



# EMPLOYMENT TRIBUNALS

**Claimant**

**Sharon Blake**

**Respondent**

**Imperial College Healthcare NHS  
Trust**

**Heard at:** London Central

**On:** 16 – 18, 21 - 22 October 2024  
In chambers: 23 – 24 October 2024

**Before:** Employment Judge Lewis  
Mr A Adolphus  
Ms G Carpenter

**Representation**

**For the Claimant:** Miss L Halsall, Counsel

**For the Respondent:** Miss M Martin, Counsel

## RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that

1. The claimant was unfairly dismissed.
2. The claimant's dismissal was discrimination arising from disability contrary to section 15 of the Equality Act 2010.
3. The respondent failed to make the reasonable adjustment of exploring redeployment and redeploying the claimant outside her department.

A remedy hearing will be held on **28 – 30 April 2025**.

## REASONS

### Claims and issues

1. The claimant brings claims for unfair dismissal, discrimination arising from disability contrary to s15 of the Equality Act 2010 and failure to make reasonable adjustments. She has withdrawn claims for notice pay and the claim for holiday pay has now been resolved.
2. The respondent admits that the claimant had two disabilities at the relevant time: (1) depression and stress (2) spinal stenosis. The respondent states that it had knowledge of the depression from February 2022, the stress from August 2022 and the spinal stenosis from February/March 2022. The claimant's arm / shoulder / hand pain was initially thought to be tenosynovitis and then carpal tunnel syndrome, before it has eventually been diagnosed as spinal stenosis, though even that is still under investigation. Whichever of these, the respondent accepts that the arm / shoulder / hand pain was a disability.
3. The outstanding issues were agreed at the start of the original hearing as follows:

### Unfair dismissal

- 3.1. What was the reason for the claimant's dismissal?
- 3.2. Was that reason a potentially fair reason for dismissal?
- 3.3. Did the respondent act reasonably in the circumstances, including its size and administrative resources, in treating the reason as sufficient for dismissing the employee?
- 3.4. In particular, did the respondent:
  - 3.4.1. Take steps to establish the current medical position of the claimant and her likely prognosis?
  - 3.4.2. Base its decision to dismiss on the objective facts?
- 3.5. Did the respondent follow a fair procedure in dismissing the claimant? In particular, did the respondent
  - 3.5.1. Fail to rearrange the Stage 2 Absence Review meeting
  - 3.5.2. Fail to hold an appeal meeting
  - 3.5.3. Take reasonable steps to look for suitable alternative roles?
- 3.6. Was dismissal within the range of reasonable responses open to the respondent?

### Discrimination arising from disability

- 3.7. Did the respondent know, or could it reasonably have been expected to know, that the claimant was disabled?

- 3.8. What was the 'something arising in consequence' of the claimant's disability? The claimant says it was her inability to work and the fact that she was signed off sick as a result.
- 3.9. Did the respondent treat the claimant unfavourably because of the 'something arising in consequence' of her disability? The claimant says the unfavourable treatment was being given notice of dismissal on 26 October 2022 and that her employment terminated on 11 January 2023.
- 3.10. If so, can the respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

- 3.11. Did the respondent know, or ought it reasonably to have known, that the claimant was disabled?
- 3.12. If so, did the respondent apply the following provision, criterion or practice to the claimant: a requirement that chemotherapy nurses be fit and well to fulfil their contractual duties?
- 3.13. Did the provision, criterion or practice put the claimant at a substantial disadvantage in comparison with people who do not share her disability?
- 3.14. Did the respondent know, or ought it reasonably to have known, that the claimant was likely to be placed at a disadvantage as a result of her disability?
- 3.15. If so, did the respondent take reasonable steps to find a suitable alternative role for the claimant?

Time-limits

- 3.16. Are the disability discrimination claims in time?
- 3.17. If not, should the tribunal extend time on a just and equitable basis?
4. The tribunal agreed with the representatives early in the hearing that the issues of Polkey / Chagger would also be decided as part of the liability hearing.

**Procedure and adjustments**

5. There was a previous attempt to hold this hearing in April 2024. However, this was discontinued at an early stage because the claimant was too unwell to continue, and it was agreed that the evidence which she had given, such as it was, should be disregarded. The current hearing was a complete restart, although the tribunal panel is the same.

