At the start of the pandemic, it was agreed the Outer Office would be temporarily used for changing, for both doctors and nurses, in order to comply with social distancing guidelines. I was told this by Kate Lloyd-Hatchard but I do not know who made the decision. There was a door going into the Outer Office from the corridor, and another door between the Outer Office and the back office, both of which could be locked. When the arrangement started, Simon was not present at work because he was shielding and so it did not affect him, but he had locked the door to the back office. However, the back office was unlocked by a Consultant and used as an area for staff to "step-down" during Simon's period of shielding – doctors and nurses used it as a safe area to take off PPE and have a break, as it was unoccupied and staff could not leave the department due to the government's guidelines at the time.”

30. In cross examination HP confirmed that suggesting the outer office be used for changing was not because the Claimant was shielding. HP confirmed it would have been used that way in any event, because there were no other rooms that were suitable. HP confirmed that she didn't specifically choose the area, it was the only area they could use at the time to change into scrubs.
31. As is also noted in the agreed chronology, in May 2020 the Claimant actively sought out blood tests from his GP to enable him to return to work. He informed the Respondent he would be returning to work at the hospital (page 248).
32. On the 19 May 2020 the Claimant returned to work at the hospital. Upon his return, he discovered that the nursing staff had been using his offices. Following his return, the nurses continued to change in an outer office that the Claimant had to walk through in order to enter or leave his office.
33. HP at paragraph 10 of her witness statement ... “When Simon first returned to work after shielding, around May 2020, he returned to the back office. He locked this again so that it could no longer be used by staff. However, the Outer Office continued to be used for changing as there was no other suitable space. As Simon worked a maximum of three days a week, it was fine on the days he was not there. On the days he was there, I was respectful and asked if he could stay

in the back office whilst staff were changing. Changes took place mainly before 8am, at lunchtime, and after 5:30pm but also throughout the day as necessary. This would only ever take a few minutes at a time – staff would just change and come straight back out. The Outer Office was used by both doctors and nurses, male and female, for changing. The staff who were getting changed would lock the door to the Outer Office during that time. This meant Simon was unable to enter / exit the back office until the Outer Office door was unlocked.”.

34. And at paragraph 11 HP says ... “To access the toilet from the back office, Simon needed to go through the Outer Office. He never mentioned there being an issue with toilet access. However if he needed to get through the Outer Office at any stage whilst locked, he would have been let through if he had knocked and if it was appropriate i.e. anyone changing was decent. Everyone was respectful given the situation as it was not an ideal solution for anyone. As previously mentioned, Simon did not work for the Trust full time, he was only ever present a maximum of three days a week. In contrast, changing facilities were required Monday to Friday.”.
35. On the 20 May 2020 the Claimant sent an email to Helen Pope, Deputy Sister, copying in Parkash Ramchandani (PR) (Maxillofacial Clinical Director) raising concerns about the issue of staff using his office for lunch (pages 273 and 274).
36. The email from the Claimant presents him as being aggrieved that his office is being used by others for lunch. The Claimant does not complain about the outer office being used for changing, nor does he raise any concerns about access to the toilets. His focus is very much on his rights to the office space.
37. With reference to it being used for lunch the Claimant writes ... “Everyone then descended and you clearly stated to me that it had been agreed by Mr Ramchandarni that the room could be used by everyone for lunch and to discuss the situation with him. A food trolley was then wheeled past me into the room. I would estimate there were about 8 various nursing staff in addition to Shiraz and Atul.”.
38. Also, as to it being his office ... “I fully appreciate these are testing times and the room might have been used as it was perceived “empty” if the Secretary did not stay. If this was the case then I would have imagined it would have been until I returned as I can appreciate it was convenient. However, a fortuitous convenience is a not a nice reason for being kicked out of your own office of 8 years.” ... “You stated that I have another office. For clarification whilst I have access IQ an office room, at the opposite end of the hospital, there is no computer to use. This, however, is not relevant to what has happened.”.
39. In reply, PR writes (page 274) ... “I’m really very upset that you were treated in this way. In your absence it was brought to my attention they the OP nursing staff were struggling to find a space to change in and we’re eating in the clinic rooms which is inappropriate. In addition there were issues around social distancing.

We agreed to leave the office door open providing it was kept clean. I made it clear that this was your and Atul's office and that once you and he were back OP would have to discuss it with you both. Atul, Christine and I discussed the lack of space last week and we agreed that Atul would walk around the department to see if there is there some other space for them to use. Whilst I have every sympathy for our nursing staff I have made it clear that the space in question is your and Atul's office unless you both decide otherwise. I am sorry I didn't get a chance to discuss that with you yesterday as it was such a busy day for me. We'll speak about it today."

40. From this it appears that Atul was tasked with locating other spaces to use. The Claimant was asked during his oral evidence if he had spoken to Atul about the matter at the time, and he confirmed that he did not.
41. On the 7 July 2020 the nursing staff sent an email to the Respondent to raise concerns regarding the nursing changing area situation (page 275) ... "We would like to bring your urgent attention regarding changing room in the Head and Neck treatment centre. We were hoping you would be able to help us. The Outpatient Treatment centre is a new department within Outpatients. We perform Local anesthetic surgical procedures for ENT and Maxillofacial on a daily basis. Like the Day case Unit and Main theatres we need to change into surgical scrubs, However unlike those departments we do not have a designated changing area. We have our lockers in a doctors office which has a constant flow of both male and female staff. The only place available for us to change is a toilet which is used by both staff and patients and not always available. We feel this is in breach of The Poole Approach. We would appreciate your advise and help the improve our situation."
42. Then on the 9 July 2020 in reply to a query as to what they had done to source alternatives ... "Yes we have - Unfortunately neither Dawn or Michele have managed to find a solution. Helen Pope has done a lot but still we are left with the same problem. There are no free consulting rooms in Outpatients. There are two adjoining offices (the first of which has our lockers in) the other office is used twice a week which could be utilized better, however the doctor is not keen to share or move, (he was offered another office some time ago which he turned down). We would value your help and input on how to rectify this problem urgently, as morale is very low within the department."
43. On the 14 September 2020 the Claimant sent an email to Kate Lloyd-Hatchard (HR), Ben Leigh (General Manager, Surgical Services), Sophie Jordan (SJ) (Interim Deputy Group Director of Operations, Surgical Care Group) and PR outlining that he was feeling burned out due to work stressors and requesting two weeks of unpaid leave be authorised (page 313). As the Claimant writes ... "The situation with not being able to see patients, having to ring them with the same excuses when they need help and the constant requests for F2F is affecting my wellbeing. I am frustrated and recognise some signs of burnout in myself and I

feel I cannot continue doing this". The Claimant does not raise any issue with the outer office being used for changing, or concerns over toilet access.

44. From the 15 September 2020 to 27 September 2020 the Claimant took two weeks of unpaid leave.

45. It is then on the 20 October 2020 the Claimant sent an email to SJ raising the fact that the changing situation remained unresolved (pages 322 to 323):

"Re the changing area outside my office nothing appears to have changed at all and the room is full of coats and shoes most days now. I was even told to come back later by Helen, last Wednesday morning at 7.45, when I tried to get into my office. Previously I did thank her for finding Haley, when you told me she had, to acknowledge her work."

"It would appear the stealth take over of the room is pretty complete as even 2 other nurses this evening told me it must be a nightmare getting into my office! I think we need to try again with a meeting to discuss the new room use and that she doesn't walk out of it."

"Whichever way you look at it; it isnt appropriate for any person (male/female) to change there. I would like to know with what authority this happened. It would appear to be led by Helen Pope but the question needs clarification and that it was properly planned and also why staff cannot continue to change in Day Theatres changing rooms as they have done for the last 10 years. I continue to walk round and change there so its good enough for me!"

46. SJ responded to say she would 'speak to Dawn' and 'pop down to the department' (page 322).

47. The issue for the Claimant, as was also articulated in his email sent in May, is his ownership of the office space. The Claimant does refer to one issue when seeking to get into his office, but he makes no complaint of being unable to utilise toilet facilities. He also references it being inappropriate for changing for any person, whether male or female.

48. We also note that during his oral evidence the Claimant clarified that there was an internal window in the wall between the inner and outer office. He could therefore look out of it into the outer office when it was being used for changing but he tried not to do so. He confirmed that he did not raise an issue with the window being there, nor seek to block it up in any way. This is surprising to us as blocking the internal window would have helped avoid personal embarrassment for him or those changing in the outer office.

49. The Claimant in his information for the investigating Officer dated 28 June 2021 (pages 491 to 500 also records in response to HP's response (pages 494 and

495) [and shown in bold italics for reference in this Judgment, them originally being in red text]:

“• Due to COVID restrictions within the trust and the procedures undertaken in the Treatment Centre, changing in a safe environment was required. Other areas were not suitable due to restricted numbers of staff allowed in the areas and that these staff were allocated to COVID wards. ***This maybe the case but doesn't not [sic] warrant expelling a member of staff from their designated office of 10 years.***

• Therefore, the front room became a changing room for all staff, doctors and nurses and the system was working well. Staff felt safe and we were not wearing scrubs around the hospital which was a trust requirement if you had been in a potential COVID area. ***This maybe the case but doesn't not [sic] warrant expelling a member of staff from their designated office of 10 years.***”

50. The Claimant appears to consider that his “rights of occupation” should trump the attempts to provide a safe system in view of COVID.
51. It is not in dispute that the area outside the Claimant’s office was for a period of time allocated as a changing area for nurses restricting his access in and out of his office and to the toilets at certain times.
52. It is also not in dispute that the area ceased to be used in such a way in the later part of 2021. It was put to the Claimant in cross examination that it ceased in September 2021 and the Claimant accepted this. As to when the Claimant knew this to be the case, he was unable to confirm, but we note this is something that is expressed to him in the DAW outcome letter (page 614) which he received on the 24 January 2022. We also note within the appeal outcome dated 31 May 2022 ... “On questioning Mr Alborough-Duell he confirmed that the accommodation issue was resolved after he came into post in June 2021. Mr Alborough-Duell indicated that he recalls that he verbally communicated this to you [the Claimant].” (page 766).
53. The Claimant had also accepted in cross examination that from the point in time the Respondent moved the changing area it couldn't then be discrimination against the Claimant on the grounds of sex or disability. The Claimant accepted that is also when the reasonable adjustment discrimination would end.
54. Dawn Spriggs (DS) (Matron for Outpatients) sends an email dated 11 January 2021 about the incident between the Claimant and HP on the 11 January, which says (page 341):

“The room in front of Simons has had to continue to be used while Simon has been off there is absolutely no where else for the treatment centre staff to change theatre cannot accommodate.

The Male Consultants have been charging in there too Kate was aware of this while you were off.

Simons room itself has not been used or touched he locked it and took the key with him.