6. A ground rules hearing was held in July 2024.
7. The tribunal heard from the claimant and for the respondent, from Miriam Phillip, Linda Watts and Alexandra Donkin. There was an agreed trial bundle of 633 pages and the witness statements were together in another bundle. We were also given these loose documents during the hearing: two emails related to the appointment of a new ward sister and what we have called an 'extra trial bundle' including the draft OH report in July 2022 and emails regarding submission of the grievance; a bundle called 'additional emails 2' which largely encloses emails that are already in the main bundle but has 1 or 2 additions; an email from Mrs Watts to the claimant dated 16 January 2023. Both representatives provided written closing submissions.
8. There was also an agreed statement of facts; a short chronology and a longer chronology. These were used to give the claimant reference points through her cross-examination.
9. The claimant's sister sat next to her. The tribunal asked everyone except the tribunal panel, Counsel and any witness while being cross-examined, to switch their cameras off. There was a 5 minute break every 30 minutes except where there was a longer scheduled break, and during the claimant's cross-examination, there was a 5 minute break every 20 minutes in addition to the usual longer breaks. We had an extended break mid morning on day 4 at the claimant's request. Miss Martin took cross-examination at a patient and calm pace and the adjustments appeared to work well, with the claimant able to answer questions, except where she said she was unable to remember details.
10. The ground rules hearing had agreed that it would be for the claimant to state whether she wished to give evidence first or last. She had informed the respondent that she wished to give evidence last. At the outset of the hearing, the respondent asked for Miss Donkin to give evidence not before the afternoon of the third day and for the claimant's evidence to be interposed after Ms Phillip's and Mrs Watts' evidence. The reason was due to some commitments up to that point in relation to a recent Fellowship which Miss Donkin has been awarded. The claimant objected. The tribunal stated that the claimant would give evidence last. It had been agreed at the ground rules hearing that it would be her choice. Interposing witnesses was never ideal at the best of times. The tribunal did its best to accommodate Miss Donkin by offering to read the witness statements as quickly as possible, so she could start her evidence on day 1 and Miss Halsall indicated her questions could be finished on day 1. However, Miss Martin said the respondent wished to call their other witnesses first. The tribunal said the respondent could call their witnesses in whatever order they wished. In the event, Ms Phillip's evidence was completed on the first afternoon. Mrs Watts gave evidence first on the second morning. Then Miss Donkin gave evidence. As far as we could tell, Miss Donkin was present and watched virtually all, if not all, of the first three days,

## Fact findings

### Witnesses and evidence

11. It was difficult to make fact findings in this case. Each of the respondents' witnesses expressed difficulty from time-to-time in remembering detailed conversations so long ago. The claimant had even greater difficulty because of her mental health issues. As with all witnesses, we were careful to consider at all times whether a witness has actually forgotten or prefers to avoid a question. These memory difficulties were compounded by the unusual lack of notes and minutes on all the key meetings, which parties usually use to refresh their memories. The problem with outcome letters is that they are a short summary from a particular perspective. We have done our best from such documents and oral evidence that we have.

### Background

12. The claimant qualified as a registered nurse in 1985 at Charing Cross Hospital. She had worked for the respondent, partly as a bank nurse and partly in permanent posts for over 20 years. As a bank nurse, she had worked in various specialities all over the hospital and was even put in charge on occasion.
13. The claimant started full-time employment with the respondent in 2002. She became a Band 6 nurse in 2005. In 2010, she was redeployed from the 6 East Chemotherapy Day Care Unit at Charing Cross Hospital to St Mary's Hospital as a result of what she describes as bullying and harassment at that time. This impacted on her mental health and she was first diagnosed with stress, anxiety and depression in 2010. In 2011, the St Mary's Hospital unit was closed and the claimant moved to Hammersmith Hospital.
14. The claimant developed problems with her right hand in 2019 and she was seen by Occupational Health ('OH') at that time. Informal local adjustments were put in place at that time in that the small team would accommodate which patients she felt able to work with.
15. In early 2021, the claimant's unit at Hammersmith Hospital was transferred to the Charing Cross Hospital chemotherapy day care unit. For the claimant, this brought back traumatic memories of being bullied. The claimant was now working on a different unit and if chemotherapy drugs needed to be collected from the fridge at 6 East, she would ask colleagues to collect them for her.
16. Alexandra Donkin became the claimant's line manager in June 2021.
17. Around this time, a merger of units was planned, so that the claimant's unit would merge with 6 East. In the lead up to the merger, Miss Donkin was encouraging the respective staff to get used to various tasks on the other unit.

She accepts she encouraged the claimant to do some of these tasks. The claimant experienced this as pressure – her previous manager had simply accepted that she could not go to 6 East.

18. Ultimately the merged units were to move to a new location, ie 6 West.
19. The claimant was on sick leave from 14 December 2021 to 31 January 2022 with Covid, followed by a chest infection. A phased return to work was agreed. A couple of days into her phased return, the claimant's father died. She was granted 5 days' bereavement leave, after which she was signed off sick until 28 February 2022 as a result of the bereavement. The claimant had also lost her mother the previous year along with other close relatives and friends, and her parents' loss greatly impacted her mental health.
20. The claimant remained off sick under a series of Fit Notes until the end of her employment. By way of overview, shoulder / arm / hand pain was a consistent factor throughout from 25 February 2022. At certain points, when we mention below, there was also reference to bereavement or workplace stress.
21. On 25 February 2022, her GP signed the claimant off until 24 March 2022 with 'bereavement / arm and hand pain under review'.
22. The unit merger took place in December 2021. There would now be about 20 members of staff instead of 5. Staff worked in teams rather than in individual silos, which Miss Donkin felt allowed more flexibility for others to do strenuous tasks instead of the claimant. There was also a greater range of treatments and more of them would have been less strenuous.

#### First OH Referral

23. Miss Donkin accepted in cross-examination that from February 2022 she would probably have classified the claimant as having a disability with her arm / shoulder / hand injury.
24. On 18 March 2022, Miss Donkin referred the claimant for an OH report. The referral mentioned that the claimant had been off sick with bereavement and arm/hand pain since 14 February 2022. She asked whether the claimant was able to return to her current role and for suggestions as to how she could support this.
25. On 24 March 2022, the claimant's GP issued another Fit Note for the period 24 March – 6 April 2022. This Fit Note simply referred to 'shoulder and arm pain'.
26. The claimant was assessed by OH over the telephone on 25 March 2022 and a report provided on that date by a Senior Occupational Health Adviser, Bolanle Ijagbemi. OH confirmed that the claimant had (what was then thought to be) an underlying carpal tunnel condition. OH recommended that the manager do a workplace risk assessment regarding some clinical procedures

which contributed to her pain, including drawing up liquid injections. OH said that a DSE/workstation assessment should also be done, and that the claimant would benefit from dragon software to help her with writing reports.

27. OH said that the claimant was currently unfit for work, both because of her right shoulder and hand pain, and also because of her mental health symptoms due to bereavement. OH recorded that the claimant did not have full power to grip and hold things with her right hand, although she could clean and cook to an extent. It was painful to write. Medication was not effective in removing the pain. The claimant had one session of physiotherapy so far, but felt the physiotherapy might help. She had had a steroid injection which had only helped for a short while.
28. Regarding bereavement, OH said the claimant had spoken with the CONTACT team for mental health support, but was not currently in the right head space for counselling. She had lost her mother last year as well as her father this year. She was having broken sleep and fluctuating mood, memory, concentration, focus and concentration level. She remained symptomatic with both pain and mental health symptoms due to bereavement.
29. The OH report said that on her return, temporary workplace adjustments would be required. It was not possible to estimate a return to work date at this point. Management should consider reasonable adjustments under the Equality Act on her return. There should be a 4 week phased return to work plan, during which she should avoid the scalp cooling machine and dealing with intravenous injections requiring a lot of pressure. After that, she should slowly be reintroduced to some clinical process. She should then be reviewed weekly to ensure she was coping. The manager should ensure the claimant had appropriate duties should she report that she was impacted on occasion so that she could conduct work of a less demanding nature. OH recommended that the claimant minimise the risk of exacerbating her condition through risk assessing her activities and workload and working within the limitations of her condition. She would also benefit from protected time for medical appointments and Access to Work. The report concluded that as part of the claimant's current role could exacerbate her existing condition, redeployment to another work area where there were not many hands-on duties would be beneficial.
30. At that point, Miss Donkin did not make any concrete plans for the claimant's return to work because there was no indication as to when the claimant was likely to return.
31. From 4 – 25 April 2022, the claimant was signed off sick because of 'shoulder and arm pain'. From 22 April – 9 May 2022, the claimant was signed off sick because of 'shoulder and arm / hand pain'.
32. We add here that although at the time everyone believed the claimant had carpal tunnel syndrome, more recently the diagnosis has changed to spinal stenosis. Either way, the parties agree that the arm / shoulder / hand

impairment was a disability, whether arising from spinal stenosis or carpal tunnel syndrome.