A bit of compromise is required whilst alterations are started and completed”

55. On the 16 February 2021 DS, sends an email to Ben Leigh (BL), General Manager of Head and Neck Services, to confirm that the area outside the Claimant’s office will no longer be used as a changing area. The email states that the offices will ‘revert back to a clinical area’ (pages 379 to 380). This email was then forwarded to the Claimant by BL on the 19 February 2021.
56. Then on the 16 February 2021 DS sent an email to Clare Bone (CB), Matron, outlining new changing arrangements for nurses (page 384). Then on the 19 February 2021 CB responded to DS outlining difficulties with the proposed new arrangements (page 383). Then on the 22 February 2021 DS forwarded the email from CB to BL (page 383).
57. The allocation of the outer office as a changing area was investigated by LP in her investigation report. Within her report she writes (page 258) ... “On balance it would seem that in March 2020 at the start of the Covid-19 pandemic the Treatment Centre team sought to consistently use the area in the front of SE office as a changing area. Initially due to personal health reasons SE was shielding and not attending the hospital for work. It was deemed by departmental managers as a reasonable solution. There was considerable concern regarding Covid 19 and this solution provided the team an area within the department in which they could change minimising the risk of the transmission of Covid-19. Paul Bolton (Trust IPC lead) reported that no formal advice was sought from The Trust Infection Prevention and Control Team at this time by HP, DS or the senior management team regarding this decision, but considered it a reasonable action to take at that time.”.
58. And at page 259 ... “SE would like to understand why when he returned to work on 19th May 2020 alternative changing facilities were not found for the team. And why the arrangement of using the front office was allowed to continually be used as a changing facility until he went off sick on 27th October 2020.”.
59. From all these facts we find that it is the continuation of use that is an issue for the Claimant, and the conclusion at that time is there is no suitable alternative. We find that the reason for the outer office’s original use and continuing use as a changing area is not because the Claimant was shielding or needed access to toilets at certain times, it is because it was the only suitable option at the time.
60. The Respondent says that using that space in that way was a proportionate means of achieving a legitimate aim, the aim being ensuring that there were sufficient changing facilities available to accommodate staff during peak periods

in order to ensure the health and safety of staff and patients by complying with social distancing rules to prevent the spread of Covid infection.

61. The Claimant in cross examination accepted that was the Respondent's aim, but that he couldn't agree with it.
62. Considering then the second key factual allegation that on the 11 January 2021 an incident occurred between the Claimant and lead nurse HP.
63. It is not in dispute that on 11 January 2021 HP had an altercation with the Claimant in which she shouted at the Claimant; threw keys on a desk and slammed a door.
64. The Claimant describes the incident in paragraph 16 of his witness statement ...
"I arrived on the first day around 7.30am to find a nurse using the lockers in the room outside my office. After leaving my office to get a coffee I returned 2-3 minutes later around 7.45 to find more nurses using the room. I stated that no-one should be changing there, and I tried to enter the room. Ms Pope subjected me to a verbal outburst, both outside and then inside my office, and physically slammed keys onto my desk, before storming out of my office, slamming my office door as she left. I felt shaken and upset by this, not to mention humiliated as it had happened within sight and earshot of several other members of the nursing staff."
65. We were referred to copies of the Claimant's post-it notes in the bundle (at page 252) where it is written:
- "7.42 door locked and changing.
- 7.52 "not been sorted"
I'm pissed off with this now"
"Take your keys & stay in here"
Slams the door
Drops the keys on my desk
- "Helen had locked the door, opened it & refused to let me in. I insisted & went in to my office where light was on, door unlocked & key in door – witnessed by Mel & another nurse who was in state of undress".
66. The Claimant sends a message at 8:23 on the 11 January 2021 which says (page 420) ...
- "Kate. Sorry but I have left the hospital at 8.00. I was subjected to a verbal outburst by Helen Pope at 7.52. There were 2 nurse witnesses Mel and another who was in state of undress. I will be making a formal complaint about this."
67. The contemporaneous notes of the Claimant record there being a nurse in a state of undress.

68. In cross examination the Claimant confirmed the altercation was not because of his Crohn's disease. He agreed he was not alleging HP did what she did because he has Crohn's disease. He explained that his issue with the changing area was social embarrassment. He confirmed that all he wanted was to have his office, the changing was the issue as he wanted to use his office. He accepted no responsibility for what happened on the 11 January. He did not assert that HP was lying about her belief that the Claimant's behaviour at that time was poor.
69. The Claimant says he entered the door code to enter, not believing there was time from when he left the office to get his coffee and then return, for anyone to enter and start changing. He confirmed that he does push past HP as he does not believe what HP tells him that there are people changing.
70. Helen Pope says in paragraph 15 of her witness statement ... "On 11 January 2021, I locked the Outer Office doors whilst two colleagues were changing. Someone tried the door from the corridor (not the back office), then tried again but more violently. I opened the door to speak to the person as I was about to leave. It was Simon. I had to move out of the way quickly as Simon pushed the door open and pushed past me into the Outer Office, where one of my nurses was in her underwear, and walked into the back office. I shouted at him and threw his keys on the desk, telling him he should keep hold of them and I then shut the door very hard. I did this because I was outraged and felt it was completely inappropriate behaviour for someone to barge through in the way he did in to an area where staff – male or female – were getting changed. COVID-19 guidelines meant only 2 people could be changing in the Outer Office. Any additional people in the Outer Office could pose a risk to health and safety, although walking through with a mask on would be considered acceptable, and Simon was wearing a mask."
71. HP sends an email on the 11 January 2021 (page 342) setting out her version of the incident. In the email it is written:
- "I entered the room that currently holds our lockers to change into my uniform. Simon Ellis came out of the room at the back into this area and proceeded to leave. I was surprised he was there as we had not been told of his return to work.
- We passed pleasantries and I told him we were about to change. I was not alone in this room, 2 other members of staff were also about to change. I locked the door for privacy.
- Within a short space of time the door was rattled, I did not react to this until the second attempt of rattling as my colleagues were changing. On opening the door Simon Ellis was there, I asked him to wait as we were changing, he said that I could not stop him going into the back room and proceeded to push the door open and walk into the room and through into the back room.
- I asked him not to then come out of that room, as we were changing, He said that he had been informed that 'this had all been sorted', I replied it had not been 'sorted'. At that time I was in control of my emotions.

On him shutting the door I became overcome with frustration and emotional about the situation we still found ourselves in once again. I removed the keys from the back room door, thrust them onto the desk in the back room, told him to stay in there and on leaving I slammed the door.

I immediately regretted my actions, and in a distressed state left the front room to seek my line manager. After discussing the incident with my line manager, I returned to the area to apologise for my action but Simon Ellis was no longer in the back room.”

72. HP confirmed in cross examination that her reason for doing what the Claimant complains about (that is shout at the Claimant, throw keys on a desk and slam a door) was her being pushed out of the way, by someone who is told people are changing in the area they are seeking to pass through.
73. HP confirmed to this Tribunal panel that for any person she would have acted the same way.
74. We accept what HP tells us as to her reason, and we find it is not because of the Claimant’s sex or a reason related to it. As HP says in her statement ... “I did this because I was outraged and felt it was completely inappropriate behaviour for someone to barge through in the way he did in to an area where staff – male or female – were getting changed.”.
75. It was then on the 27 January 2021 that the Claimant lodged a formal bullying and harassment complaint against HP utilising the DAW policy (pages 361 to 369). Within it he writes ... “My concern is at minimum a grievance and at worst bullying or harassment given the gender difference and situation forced up on me and potential "sexual claims" that could then be made against me. I will take advice from the Trust on the exact nature of this complaint but documented it on the 11th January 2021 as formal complaint to implement immediate action given the 7 months of problems.” (page 364).
76. It is not in dispute that the Claimant utilises the DAW procedure and in closing submissions it was confirmed that he withdrew allegation 2.1.3.7 that the Respondent failed to treat the written complaint as a grievance. We also note that the Claimant references potential “sexual claims” in his complaint. With this expressed awareness on his part, we are surprised that he continued to go through the office space when he was warned and did then become aware of a nurse in a state of undress. The Claimant did suggest in his oral evidence that he didn’t believe HP when warned because he had only been away from his office a very short period, however as it transpires the warning given to him was correct and he put himself at risk or a “sexual claim” by ignoring it.
77. An informal meeting was held between the Respondent and the Claimant on the 9 February 2021 to discuss the formal complaint raised by him (pages 374 to 378).

78. On the 16 February 2022 HP sent a letter to nursing staff, advising them that she was to attend mediation with the Claimant and asking for them to write a letter outlining any issues they have had with the Claimant (page 773).
79. On the 23 February 2021 the Claimant sent an email to BL, raising concerns that he has still not received an outcome letter and requesting that his complaint be escalated to the next level (page 385).
80. During 25 February 2021 and 26 February 2021 in response to HP's request of 16 February 2022, dental nursing staff emailed their opinions of the Claimant to her (pages 388 to 390).
81. As to why HP was canvassing such views is addressed by her in paragraphs 18, 19 and 20 of her witness statement:

"18. Simon's previous behaviour towards me and the nursing staff contributed to my behaviour when he barged in the changing area, I felt I had been provoked to react the way I did. I felt there was constant sniping – that he felt the COVID-19 guidelines I was responsible for were designed to ruin his clinics. This was not true, as I was simply trying to keep people safe in an unprecedented time. As well as Simon, we had other vulnerable staff, and colleagues knew doctors who had died of COVID-19 at other Trusts. I did not want that to happen to us.

19. I therefore asked HR if I could bring more information to the mediated meeting and was told that I could. I had already been provided with statements from the two nurses who were changing when Simon pushed into the Outer Office. I emailed all of the nurses in the team on 16 February 2021 explaining that the mediated meeting with Simon was an opportunity to discuss any issues, and asking them to provide me with examples of issues they had experienced with Simon, so they could be discussed and brought to his attention. I knew from previous discussion with the nurses that they wanted Simon to understand how he had made them feel. I did not intend for them to be statements, nor were they obtained as retaliation – they were examples of incidents showing Simon's poor behaviour towards them.

20. I provided the information I had gathered to Matron and HR in advance of the mediated meeting as I did not want Simon to feel ambushed. This included my own written response dated 31 March 2021 (page 414), which I had sent to my Royal College of Nursing representative beforehand, and the emails the nurses had sent me (page 272, 388, 389, 390). I was prepared for the mediated meeting on 6 April 2021. However, the meeting was postponed and rearranged for 19 April 2021. This was then cancelled. I understand this was because Simon did not want to go ahead with it."

82. On the 12 March 2021 it was agreed that the mediation would take place on the 6 April 2021 (page 412).

83. On the 31 March 2021 HP sent a letter about the Claimant's alleged conduct to the Respondent (page 414).
84. The planned mediation meeting for the 6 April 2021 was postponed due to the letter that the Respondent had received from HP. The Claimant was not notified until the day of the meeting (page 446).
85. On the 18 April 2021 the Respondent sent the letter from HP about the Claimant to the Claimant (page 444).
86. The Claimant sent a message on the 18 April 2021 (page 422) and letter to the Respondent on the 19 April 2021 (page 438) advising that he would not be attending the mediation with HP having had sight of her letter.
87. On the 27 April 2021 the Claimant sent a letter to BL requesting that his complaints be addressed via formal procedures (page 448).
88. On the 7 May 2021 LP was contacted by HR to ask if she could undertake a Dignity at Work investigation regarding the Complaint (page 458). LP confirmed that she could and was told she would be sent the agreed Terms of Reference (ToR).
89. On 2 June 2021, LP chased the ToR (page 457). After the ToR had been agreed, LP was given the go ahead to contact the Claimant and HP on 25 June 2021. Contact was made to arrange interviews.
90. As BAD explains in paragraph 9 of his witness statement ... "The ToR were presented to me by HR as having been agreed when I came into the role on 21 June 2021, so my name was simply added and they were dated (page 465).".
91. The ToR are at pages 465 to 467 of the bundle and are dated 21 June 2021. They say that the investigation report should be completed within one month (this is different to the DAW policy which refers to 60 days to complete the investigation (page 171)).
92. The ToR set the terms as follows:

"To conduct an investigation into the following complaint(s)/allegation(s) made against the above named employee:

 - Helen Popes management and behaviour over the use of Mr S Ellis's office as a changing facility.
 - Helen Popes behaviour and outburst on the 11th Jan 21 following Mr S Ellis's return to work.
 - The continued pressure and lack of understanding from Helen Pope around the desire to remove Mr S Ellis from his office long term and repurpose the room for outpatient use.

- Accusations made by Helen pope in her letter which was submitted prior to an informal mediation meeting, which failed to take place.
- Whether Helen Pope, went against the spirit of the mediation process to canvas opinions from Other colleagues against Mr Ellis when writing her letter. '
- Failure to respect Mr S Ellis's professional judgement regarding restart of restorative dentistry service, despite evidence and IPC support.
- To investigate any related matters, which might be deemed relevant, which become apparent as part of the investigation.

Arrangements will be made for the following staff to be interviewed:

- Mr Simon Ellis
- Helen Pope
- Sophie Jordan
- Kate Lloyd-Hatchard
- Nicola Nicholas
- Linda Biglowe
- Deborah Ruffel
- Melanie Hatton
- Paul Bolton,
- Natalie Coombes,
- Dawn Spriggs
- Mr Parkash Ramchandani
- Mr Atul Kusanale”

93. HP is named as the “complainee” (page 466) and 5 of the 7 bullet points name HP.

94. The ToR concludes that ... “The investigating officer will report their finding to the Commissioning Manager, providing one of the following recommendations.

Dignity at Work:

- Complaint not upheld - in such cases the employees will be informed of the outcome and the matter will be closed
- Complaint to proceed to a formal disciplinary hearing - where the IO and HR Business Partner believe that there is a case to answer, the alleged perpetrator will be invited to attend a hearing in accordance with the Trust's managing disciplinary issues policy and procedure
- Complaint upheld - where the complaint is upheld at a formal disciplinary hearing and a sanction is issued. This would normally include an allegation of breaching the Trust's "Dignity at Work" Policy and may include recommendations”

95. We understand that these ToR were agreed with the Claimant as with reference to another copy of the ToRs at page 451 he confirmed in his oral evidence (during re-examination) that the 7 bullet points are what he agreed with BL and what he wanted investigated.

96. LP was on leave for two weeks from 5 July, but she met with HP on 2 July 2021 to interview her (page 504) and came in during her leave to meet the Claimant on 5 July 2021 to interview him (page 526) because, she says, she did not want to cause any delay (paragraph 7 of LP's witness statements).
97. As to the other staff in the ToR list LP explains at paragraph 15 of her witness statement ... "I contacted everyone listed in the ToR (page 465) to speak to them, and I interviewed the majority. Atul Kusanale told me he was not sure why he was involved. Parkash Ramchandani spoke to me briefly but told me he did not want to get involved and did not think he had anything to offer. I spoke to Sophie Jordan, Ben Leigh, Dawn Spriggs, Kate Lloyd-Hatchard and Lisa Hacker but I do not have notes of these as they were brief conversations. In general, they confirmed that they knew Simon had ongoing issues with management wanting him to move offices but nothing specific about Simon's working relationship with Helen, or Helen's conduct. The nurses I spoke to were all telling me similar stories. I had also been provided with written statements that the nurses had previously provided regarding Simon (pages 272, 339, 352, 388, 389, 390). I cannot recall if I spoke to all the nurses, but considered that I had sufficient information from that cohort of staff."
98. LP at paragraph 14 says ... "At my interview with Simon, he suggested I spoke to "all the MDT people and consultants" and provided further names (page 540 – 541)." Then at page 541 ... "SE I would further suggest Professor Ilankovan so he is the third, he is a Maxfac Consultant. And then the other one is Christine Lwin and she is an Oral Surgery Consultant. So that is the four Consultants. And then on ENT side is Emma King, Neil D'Souza and then the Oncologist who is Joe Davies. And then probably one of the Cancer Specialist, Karen Roberts, so she had got a lot of patient feedback about what is Ellis doing or what is he not doing!"
99. Prior to this final hearing the Claimant has also confirmed the following names of the person he believed were not interviewed as part of the investigation into his grievance:
- Atul Kusanale
 - Parkash Ramchandani
 - Prof V. Ilankovan
 - Christine Lwin
 - Emma King
 - Joe Davies Oncologist
 - Emma King
 - Neil De Zoysa
 - Karen Roberts
100. Apart from the first two on that list the others are not listed in the ToR agreed with the Claimant. It was clarified to us during the Claimant's oral

evidence that these additional potential witnesses had knowledge of the “ownership” of the office space, so were relevant to his “rights of occupation”.

101. LP explains in paragraph 16 of her witness statement ... “Simon provided names of consultants and professors that he wanted me to interview. I considered whether I should speak to them, but I did not think it was proportionate to extend the investigation to interview them. I weighed up the request with the need to conclude the process in a timely manner. I felt that adding further time would not have been in anybody’s favour. Therefore, and with advice from HR, I did not speak to all of the people named in Simon's Information Document and instead kept to the list of the names supplied in the ToR,”.

102. LP was challenged in oral evidence about who she interviewed and how she interviewed them. In cross examination she was challenged about the lack of interview notes in her report which was contrary to the DAW policy. The investigation process undertaken by LP is also a matter picked up in the appeal outcome of AD to the Claimant’s appeal.

103. In the appeal outcome letter dated 31 May 2022 (page 765):

“1. Complaint Handling and Process

Regarding the investigation; I can confirm that Lisa Pigott is an experienced investigator having undertaken many investigations over the years for Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust. Lisa had not until that point undertaken an investigation under the Poole Hospital policy which was why she had indicated to you that she had never investigated a case previously under the Poole Dignity at Work Procedure. You presented in your letter of appeal and verbally a variety of concerns in ensuring that this was a fair, balanced and proper investigation. In terms of evidence gathered there appears to be omissions in who was formally interviewed, and this includes the Clinical Lead for OMF and other medical staff that you had highlighted should be included.

I would have expected that there would have been more discussions with the Medical Staff involved in the service to give a fuller understanding of the issues. Within the investigation report LP indicated that she contacted/spoke with two consultants (AK/PR) following your request but they were not formally interviewed. You also confirmed that BL had informed you that only 15 persons could be interviewed as part of this process. We are not aware why a restriction has been put in place for an investigation and we are not able to ask BL as he is no longer an employee of the Trust.

LP has indicated that she triangulated the information from the interviews including the information provided on the USB device in order to write her report. Following our discussion today I do not feel that this investigation was to the depth I would have expected in order to be able to draw clear conclusions. In the event that you had remained as an employee, we would have considered whether it would be appropriate to have commissioned a supplementary investigation.

1: UPHELD”

104. In her witness statement AD refers (paragraph 17.1) ... “Complaint handling and process: Lisa was an experienced investigator but that there had been omissions in who had been formally interviewed as part of the investigation. I would have expected more discussions / interviews with the medical staff to provide a full understanding of the issues and situation relating to Simon, particularly as Simon had requested that they were interviewed, although I do not know what they would have commented on. I did not feel the investigation was as in-depth as I would have expected. I upheld this point of appeal.”.
105. In her oral evidence AD confirmed that she did not investigate why LP conducted the process the way she did. AD explained she had not appreciated LP had done the interviews she says. AD also confirmed that she was not concerned about the additional ones (i.e. those not in the ToR) and that the issue for her was the written report was not complete (i.e. with interview details as to when and where, and who present and as to transcripts) rather than the process itself. This is consistent with the findings AD makes in agreeing with LP’s outcome finding that there was ... “insufficient evidence to show that HP’s actions met the definition and that they intended to undermine, humiliate, degrade or injure you, because as above, it appears that there was some miscommunication between what you were being told and what HP was being told.”.
106. LP was challenged in cross examination about the pagination of the investigation report which doesn’t match the contents page (page 254). She acknowledged that was an error. LP did not accept she was biased or had predetermined matters when challenged in cross examination.
107. LP confirmed in cross examination that the way she conducted the interviews and who she interviewed was a proportionality judgment balancing time against the matters raised in the ToR (which we note in the main concern the Claimant’s relationship with HP).
108. In evidence it was confirmed to us that Nicola Nicholas was a typographical error and not the correct name. The correct name was suggested by the Claimant in his interview with LP as Nicola Stacey (page 541) and LP confirmed in cross examination that she did speak to her.
109. LP confirmed in cross examination that she did speak to everyone in the ToR, and she did have her own notes and she believed she could find those somewhere. LP did then produce further notes and emails that she had located before day 6 of this hearing which supported what she had told us in evidence. LP was recalled on day 6 to be questioned about this late disclosure. LP explained that these documents were not disclosed earlier by her in error as her work base had changed and she was then hoping to be back the week following but wasn’t and then forgot. Although this is far from ideal in the context of formal Tribunal litigation, we accept what LP tells us.

110. LP finalised the investigation report (pages 254 to 271) and sent it to HR and BAD on the 16 September 2021 (paragraph 18 of her witness statement).

111. As to the Claimant's assertion that there was delay in the process. LP is given the go ahead to contact the Claimant and HP on 25 June 2021 and the report is completed and submitted on the 16 September 2021 (a period of 83 days). LP confirmed she had three weeks leave in that period, which she informed the parties about (so 21 days) meaning discounting for that, the process took 62 days. This is 2 days longer the DAW policy requires, and 32 days longer than the ToR stipulated. LP confirmed in her oral evidence that she believed she had completed the process in a timely manner. At paragraph 23 of her witness statement ... "I consider that I completed the investigation in a timely fashion. I was given the go ahead by Barry to meet with Simon and Helen on 25 June. I met with them both within two weeks of this. The IR was submitted on 16 September, under three months later. I was on annual leave for a total of three weeks in July and August, which I had declared at the outset. In addition, this was not a straightforward investigation as Simon had provided a large amount of documents and I met with various individuals. After I had submitted the IR, I had no further involvement in the process, apart from attending the meeting on 27 September 2021."

112. Having considered the investigation report (pages 254 to 271), we note (at pages 261 and 262) that reference is made to the witness accounts of the nurses in the changing area and that they support both parties in that they reflect the Claimant pushing past HP and then engaging in a heated discussion with her whilst these staff members were in a state of undress. It notes they found this "embarrassing" and "humiliating" and then reflect that HP slammed keys on the desk and left the area slamming a door behind her and HP looking upset.

113. LP notes at page 267 that HP's behaviour fell short, acting in an unprofessional way, but it could be argued that SE's conduct of insisting on entering the space whilst there were members of staff in a state of undress in order to access his office could too, fuelling the frustrations of HP.

114. The report included a recommendation (page 270):

"Although this investigation was triggered by one member of staff, it is evident that this situation developed through the acts of both SE and HP. The initial letter of complaint by SE presents a timeline of events and assertions about HP behaviour, but does not put forward either any suggestions for an alternative arrangement or what a satisfactory outcome would look like.

The Trust cannot compel staff to make an apology to each other, but it can expect that they observe the trust's values and show consideration and respect to each other in pursuit of the shared aim of patient welfare. The issue of the office / changing area is on management's agenda but current operational demands on top of the on-going building work across the site, resolution may be some time

off. What happens during this period is for the parties to agree with support from the management team.”.

115. This is not a recommendation in the express format of the ToR, but can be understood as the complaint is not upheld, in short there was fault on both sides as explained by LP in her witness statement at paragraph 19.

116. We have had the benefit of considering the evidence about such matters in this Tribunal, hearing evidence from both the Claimant and HP, and with that insight we find that the conclusion reached by LP is a reasonable one.

117. Having considered all these facts we accept what LP tells us as to the investigation process and her conclusions.

118. It was then on the 20 September 2021 BAD wrote to the Claimant inviting him to attend a meeting to discuss the outcome of the investigation on the 27 September 2021. The Claimant was informed that he would not receive a copy of the report before the meeting. The Claimant emailed to request that he was provided with a copy of this report prior to the meeting taking place (page 589) and on the 22 September 2021 a copy was sent to the Claimant (page 596).

119. The Claimant attended the meeting on the 27 September 2021 with the Respondent to discuss the outcome of the investigation.

120. BAD explains at paragraph 18 of his witness statement ... “Following the meeting, I looked into Simon's further points. I knew I had to generate a letter to respond to Simon. Although this was in my urgent to-do pile, other tasks then took priority. Although this was regrettable, I was working 90-hour weeks at this point and I could not do everything at the same time.”.

121. The Claimant describes in his witness statement at paragraph 33 that during a family holiday (in October 2021, the Claimant's email dated 14 October 2021 at page 610 refers) after relaying personal concerns to his family ... “... I knew then that I had to leave the hospital to save my mental health. I did not want to resign and lose my job, but I could not carry on with the mental torture of indefinite waiting for hospital inaction. I had lost all faith and confidence that the hospital would safeguard me at work.”.

122. PE also refers in her witness statement to the family holiday in October 2021 and at paragraph 24 that ... “Simon felt the only course of action was to leave the hospital. It was a difficult decision for him.”.

123. It is clear from this evidence that so far as the Claimant is concerned, following receipt of the investigation outcome, the contract is broken as of October 2021. The Claimant does not resign at that point though.

124. At paragraph 34 of his witness statement the Claimant says ... "I emailed Mr Alborough-Duell again on 26 October 2021 in reply to an email from him dated 22 October 2021."
125. This email is at page 609 and in it the Claimant writes ... "I know Lisa was having an operation but has she / Trust decided on the investigation outcome measure yet? ... Also those initial 6 points I raised and the minutes nick was taking of the meeting last month?". The email is chasing the investigation outcome measure and a response to his initial 6 points,
126. BAD says at paragraph 19 of his witness statement ... "... I did prepare the outcome letter on 5 December (page 602) ("the Outcome Letter"), which covered Simon's questions and the outcome – it clearly lists Simon's questions and then my responses. It goes on to detail the learning points and outcome – for example, in relation to Helen, it says "I can confirm that the investigation has provided insufficient evidence to support the allegation and does not warrant any formal action". I went on to say "there are also several recommendations that come out of the report, and a number of actions that I will take to bring you back to the workplace. I suggest that we meet to discuss these and plan for your return to work". I also told Simon "the accommodation in question is no longer used as a changing area, and the office space remains accessible"."
127. BAD explains in paragraph 21 of his witness statement ... "I asked a colleague to put the Outcome Letter in our department's post tray on 5 December 2021 because I knew it was due to be collected shortly. Given the content of the letter (page 602), I thought it was appropriate to send it via post instead of email. I thought it unusual that I had not received a response from Simon but I knew he liked to digest matters and respond in writing. I was not aware Simon had not received the Outcome Letter until I received an Occupational Health report on 19 January 2022 following Simon's appointment on 14 December 2021 (page 616) which referred to Simon waiting for a response to our last meeting. On 20 January 2022, I emailed Simon explaining the Outcome Letter had been sent by recorded delivery in early December, and that the letter closes the investigation and invited Simon in to discuss his return to work and how to support that (page 621). I now understand that the Outcome Letter was not ever sent out but I do not know why this was."
128. The Claimant met with Occupational Health on the 14 December 2021 (pages 616 to 619). The report notes ... "Mr Ellis reports the main contributing factor for his absence is due to work related issues involving work relationship with colleagues which complaints have been raised by himself and others in regard to this." (page 616). Further, at page 618 ... "Mr Ellis does not report any limitations in his ability to carry out the skills for doing the existing work role. He does however report it is current factors in the work area, work relationships with colleagues and also issues of not sorting out a practical solution to the office location/the current staff changing room issues. In addition to the impact and effect of the long delays to resolve both this and the grievance/counter grievance

issues and the report itself and lack of outcome from it remain the current barrier for him returning to work at this time.”.

129. Also, it notes (page 619) ... “Mr Ellis also advises it will be difficult to return work environment with the same work colleagues present, if the reported complaints and work issues have not been addressed or outcome confirmed further to the reported investigation process”.
130. No reference is made to Crohn’s disease or a need for toilet access, being an issue or having been an issue.
131. It is on the 15 December 2021 that the Claimant then contacts ACAS to initiate Early Conciliation (page 1).
132. On the 17 December 2021 the Occupational Health report was sent to the Respondent. The report referred to the fact that the Claimant required a response from the Respondent regarding his investigation (page 617).
133. BAD sent an email dated 20 January 2022 to the Claimant asking if he had received a copy of the letter that they had sent in early December with an outcome of the investigation (page 621). In the email BAD writes ... “Simon I have tried your phone this morning but it has gone to answerphone so I am presuming as it is Thursday that you are in practice. I am on leave and about to go out of town for 3 days, but I got your OH report yesterday as did Sarah (copied in). we are slightly concerned as it mentioned you were waiting on a management response to our last meeting. This was sent to you recorded delivery in early December, and I have been intending to call you but we have been managing OPEL4 capacity issues with limited workforce since the beginning of the month. If you have not got this I am very apologetic and will look into how that happened. The letter closes the investigation and invites you in to discuss your return to work and how we can support that. It would be helpful to talk, we need to close this down and bring you back into the workplace as I understand your pay continues. I am back on Tuesday and will be at Poole. If you are free I am happy to meet or arrange a call, please let me know, and Michaela (my PA) can arrange a suitable time.”.
134. The Claimant advised that he had not received this letter (email dated 24 January 2022, page 623). The letter was then emailed to the Claimant on the 24 January 2022 and acknowledged as received by the Claimant (pages 622 and 623).
135. The Claimant complains about the delay in getting him the outcome letter and this issue is addressed in the appeal outcome of AD (page 767) ...

“4. Letter advising closure of investigation

You have expressed how the meeting of the 27th September 2021 to discuss the report did not answer some key questions that you raised and the format of the

meeting over TEAMS made communication more difficult. You have indicated that the Terms Of Reference were changed but during our meeting you indicated these were not fundamental changes just “fine tuning” and that is was more about the principle of not being sited on the final version and you were not aware of the changes until the report was sent to you. The outcome letter, which summarised the meeting of the 27th September, was dated 05th December which is 10 weeks after the meeting and in addition this letter did not arrive and had to be resent resulting in you only receiving this on the 24th January 2022. This delay is completely unacceptable, and I apologise that this occurred.

I have noticed in the outcome letter that you asked for a follow up meeting to discuss the inaccuracies you felt were contained in the report. You followed this up with an email requesting that this meeting take place however this was not actioned by the management team. However, I note from the outcome letter that Mr Barry Alborough-Duell addressed your queries within this letter and offered a further meeting to further discuss any remaining concerns. The outcome letter did not outline the right to appeal rather it stated that a grievance could be raised. This is incorrect and a right to an ‘appeal’ should have been set out in the outcome letter. I apologise for this omission and the confusion this created, but note that you were given the opportunity to challenge the outcome, which is what then resulted in my hearing your appeal.

4. PARTIALLY UPHELD in relation to the delay in providing the outcome letter.”

136. It notes that the delay is completely unacceptable.

137. We do accept what BAD tells us though, that he was managing high work volumes and believed the outcome letter had been sent, which is consistent with what he says in his email dated 20 January 2022.

138. The outcome letter dated 5 December 2021 is at pages 613 to 615.

139. The outcome letter does address the 6 points the Claimant raised (page 614).

140. It concludes (pages 614 and 615) ...

“I recognise the report did not meet your expectations, and I am sorry if this is the case, however the evaluation and findings from the investigation report (pages 5 - 17 of the documents) satisfy me that the investigating officer conducted the interviews based on the terms of reference and that the content of the document is reflective of this.

The recommendation (page 17 of the document) support the view that this was a series of miscommunicated messages, assumptions and poorly judged actions.

The management team at the time were not consistent with their messages, actions or communications, and there were multiple conversations that resulted in more confusion.

The investigation report highlights missed opportunities for conciliatory actions, and notes that there were no alternative suggestions to solution the problem suggested or delivered by either party.

The accommodation in question is no longer used as a changing area, and the office space remains accessible and is recognised as part of Head & Neck accommodation and will remain so until further notice.

There have been developments in the options for changing and rest facilities, these form part of a larger redesign project being undertaken, this is in response to the need for reconfiguration of space to meet the requirements of the Clinical Services Review.

Whilst we cannot disclose details of the confidential conversation held with HP on October 1, I can assure you it was dealt with in accordance with Trust policy, and I can confirm that the investigation has provided insufficient evidence to support the allegation and does not warrant any formal action.

The report does, however, highlight some behaviours that are not consistent with the Trust values and this has been noted.

Whilst this is the case, I recognise that there are further concerns you may wish to discuss, and I am happy to work these through with you. There are also several recommendations that come out of the report, and a number of actions that I will take to bring you back to the workplace. I suggest that we meet to discuss these and plan for your return to work.

If you are unhappy with the decision that I have reached, then you may choose to pursue this further under the terms of the Trust's grievance procedure, and HR will be able to support you with this.

Can I suggest that we arrange to meet at a time convenient to you within the next fortnight? I can be contacted on the numbers you have for me, or via email."

141. The outcome letter confirms that the outer office is no longer used for changing.
142. As BAD refers in his witness statement at paragraph 39 ... "As set out in paragraph 20, I told Simon he could raise a grievance if he was unhappy with the outcome but this was an error – I should have offered him the right of appeal. In any event, Simon was offered a method of redress and an appeal hearing took place."
143. The Claimant then resigns that day with notice, and in his resignation letter dated 24 January 2022 says as to the reason for leaving (page 673) ... "My job has become untenable due to the conduct of Helen Pope (and other nursing staff in my department); the ongoing failure to provide me with a safe place to work;

the way in which the Trust has handled my complaint and the procedure followed; and I feel that I have been discriminated against.”.

144. The Claimant claims that he was constructively dismissed because the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence.
145. Then to conclude matters to date of the appeal outcome we note from the agreed chronology:
146. On the 25 January 2022 the Claimant's ACAS Early Conciliation certificate is issued (page 1).
147. It is then on the 14 February 2022 that a formal grievance was raised with the Respondent by the Claimant's legal representative on his behalf (page 676).
148. Lisa White, Head of HR Operations, emailed the Claimant's legal representative on the 18 February 2022 to say that the Claimant's complaint would be dealt with as an appeal of the Dignity at Work Procedure as opposed to a grievance (page 691).
149. The Claimant's legal representative responded to Lisa White on the 22 February 2022 stating that the Claimant's complaint should be investigated under the Grievance Procedure and outlining the reasons why (page 689 to 690).
150. On the 24 February 2022 Lisa White responded to the Claimant's legal representative advising that the Respondent would continue to progress the complaint under the Dignity at Work policy (pages 688 to 689).
151. On the 26 February 2022 the Claimant's legal representative responded to Lisa White to reiterate the Claimant's request that his new complaint be heard as a formal grievance under the Grievance Procedure (page 688).
152. Lisa White sent an email dated 2 March 2022 to the Claimant's legal representative further outlining why the Dignity at Work Policy was the preferred policy to use (page 715).
153. On the 4 March 2022 an email was sent from the Respondent to the Claimant with a letter attached inviting the Claimant to a 'Dignity at Work Appeal Hearing' to take place on 22 March 2022 (page 709).
154. On the 15 March 2022 the Claimant's legal representative responded to the email from Lisa White further confirming the Claimant's position that the Respondent should be dealing with the complaint as a grievance (page 714).
155. On the 16 March 2022 the Respondent postponed the planned hearing due to unforeseen circumstances (page 723). The Respondent sent an email

dated 22 April 2022 with a new date for the appeal hearing on 4 May 2022 (page 727).

156. It is then on the 14 April 2022 the Claimant submitted a claim in Employment Tribunal (page 3).
157. Claimant's effective date of termination is the 24 April 2022.
158. On the 3 May 2022 the Dignity at Work Appeal meeting was held (page 737).
159. On the 31 May 2022 the Respondent sent the Claimant the outcome of the Dignity at Work appeal.
160. About the appeal outcome the agreed chronology says that a number of the Claimant's complaints were upheld, including the fact that the Respondent had failed to deal with the situation regarding the nursing staff changing outside his office (page 764).
161. We have considered what the appeal outcome does say about this matter (page 766):

"2. Office Issues

The key events that your complaint is based upon relate to the use of your office and the outside room being used initially whilst you were shielding as a changing room by nurses. Prior to COVID they had changed in the Outpatients Theatres and you were assured on your return that the office spaces would no longer be used as a changing facility. Even though they vacated your office on your return, it is understood that the room outside your office continued to be used as a changing area for another 5 months. From the investigation report there is no evidence that the Head and Neck team intended to release this space to Outpatients and had plans regarding further recruitment and use of this space. However, there was a drive from Outpatients to reclaim areas as clinical space. On questioning Mr Alborough-Duell he confirmed that the accommodation issue was resolved after he came into post in June 2021. Mr Alborough-Duell indicated that he recalls that he verbally communicated this to you. Sadly, the lack of effective communication and decision making meant that the situation was not rectified in a timely manner and ultimately impacted significantly on you for which I apologise.

2. UPHELD"

162. The conclusion is specifically that ... "the lack of effective communication and decision making meant that the situation was not rectified in a timely manner and ultimately impacted significantly on you for which I apologise."

163. This is consistent with the findings of LP in her investigation report which records (page 268) ... “There is evidence to show that that communication with HP regarding this has been to identify the space as outpatient space, this was supported by DS. This misinformation and subsequent communications relating to this has underpinned the way HP has perceived this situation and this led to a common understanding within the Outpatients directorate that SE was being obstructive in this process.”

THE LAW

164. **Discrimination**

165. The Claimant is alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 (“the EqA”).

166. The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination and harassment related to disability and sex. The legal tests for the two different heads of claim are slightly different and, notably, if treatment is found to be harassment under s26 EqA it cannot also be found to be direct discrimination because the two claims are mutually exclusive (due to the application of s212(1) EqA and its definition of “detriment”). The Claimant also claims something arising from disability and a failure in the duty to make reasonable adjustments. He also claims indirect discrimination.

167. The protected characteristics relied upon are disability and sex as set out in sections 4, 6, and 11 of the EqA.

168. **Disability**

169. As set out in ***section 6 and schedule 1 of the Equality Act 2010*** a person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P’s ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.

170. It is not in dispute in this claim that the Claimant is a disabled person at times material to the matters complained about.

171. Knowledge of the symptoms and the substantial disadvantage of that disability are disputed.

172. The Court of Appeal held in ***Gallop v Newport City Council [2013] EWCA Civ 1358, [2014] IRLR 211*** that ... “For that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental

impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1.”.

173. Direct discrimination – section 13 Equality Act 2010

174. For a claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

175. Direct discrimination claims require a comparison as between the treatment of different individuals i.e., individuals who do not share the protected characteristic in issue. In doing so there must be no material difference between the circumstances relating to each individual (section 23 EqA). The Tribunal therefore must compare 'like with like'.

176. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

177. In respect of the burden of proof, there is a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons (Igen -v- Wong [2005] EWCA Civ 142 as affirmed in Ayodele -v- CityLink Ltd [2018] ICR 748).

178. We also note the recent decision of Efobi v Royal Mail Group Ltd (2021) ICR 1263 which confirmed that the reverse burden of proof remains good law under the EqA.

179. Also, considering Madarassy v Nomura International Plc [2007] ICR 867, Mummery LJ stated: “The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on

the balance of probabilities, the respondent had committed an act of discrimination”.

180. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that the Respondent had committed an unlawful act of discrimination (***Madarassy***). “Could conclude” must mean that “a reasonable Tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

181. In ***Igen*** the Court of Appeal cautioned tribunals ‘against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground’ but made it clear that a finding of ‘unexplained unreasonable conduct’ is a primary fact from which an inference can properly be drawn to shift the burden.

182. **Discrimination arising from disability (Section 15 Equality Act 2010)**

183. Section 15 of the Equality Act states:

15 Discrimination arising from disability

(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.

184. We remind ourselves that the correct approach to the operation of section 15 was set out at paragraph 31 by Simler P in the case of ***Pnaiser v NHS England [2016] IRLR 170***. In essence, as summarised by Harvey at Q [1468], the position is:

(1) Was there unfavourable treatment and by whom?

(2) What caused the impugned treatment, or what was the reason for it?

(3) Motive is irrelevant.

(4) Was the cause/reason 'something' arising in consequence of the claimant's disability?

(5) The more links in the chain of causation, the harder it will be to establish the necessary connection.

(6) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

(8) It does not matter in which order these matters are considered by the tribunal.

185. At paragraph 31(b) of ***Pnaiser***, Simler P emphasised the focus of the analysis to be on the state of mind of the alleged discriminator as to the underlying reason for the allegedly unfavourable treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the mind of the person alleged to have caused the unfavourable treatment.

186. In terms of knowledge, there need only be actual or constructive knowledge as to the disabilities themselves, not to the causal link between the disability and its consequent effects which led to the unfavourable treatment.

187. Indirect discrimination – section 19

188. Indirect discrimination occurs where an employer applies a provision, criterion or practice ("PCP") to those without the employee's protected characteristic; it puts those with the employee's protected characteristic at a particular disadvantage when compared to those without the characteristic; it puts the employee at that same disadvantage; and the employer cannot show the PCP to be a proportionate means of achieving a legitimate aim: s.19(2) EqA.

189. In relation to the protected characteristic of disability, a reference to persons who share a protected characteristic is a reference to persons with the same disability: s.6(3) EqA.

190. The justification defence allowed by virtue of s.19(2)(d) EqA places the burden on the employer but gives rise to an objective test, requiring the Tribunal to carry out its own assessment as to whether the means adopted were proportionate, weighing the real needs of the employer against any discriminatory effects of the requirement: *Hardy & Hansons plc v Lax* [2005] ICR 1565, CA. To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were "reasonably necessary" in order to achieve the legitimate aim(s): ***Barry v Midland Bank Plc* [1999] IRLR 581 (HL)**.

191. **Reasonable adjustments**

192. Section 20 of the Equality Act states:

(1) 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.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

193. ***Paragraph 20(1) of Schedule 8 to the EqA*** provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid — ***paragraph 20(1)(b)***.

194. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e., what the employer ought reasonably to have known). In view of this, the EAT has said that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

- a. first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?
- b. if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? ***Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT.***

195. It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

196. There is guidance in the case authority of ***Environment Agency v Rowan [2008] IRLR 20, [2008] ICR 218*** as to what needs to be found in such claims, namely that in order to make a finding of failure to make reasonable adjustments there must be identification of:

- c. the provision, criteria or practice applied by or on behalf of an employer;
or
- d. the physical feature of premises occupied by the employer;

- e. the identity of non-disabled comparators (where appropriate); and
- f. the nature and extent of the substantial disadvantage suffered by the claimant.

197. Harassment – section 26 Equality Act 2010

198. Section 26 provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

199. The Claimant needs to establish, under section 26 EqA, unwanted conduct relating to his disability ((1)(a)), which had the effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him ((1)(b)).

200. In deciding whether the conduct had the effect set out in (1)(b), the Tribunal must take into account the Claimant's perception, other circumstances, and whether it was reasonable for the conduct to have that effect ((4)). The section (1)(b) test, as a result of section (4), has an objective element.

201. Time Limits

202. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

203. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
204. Section 123(3)(b) of the EqA, failure to do something, is to be treated as occurring when the person in question decided upon it. Where there is no evidence to the contrary, s.123(4) of the EqA 2010 provides a default means by which the date of the 'decision' can be identified, either when there is an inconsistent act or alternatively the expiry of the period in which the employer might reasonably have been expected to do it.
205. An ongoing situation or continuing state of affairs amounting to discrimination was considered in **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96**. It is not sufficient to rely on an alleged overarching or floating discriminatory state of affairs without that state of affairs being anchored by discrete acts of discrimination.
206. We note the principals from the cases of **British Coal v Keeble [1997] IRLR 336 EAT**; **Robertson v Bexley Community Service [2003] IRLR 434 CA**; and **London Borough of Southwark v Afolabi [2003] IRLR 220 CA**;
207. We note the factors from section 33 of the Limitation Act 1980 which are referred to in the **Keeble** decision:
208. The length of and the reasons for the delay.
209. The extent to which the cogency of the evidence is likely to be affected by the delay.
210. The extent to which the parties co-operated with any request for information.
211. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
212. The steps taken by the claimant to obtain appropriate professional advice.
213. We note that the Court of Appeal in the **Afolabi** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
214. It is also clear from the comments of Auld LJ in **Robertson** that there is no presumption that a tribunal should exercise its discretion to extend time, and

the onus is on the claimant in this regard ... "It is also important to note that time limits are exercised strictly in employment and industrial cases. 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".

215. We had the benefit of an agreed legal summary as helpfully prepared by the parties Counsel which confirmed the following in respect of the complaints of discrimination:
216. Unpleaded acts of alleged discrimination cannot be relied upon (**Simon v Chapman 1994 IRLR 124, CA**).
217. **S 13 EqA:** Direct discrimination (sex and or disability). C must show a difference in protected characteristic and must show less favourable treatment. This involves showing that C was treated less favourably than a comparator (here a hypothetical comparator) in materially the same circumstances.
218. If C can show facts from which an inference of discrimination can be drawn, it is for R to show an explanation for the treatment which has nothing whatsoever to do with discrimination (an innocent explanation).
219. C must show that he has suffered a detriment (section 39). A detriment is something which a reasonable worker would regard as a detriment.
220. **Section 15 EqA:** C must identify the treatment. C must prove that it is unfavourable treatment (subjective and objective elements involved). C must prove that the treatment was because of something arising in consequence of C's disability.
221. Considering whether the treatment was because of something arising in consequence of C's disability involves considering the mental processes of those making the relevant decisions.
222. If C shows unfavourable treatment because of something arising from his disability, R must show that it gave the unfavourable treatment in pursuit of a legitimate aim and that the treatment was a proportionate means of achieving that legitimate aim, including whether anything less discriminatory could have been done still achieving that legitimate aim.
223. **Section 19 EqA:** C must show that R applied a PCP applicable to all. He must show that it subjected those sharing his protected characteristic to a particular disadvantage. This can be done by C showing that the PCP inherently disadvantages that group or by statistics showing that the proportion of those from the protected characteristic group negatively affected by the PCP is greater than that from the non-protected characteristic group. The circumstances of the

two groups must be considered as materially the same (or not materially different) under section 25.

224. C must show that he suffered that particular disadvantage.
225. If C proves the above, R must show that use of the PCP is justified as a proportionate means of achieving a legitimate aim, considering the discriminatory impact of the PCP and whether there were less discriminatory means of achieving the legitimate aim.
226. **Reasonable adjustments s 20:** C must show that R applied a PCP to him. C must show that the PCP placed him at a more than minor or trivial disadvantage compared to non-disabled persons. C argues that the reasonable adjustment that ought to have been made was to relocate the changing space.
227. The tribunal must consider whether the adjustment which C says that R ought to have undertaken was a reasonable one for R to have to take in all the circumstances of the case in order to remove the substantial disadvantage to the claimant from the PCP.
228. R must show that it did not know and could not reasonably be expected to know that it was “on the cards” that its arrangements would place C at the substantial disadvantage complained of.
229. **Harassment s 26:** C must show that R treated him to unwanted conduct. C must show that the unwanted conduct was related to the protected characteristic. Unless on its face the treatment is related to the protected characteristic the tribunal must examine the motives of those giving the unwanted conduct (to determine whether it is related to the protected characteristic).
230. A one-off incident may be sufficiently serious to create an environment, and this is a question of fact and degree (***Insitu Cleaning Co v Heads [1995] IRLR 4***).
231. The C must show that the unwanted conduct created the prohibited environment for him. This is something more than an unwarranted sense of grievance. It is also something more than being aggrieved at a particular incident. What must be created by the act complained of (and not subsequent or previous acts) is the prohibited environment.
232. In considering whether the unwanted conduct has the prohibited effect the tribunal must have regard to C’s perceptions (subjective), but must also have regard to all the circumstances of the case (objective), and to whether it is reasonable for the unwanted conduct be considered to have the prohibited effect (***Richmond Pharmacology v Dhaliwal [2009] IRLR 336***).
233. **Time limits:** section 123 EqA governs the limitation period. (Subject to the act extending over a period argument, it is agreed that all acts before 15 December 2021 are on the face of it outside the limitation period).

234. There can be conduct extending over a period. It is only if an act is found to be an act of unlawful discrimination that it can be linked as part of conduct extending over a period. If any of the alleged acts are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act (**South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168**)
235. A deliberate omission is deemed to take place when an act inconsistent with doing the omitted action is done, or when it would have been reasonable for the omitted act to have been done (s 212(3) EqA 2010). Where an employer fails to make reasonable adjustments for a disabled employee simply because it fails to consider doing so, time runs at the end of the period in which the employer might reasonably have been expected to comply with its duty (**Matuszowicz v Kingston-upon-Hull City Council [2009] IRLR 288 (CA)**). This should be assessed from the employee's perspective (**Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**). The test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably.
236. The time limit can be extended if the claimant shows that it was presented within such period as the tribunal considers to be just and equitable. tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule (**Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**). This does not mean, however, that a claimant must put forward a good reason for their delay, or that time cannot be extended in the absence of an explanation for the delay from the claimant (see **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**).
237. When exercising discretion under section 123(1)(b) of the EqA 2010, tribunals should assess all relevant factors in a case, including "the length of, and the reasons for, the delay". In **Keeble**, it was suggested that a comparison with the checklist might help illuminate the tribunal's task, not that the checklist should be a framework for any decision.
238. When considering a period of unexplained delay, tribunals should be clear about the length of the period, in **Labongo Alum v Thames Reach Charity [2022] EAT 8**.
239. We were also referred to the following further case authorities:
- a. **Thomas Sanderson Blinds Ltd v English UKEAT/0316/10**
 - b. **Raj v Capita Business Services Ltd UKEAT/074/19**
 - c. **Pemberton v Inwood [2018] EWCA Civ 564**
 - d. **Weeks v Newham College of Further Education UKEAT/0630/11**
240. **Constructive dismissal**

241. Under section 95(1)(c) of the Employment Rights Act 1996 (“the Act”), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.
242. If the Claimant’s resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides “.... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case”.
243. With regard to trust and confidence cases, Dyson LJ summarised the position in ***Omilaju v Waltham Forest London Borough Council***: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”. 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: “impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”.
244. The judgment of Dyson LJ in Omilaju has been endorsed by Underhill LJ in ***Kaur v Leeds Teaching Hospital NHS Trust*** [2018] 4 All ER 238. Having reviewed the case law on the “last straw” doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation by the employee.
245. The Court in *Kaur* offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it

nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign. (5) Did the employee resign in response (or partly in response) to that breach?

246. We had the benefit of an agreed legal summary as helpfully prepared by the parties Counsel which confirmed the following in respect of the complaint of constructive dismissal:

247. The Claimant must satisfy the terms of section 95 of the Employment Rights Act 1996. The Claimant must show a fundamental breach of the implied term that the Respondent would not without proper cause, act in a manner that is likely to destroy or seriously undermine the relationship of trust and confidence.

248. The Claimant must show that he resigned in response to the breach. Events after the decision to resign are not relevant causally.

249. If the Claimant shows a series of events including in a final straw, undermining trust and confidence without reasonable or proper cause, he can prove a relevant breach (Kaur).

250. The Claimant must not have affirmed the contract. (Western Excavating).

251. The relevant principles are set out in W E Cox Toner (International) Ltd v Crook [1981] IRLR 443. So mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but prolonged delay may be evidence of an implied affirmation.

252. All the relevant factors of the case should be considered, not just the length of delay (Leaney v Loughborough University [2023] EAT 155 an academic waiting until after the summer holiday to resign had not affirmed, particularly where negotiations were taking place and they had 40 years' service).

253. We were also referred to the authorities of Quigley v University of St Andrews UKEATS/0025/05 and Fereday v South Staffordshire NHS Primary Care Trust UKEAT/0513/10.

THE DECISION

254. It is not in dispute that the Claimant is a disabled person as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about by reason of Crohn's disease. We accept this position.

255. It is not in dispute that the Respondent knows the Claimant has Crohn's disease at the times material to this claim.

256. There is a dispute though as to the substantial disadvantage that the disability causes and the extent of knowledge about that by the Respondent.

257. The Claimant asserts that the following arise in consequence of that disability:

- a. That he needed to shield due to his disability during COVID. It is not in dispute that the Claimant was shielding from 23 March 2020 to 19 May 2020 and this arises from his disability.
- b. That he required unimpeded access to the toilet at all times because of his Crohn's disease. The Claimant provides no details of this in his witness statement for this hearing. In oral evidence no examples were given either. The Claimant's evidence in his disability impact statement supports this being an intermittent event. The Claimant did not evidence that this was an issue for him when the outer office was being used and he couldn't pass through it. He presented no evidence to us that his Crohn's disease meant he needed the toilet at certain times at times material to this claim. The only significant example in witness evidence of the Claimant being restricted in the use of his office at the Respondent is in relation to events on the 11 January 2021 when he was returning to his office having left to get a coffee.

258. HP confirmed in cross examination that she knew the Claimant was shielding but not that it was due to his Crohn's disease. HP did not know of the Claimant's toilet needs and this is not a surprise as the Claimant did not communicate this to the Respondent in writing or verbally while the outer office was being used as a changing area. The Claimant's wife confirmed in cross examination that she was possibly the only person he would discuss such things with. The Claimant's ability to leave his office to go to the toilet is not a matter that was raised with the Respondent at the material time.

259. So, considering as a matter of fact the knowledge the Respondent had of this particular issue. No evidence has been presented to this Tribunal from which we can find the Respondent had actual or constructive knowledge of the disadvantage, in that the Claimant required unimpeded access to the toilet at all times because of his Crohn's disease, while the outer office was being used for changing (for a period from March 2020 to around late 2021).

260. In this claim there are two key factual allegations that relate to the complaints of discrimination:

- a. Allocating an area outside the Claimant's office as a changing area for nurses restricting his access in and out of his office and to the toilets at certain times (this relates to the arising from complaint and is also relevant to the complaints of indirect discrimination and failure in the duty to make reasonable adjustments). For the purposes of harassment, it is referred to as "locate the nurses' changing area outside the Claimant's office meaning he had to go through the area in order to access toilet".
- b. On 11 January 2021 Helen Pope had an altercation with the Claimant in which she shouted at the Claimant; threw keys on a desk and slammed a

door (which is asserted as direct disability or sex discrimination and harassment related to disability or sex). During his oral evidence when being asked about his complaint of direct discrimination the Claimant confirmed this altercation was a sex discrimination issue only and that he was not alleging HP did what she did because he had Crohn's disease. In closing submissions, it was confirmed the Claimant withdrew the allegation that this was direct disability discrimination or harassment related to disability.

261. As the second factual allegation is pleaded as both direct discrimination and harassment the following applies:

- a. In the first place the second allegation will be considered as an allegation of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.
- b. If the factual allegation is proven, then we will apply the statutory test for harassment. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under section 212(1) of the Equality Act 2010, the definition of detriment does not include conduct which amounts to harassment.
- c. If the factual allegation is proven, but the statutory test for harassment is not made out, we will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

262. For the complaint of direct discrimination, the Claimant relies upon a hypothetical comparator in the case of sex discrimination a hypothetical woman.

263. Considering the first of those allegations.

264. The issue for the Claimant, as was articulated in his emails sent in May and October 2021, is his ownership of the office space.

265. The Claimant in his information for the investigating Officer document dated 28 June 2021 (pages 491 to 500) records in response to two of HP's response (pages 494 and 495) ... "This maybe the case but doesn't not [sic] warrant expelling a member of staff from their designated office of 10 years.". The Claimant appears to consider that his "rights of occupation" should trump the attempts to provide a safe system in view of COVID.

266. It is not in dispute that the area outside the Claimant's office was for a period of time allocated as a changing area restricting his access in and out of his office and to the toilets at certain times.

267. It is also not in dispute that the area ceased to be used in such a way in the later part of 2021. It was put to the Claimant in cross examination that it ceased in September 2021 and the Claimant accepted this.

268. The Claimant had also accepted in cross examination that from the point in time the Respondent moved the changing area it couldn't then be discrimination against him on the grounds of sex or disability. The Claimant accepted that is also when the reasonable adjustment discrimination would end.
269. We find that it is the continuation of use that is an issue for the Claimant, and the conclusion at that time is there is no suitable alternative. We find that the reason for the outer office's original use and continuing use as a changing area is not because the Claimant was shielding or needed access to toilets at certain times, it is because it was the only suitable option at the time.
270. The Respondent says that using that space in that way was a proportionate means of achieving a legitimate aim, the aim being ensuring that there were sufficient changing facilities available to accommodate staff during peak periods in order to ensure the health and safety of staff and patients by complying with social distancing rules to prevent the spread of Covid infection.
271. The Claimant in cross examination accepted that was the Respondent's aim, but that he couldn't agree with it.
272. Considering then the second key factual allegation that on the 11 January 2021 an incident occurred between the Claimant and lead nurse HP.
273. It is not in dispute that on 11 January 2021 HP had an altercation with the Claimant in which she shouted at the Claimant; threw keys on a desk and slammed a door.
274. We have considered what the Claimant and HP told us about the incident and considered what the contemporaneous documents record about it. We also note that HP confirmed in cross examination that her reason for doing what the Claimant complains about (that is shout at the Claimant, throw keys on a desk and slam a door) was her being pushed out of the way, by someone who is told people are changing in the area they are seeking to pass through. HP also confirmed to this Tribunal panel that for any person she would have acted the same way.
275. We accept what HP tells us as to her reason, and we find it is not because of the Claimant's sex or a reason related to it. As HP says in her statement ... "I did this because I was outraged and felt it was completely inappropriate behaviour for someone to barge through in the way he did in to an area where staff – male or female – were getting changed."
276. Considering then these findings against the allegations of discrimination.
277. Firstly, the **discrimination arising from disability** complaint.
278. The Claimant alleges that he was treated unfavourably by the Respondent allocating an area outside his office as a changing area, restricting his access to

the toilets at certain times. This is because when the area outside his office was being used for changing the Claimant was expected not to pass through it.

279. So, did the Respondent treat the Claimant unfavourably by allocating an area outside the Claimant's office as a changing area for nurses restricting his access to the toilets at certain times? The area outside the Claimant's office was allocated as a changing area for nurses it would appear from March 2020 to September 2021.

280. Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that because of Crohn's disease the Claimant needs the toilet at certain times and the Claimant needing to shield because of his disability? We accept that the Claimant had to shield from 23 March 2020 to 19 May 2020 due to his disability. We also accept that the Claimant needs the toilet at certain times, being after a period of constipation.

281. Was the unfavourable treatment because of that thing? Did the Respondent allocate the area outside the Claimant's office as a changing area because of the Claimant needing to shield because of COVID and because the Claimant needs the toilet at certain time?

282. We do not find that what happened was because of that thing. We accept the Respondent's reasons as evidenced to us. It is because that area is the only suitable space in view of the extra measures needed during those COVID times. This is supported by that area being used in that way after the Claimant's return to work from shielding.

283. We also note that the Claimant accepts the Respondent's aim, and based on the evidence presented to us, we also accept that it is a legitimate aim. If our conclusions had been different as to the reason, we would have found that what happened was a proportionate means of achieving that legitimate aim, as it was appropriate and reasonably necessary, and something less discriminatory could not have been done instead. This is supported by there being only one notable example of restricted access on the 11 January 2021 when the Claimant seeks to return to his office having obtained a coffee.

284. As to the complaint of **indirect discrimination**.

285. It is not in dispute that the Respondent had or applied the PCP of needing to move between an inner office and an outer room to use the toilets. We accept this position. We also accept that the PCP was applied to the Claimant and would have applied to persons with whom the Claimant did not share the same protected characteristic.

286. However, we have not been presented evidence (so the Claimant has not discharged the burden of proof here) that the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom he did not share the characteristic (the group disadvantage). Nor, that the PCP put the Claimant at that disadvantage in that he required unimpeded access to the toilet at all times.

287. We also note that the Claimant accepts the Respondent's aim, and based on the evidence presented to us, we also accept that it is a legitimate aim. If our conclusions had been different to those set out above, we would have found that what happened was a proportionate means of achieving that legitimate aim, as it was appropriate and reasonably necessary, and something less discriminatory could not have been done instead. This is supported by there being only one notable example of restricted access on the 11 January 2021 when the Claimant seeks to return to his office having obtained a coffee.
288. As to the failure in the duty to make **reasonable adjustments**.
289. The PCP relied upon by the Claimant is the necessity of the Claimant going through the nurses changing area to access a toilet. This was the position as the toilet had to be accessed in that way.
290. The disadvantage asserted is (either as a PCP or a physical feature) that the Claimant required unimpeded access to the toilet at all times and when it was in use for changing it impeded his access. This disadvantage has not been evidenced to us.
291. Importantly the Claimant has not proven (on the balance of probability) that the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at that disadvantage, certainly while such a disadvantage was potentially active. Without such knowledge the duty to make reasonable adjustments does not engage.
292. Considering then the allegations of **harassment** related to disability and/or sex.
293. It is not in dispute that the Respondent did the following things:
- a. locate the nurses' changing area outside the Claimant's office meaning he had to go through the area in order to access toilet;
 - b. On the 11 January 2021 Helen Pope had an altercation with the Claimant in which she shouted at him; threw keys on a desk and slammed a door.
294. We accept that this is unwanted conduct as asserted by the Claimant.
295. Considering then whether it related to the Claimant's protected characteristic, namely disability or sex for the first allegation and sex for the second.
296. We find as a matter of fact that the area was used for changing by males and females. We have also found that the reason it was used in such a way was because that area is the only suitable space in view of the extra measures needed during those COVID times. This is supported by that area being used in that way after the Claimant's return to work from shielding. We do not find that

locating the changing area outside the Claimant's office was for a reason related to disability or sex.

297. We accept what HP tells us as to her reason for what she did on 11 January 2021, and we do not find that it is a reason related to sex. As HP says in her statement ... "I did this because I was outraged and felt it was completely inappropriate behaviour for someone to barge through in the way he did in to an area where staff – male or female – were getting changed."
298. The complaint of harassment fails because what happened is not related to the protected characteristics relied upon.
299. Finally, the allegation of **direct sex discrimination** (the direct disability discrimination allegation having been withdrawn).
300. It is not in dispute that on 11 January 2021 Helen Pope had an altercation with the Claimant in which she shouted at the Claimant; threw keys on a desk and slammed a door.
301. We have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator being a hypothetical woman.
302. As submitted by Respondent's Counsel the comparison has to be between the Claimant and a woman behaving in the same way. Counsel submits that HP would have acted in the same way towards a woman. We accept these submissions. We accept what HP tells us as to her reason for what she did on 11 January 2021, which is because of their conduct. As HP says in her statement ... "I did this because I was outraged and felt it was completely inappropriate behaviour for someone to barge through in the way he did in to an area where staff – male or female – were getting changed.". HP would have treated a woman in the same way as it is their conduct that causes HP's response. We do not find that what HP does is because of the Claimant's sex.
303. Considering all the evidence before us (which includes that adduced by the Claimant in support and that adduced by the Respondent contesting the complaint) there is not sufficient material from which we "could conclude" that the Respondent had committed an unlawful act of discrimination. We also accept the reason given by HP which is not connected to sex.
304. As a result of our findings all of the complaints of discrimination fail and are dismissed. With these findings we do not need to go on and determine the time limit jurisdictional matters.
305. Considering then the complaint of **constructive unfair dismissal**.

306. The Respondent's Dignity at Work (DAW) Procedure (pages 149 to 188) refers to a mediation process (page 163) which notes ... "Most importantly, mediation can help both parties understand each other's point of view and work together to find ways in which their working relationship can be improved.
307. The DAW procedure also sets out the role of the investigating officer (pages 171 to 172) and refers to 60 days to complete the investigation (page 171). It also details the investigation outcome and what it should contain, including details of the individuals interviewed (dates, times, names of those present during the interviews) and that transcripts of all interviews and any other relevant documents should be included as appendices.
308. The DAW procedure also describes the appeal process (pages 174 to 175). It says ... "If you are dissatisfied with the actions confirmed to be taken as a result of an investigation, or have queries regarding the investigation itself, you should first raise your concerns with the appropriate Commissioning Manager who made the decision." Then after that an appeal can be lodged within 14 days with the Head of Workforce Information.
309. It is not in dispute that the Claimant utilises the DAW procedure and in closing submissions it was confirmed that he withdrew allegation 2.1.3.7 that the Respondent failed to treat the written complaint as a grievance.
310. As to the ToR for the DAW procedure we understand that these were agreed with the Claimant.
311. As to the investigation report then produced by LP (pages 254 to 271).
312. LP is given the go ahead to contact the Claimant and HP on 25 June 2021 and the report is completed and submitted on the 16 September 2021 (a period of 83 days). LP confirmed she had three weeks leave in that period, which she informed the parties about (so 21 days) meaning discounting for that, the process took 62 days. This is 2 days longer the DAW policy requires, and 32 days longer than the ToR stipulated. LP confirmed in her oral evidence that she believed she had completed the process in a timely manner, which is also supported by paragraph 23 of her witness statement.
313. LP was challenged in cross examination about the pagination of the investigation report which doesn't match the contents page (page 254). She acknowledged that was an error. LP did not accept she was biased or had predetermined matters when challenged in cross examination.
314. LP confirmed in cross examination that the way she conducted the interviews and who she interviewed was a proportionality judgment balancing time against the matters raised in the ToR (which we note in the main concern the Claimant's relationship with HP).

315. LP confirmed in cross examination that she did speak to everyone in the ToR, and she did have her own notes and she believed she could find those somewhere. LP did then produce further notes and emails that she had located before day 6 of this hearing which supported what she had told us in evidence. LP was recalled on day 6 to be questioned about this late disclosure. LP explained that these documents were not disclosed earlier by her in error as her work base had changed and she was then hoping to be back the week following but wasn't and then forgot. Although this is far from ideal in the context of formal Tribunal litigation, we accept what LP tells us.
316. Having considered what was investigated by LP and the report she then produced it is clear that the process and report produced was not to the letter of the DAW procedure. However, the conclusions in our view remain fair. Although criticism is raised in the appeal outcome of LP, as was confirmed by AD, she was not concerned about the additional witnesses (i.e. those not in the ToR) and that the issue for her was the written report was not complete (i.e. with interview details as to when and where, and who present and as to transcripts) rather than the process itself. This is consistent with the findings AD makes in agreeing with LP's outcome, herself finding that there was ... "insufficient evidence to show that HP's actions met the definition and that they intended to undermine, humiliate, degrade or injure you, because as above, it appears that there was some miscommunication between what you were being told and what HP was being told."
317. About LP's recommendation, we have had the benefit of considering the evidence about such matters in this Tribunal, hearing evidence from both the Claimant and HP, and with that insight we find that the conclusion reached by LP is a reasonable one.
318. Having considered all these facts we accept what LP tells us as to the investigation process and her conclusions.
319. The Claimant is provided a copy of the report on the 22 September 2021, and he then attends a meeting on the 27 September 2021 with the Respondent to discuss the outcome of the investigation.
320. Chronologically then, as the Claimant describes in his witness statement at paragraph 33, it is during a family holiday in October 2021, after relaying personal concerns to his family ... "... I knew then that I had to leave the hospital to save my mental health. I did not want to resign and lose my job, but I could not carry on with the mental torture of indefinite waiting for hospital inaction. I had lost all faith and confidence that the hospital would safeguard me at work."
321. PE also refers in her witness statement to the family holiday in October 2021 and at paragraph 24 that ... "Simon felt the only course of action was to leave the hospital. It was a difficult decision for him."

322. It is clear from this evidence that so far as the Claimant is concerned, following receipt of the investigation outcome, the contract is broken as of October 2021. The Claimant does not resign at that point though.
323. The Claimant sends an email to BAD on the 26 October 2021 (paragraph 34 of his witness statement and page 609). The email is chasing the investigation outcome measure and a response to his initial 6 points, it is not seeking to protest at what has happened or reserve his position, that is the Claimant expressing the contract is breached unless the Respondent does x or y.
324. It is not in dispute there is a delay in getting the outcome letter to the Claimant. BAD refers to pressure of work and then believing he had arranged for the letter to be posted by recorded delivery after it was written on the 5 December 2021.
325. This is investigated at appeal by AD. Her appeal outcome notes that the delay is completely unacceptable.
326. We do accept what BAD tells us though, that he was managing high work volumes and believed the outcome letter had been sent, which is consistent with what he says in his email dated 20 January 2022.
327. The outcome letter was sent to the Claimant on the 24 January 2022, and it does address the 6 points the Claimant raised and confirms that the outer office is no longer used for changing (page 614).
328. It does not uphold the Claimant's complaint concluding (page 615) ...

"Whilst this is the case, I recognise that there are further concerns you may wish to discuss, and I am happy to work these through with you. There are also several recommendations that come out of the report, and a number of actions that I will take to bring you back to the workplace. I suggest that we meet to discuss these and plan for your return to work.

If you are unhappy with the decision that I have reached, then you may choose to pursue this further under the terms of the Trust's grievance procedure, and HR will be able to support you with this.

Can I suggest that we arrange to meet at a time convenient to you within the next fortnight? I can be contacted on the numbers you have for me, or via email."

329. As BAD refers in his witness statement at paragraph 39 ... "As set out in paragraph 20, I told Simon he could raise a grievance if he was unhappy with the outcome but this was an error – I should have offered him the right of appeal. In any event, Simon was offered a method of redress and an appeal hearing took place."

330. The Claimant then resigns that day with notice, and in his resignation letter dated 24 January 2022 says as to the reason for leaving (page 673) ... "My job has become untenable due to the conduct of Helen Pope (and other nursing staff in my department); the ongoing failure to provide me with a safe place to work; the way in which the Trust has handled my complaint and the procedure followed; and I feel that I have been discriminated against."

331. The Claimant claims that he was constructively dismissed because the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence.

332. We now consider each of the asserted breaches the Claimant relies upon:

- a. All matters relied on as discrimination which we have already addressed. We do not find the Claimant has proven his allegations of discrimination either as acts of discrimination or in the way alleged to therefore amount to an asserted breach as relied upon by the Claimant.
- b. The allegation that on his return to work the Claimant had no office to return to was withdrawn in closing submissions, as it was recognised that he did have an office to return to.
- c. The remainder are in respect of the Claimant's complaint of 11 January 2021, which we take to mean the Claimant's complaint about matters on the 11 January 2021, rather than just his complaint of the 11 January 2021:
 - i. The Respondent failed to follow a proper procedure. About this we note that the Respondent utilised the DAW procedure in agreement with the Claimant. Having considered what was investigated by LP and the report she then produced it is clear that the process and report produced was not to the letter of the DAW procedure. However, the conclusions in our view remain fair. Although criticism is raised in the appeal outcome of LP, as was confirmed by AD, she was not concerned about the additional witnesses (i.e. those not in the ToR) and that the issue for her was the written report was not complete (i.e. with interview details as to when and where, and who present and as to transcripts) rather than the process itself. This is consistent with the findings AD makes in agreeing with LP's outcome. LP confirmed in cross examination that the way she conducted the interviews and who she interviewed was a proportionality judgment balancing time against the matters raised in the ToR (which we note in the main concern the Claimant's relationship with HP).
 - ii. The Respondent failed to make a decision on the Claimant's complaint. This is not correct as a matter of fact, a decision was reached, it was not the decision the Claimant wanted.
 - iii. The Respondent delayed in processing the complaint. We do not accept that LP delayed the process so far as her input was

concerned. However, BAD was delayed in getting the outcome letter to the Claimant. About this we do accept what BAD tells us though, that he was managing high work volumes and believed the outcome letter had been sent, which is consistent with what he says in his email dated 20 January 2022.

- iv. There was a lack of impartiality by the investigating officer. This as a matter of fact has not been proven by the Claimant (on the balance of probability).
- v. During the course of investigation, the Claimant was not provided with responses to his questions. As a matter of fact, the Claimant had 6 questions, he chased a response to those, and was provided answers to them.
- vi. The Claimant's key witnesses were not interviewed. The key witnesses in accordance with the agreed ToR were interviewed as demonstrated by LP. There were some additional witnesses suggested by the Claimant which were not spoken to or interviewed, but as confirmed they related to the Claimant's rights of ownership of the office space. The DAW procedure was looking in the main at the relationship between the Claimant and HP. The conclusions reached by LP are in our view reasonable based on the evidence we heard.
- vii. The Respondent failed to treat the written complaint as a grievance. This was withdrawn by the Claimant in closing submissions, it being accepted that the process was under the DAW procedure.
- viii. The Respondent failed to send the decision and outcome of the complaint on the 3 December 2021 as they purported to do. We accept that BAD thought the outcome letter had been sent. We accept that the Claimant did not receive it. The Claimant has not proven the Respondent knowingly failed to send the letter on 3 December 2021. We would also note that the Claimant did not chase the outcome from BAD. It was BAD following the matter up with the Claimant, that led to the non-receipt issue being identified.
- ix. The outcome of the process was to close it without any Resolution; This is not correct as a matter of fact, a "Resolution" was reached, it was not one the Claimant wanted.
- x. Helen Pope obtained statements from nurses in retaliation for the Claimant having made complaints against her. We accept the evidence of HP about this matter, HP thought this was part of the mediation process which is consistent with the DAW procedure and HR advice.
- xi. None of the issues which caused the Claimants absence which were to do with the location of the office were addressed despite

the recommendations of the occupational health report of the 17 December 2021. The issues as before us about the outer office being used for changing and the Claimant's disability were not matters before the Respondent at the time. The Claimant's focus at that time is about his exclusive ownership of the space. That was addressed as the outcome letter states that the outer office is no longer used for changing. Further, the Investigation report makes findings as to why what happened did at that time.

- xii. The Claimant was denied a right of appeal because the Respondents dealt with his complaint under the dignity at work policy. The Claimant was not denied a right or appeal under the DAW procedure as such an appeal did take place. What happened as a matter of fact was BAD did not offer an appeal because he did not think there was one. Instead, he invited the Claimant to interact with him and also confirmed ... "...If you are unhappy with the decision that I have reached, then you may choose to pursue this further under the terms of the Trust's grievance procedure, and HR will be able to support you with this.". The Claimant then tried to do that through his instructed solicitors but was then diverted back to an appeal under the DAW procedure. The Claimant had not exhausted his options at the point of his resignation.
- xiii. The Respondent did not provide any resolution to the Claimant's complaint up to the point of the Claimant's resignation. This is not correct as a matter of fact, a "resolution" was provided, it was not one the Claimant wanted.
- xiv. On 24 January 2022 the Claimant was notified by the Trust that they would be closing the investigation. This is correct because the Respondent had provided an outcome.

333. The Claimant asserts that the last of these breaches (that on 24 January 2022 the Claimant was notified by the Trust that they would be closing the investigation) is the 'last straw' in a series of breaches, as the concept is recognised in law.

334. Considering the five questions raised by **Kaur**

- a. ***What was the most recent act on the part of the employer which the employee says caused, or triggered, his resignation (1)?*** This was on 24 January 2022 the Claimant was notified by the Trust that they would be closing the investigation.
- b. ***Has he affirmed the contract since that act (2)?*** No.
- c. ***If not, was that act by itself a repudiatory breach of contract (3)?*** So, to consider:

- i. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
 - ii. Whether it had reasonable and proper cause for doing so.
- d. The Respondent notified the Claimant that they would be closing the investigation because it had provided an outcome. This may not be what the Claimant wanted to hear, but the Respondent has reasonable and proper cause for doing so, as they have reached a conclusion.
- e. ***If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence (4)?*** The Claimant has presented evidence to this Tribunal that the contract was broken so far as he was concerned in October 2021. By that point the Claimant had the investigation report. He does not resign at that point though, resigning on the 24 January 2022 with three months' notice. Looking at what happened up to October 2021 that the Claimant complains about. He relies upon all matters relied on as discrimination which we have already addressed. We do not find the Claimant has proven his allegations of discrimination either as acts of discrimination or in the way alleged to therefore amount to an asserted breach as relied upon by the Claimant. As to the matter concerning HP obtaining statements from nurses in retaliation for the Claimant having made complaints against her. We accept the evidence of HP about this matter. HP thought this was part of the mediation process which is consistent with the DAW procedure and HR advice. We find therefore she had reasonable and proper cause for doing what she did. The DAW procedure was not followed to the letter, but LP was in our view doing what she thought was best to conclude a report in a proportionate way and within a reasonable time. The conclusions LP reaches are in our view fair. The outcome is not as the Claimant wanted, and we do not know if he would still challenge the process if it was, but as to the process we find that LP had reasonable and proper cause for acting in the way that she did.
- f. ***Did the employee resign in response (or partly in response) to that breach (5)?*** The Claimant has presented evidence to this Tribunal that the contract was broken so far as he was concerned in October 2021. The Claimant does not resign at that point, nor seek to protest or reserve his position from that point. What he then relies upon as a potential breach after that date would appear to relate to the outcome itself, in that he says it did not provide a decision/resolution, there was a delay in getting the outcome to him and not being offered a right of appeal under the DAW procedure. As we have noted the Claimant was provided a decision/resolution (including answers to his 6 questions), he just didn't agree with it. There was a delay in getting the outcome to the Claimant, but the Claimant was not chasing BAD for his outcome. We accept the evidence of BAD as to his reasons for delay and that he had reasonable and proper cause for doing what he did. As to the offering of an appeal,

the Claimant was offered a method to challenge the outcome, it was just not the correct option under the DAW procedure. What the Claimant does not assert though is that the Respondent breached the implied term of mutual trust and confidence by offering him the wrong method of challenge, which is what happened. Reminding what the Claimant writes in his letter of resignation ... "My job has become untenable due to the conduct of Helen Pope (and other nursing staff in my department); the ongoing failure to provide me with a safe place to work; the way in which the Trust has handled my complaint and the procedure followed; and I feel that I have been discriminated against.". The Claimant does appear to be resigning in response to these matters, but there does appear to be an issue of affirmation as submitted by Respondent's Counsel certainly for matters pre-October 2021, as the Claimant has not objected or reserved his position before continuing in the employment relationship.

335. Having considered all the asserted breaches we do not find that the Respondent behaved in a way that was calculated to destroy or seriously damage the trust and confidence between the Claimant and the Respondent. Some of the matters asserted may be likely to do so (for example delay in providing the outcome letter) but we find in those situations the Respondent had reasonable and proper cause for doing what it did.
336. With these determinations we do not find that there was a constructive dismissal, so we do not need to go on and consider whether it was otherwise fair within the meaning of section 98 (4) of the Act.

Employment Judge Gray
Dated 30 September 2024

Judgment sent to Parties on
12 October 2024 By Mr J McCormick

For the Tribunal Office