Stage 1: Absence Review Meeting

33. Up until this point, Miss Donkin had only had informal telephone discussions with the claimant. However, due to the length of time the claimant had been off sick, Miss Donkin decided to fix a Stage 1 Sickness Meeting under the Sickness Absence Policy.
34. There are 3 formal Stages under the Policy after informal meetings. Stage 1 is a solutions-focused discussion. The outcome and expected improvement should be set out within 7 calendar days of the meeting. There will be a monitoring period, usually between 4 and 12 weeks. Stage 2 is run in a similar way if attendance remains a concern. There may be a further monitoring period of up to 12 weeks and notification that if attendance continues to be a concern over the following 12 months, things may move to Stage 3. Possible outcomes of Stage 3 are an extension of the monitoring period, redeployment or dismissal on grounds of capability. The line manager will prepare a case summary for the person chairing the hearing including up-to-date attendance records; impact of the absences on the service and the team; OH or other medical advice; adjustments considered or already implemented; and details of alternatives to dismissal that have been explored.
35. The Stage 1 meeting took place with Miss Donkin on Teams on 26 April 2022. The claimant attended with her union representative, Ellery Trina. A Senior HR Adviser, Sahra Ismail, also attended. An outcome letter was sent the same day.
36. No minutes were taken of the Stage 1 meeting.
37. The claimant said her health was unchanged but she was continuing with her physiotherapy. Regarding when she could come back to work, the claimant said she was waiting to see her specialist. She added that she had experienced a very challenging time with multiple bereavements.
38. Miss Donkin said the claimant could have a phased return as recommended in the recent OH report and it could be supplemented with annual leave. They discussed specific recommendations that Ms Donkin could help with such as not doing scalp cooling or drawing up medications and ensuring the claimant had an allocated person to take over her patients on her phased return. The HR adviser recommended using Access to Work and Miss Donkin suggested that the claimant complete an application which might provide additional support such as dictation resources. Miss Donkin confirmed that she would support the claimant attending medical appointments.
39. The claimant was reminded that her pay would be reduced to half on 9 July 2022.



40. The claimant and Miss Donkin continued to have regular telephone conversations about her health and progress until the telephone conversation on 15 August 2022 described below. These welfare calls were intended to be once/week. They usually happened, but not always. The onus was put on the claimant to make the telephone call and if Miss Donkin was busy or elsewhere, the claimant had to keep trying to get her. The claimant at some point asked for a regular scheduled time, but Miss Donkin could not commit to that because of the demands of the department.
41. There are no notes of the content of these calls.

#### Second OH referral

42. From 9 May – 23 May 2022 and again from 20 May – 13 June 2022, the claimant was signed off work with ‘shoulder and arm hand pain’.
43. On 23 May 2022, Miss Donkin made another referral to OH. This was because the claimant had stated at the Stage 1 meeting that her arm / hand pain was caused by an injury at work and under Trust policies, that means more sick pay. Miss Donkin therefore did ask OH if it was a work-related injury and if her condition was caused or made worse by work.
44. Miss Donkin mentioned on the referral form that the claimant had work-related adjustments in place such as not being allocated scalp cooling and assistance when required to draw up medication. This must have been a reference to the earlier local adjustments in the pre-merged department.
45. The same person at OH carried out a telephone assessment on 25 May 2022. The report stated that the claimant could return to work if she could be redeployed into a supervisory role with less hands-on clinical duties and/or be given duties not requiring prolonged use of her dominant right hand. The claimant was having ongoing physiotherapy. She could lift her right hand to clean and cook but did not have full power to grip and hold things with her right hand. OH could not say, based on the OH record, whether the injury was caused by work, but it was likely that it could be made worse by work activities. The manager should risk assess to ensure appropriate duties if operationally feasible.
46. There was no mention in this report that mental health was a current problem.
47. Miss Donkin did not discuss with the claimant or look for alternative posts outside her department. Within her own department, she seems to have had some discussion with the claimant during the weekly calls. The claimant had suggested pre-treatment consultations, but this was not an option because it had been moved online to a charity during Covid. Miss Donkin says there was no position available in Clinic 8 (Outpatients). She did not look at any other clinics.

#### Third OH referral

48. The claimant remained off sick. She was signed off from 10 – 30 June 2022, from 30 June – 27 July 2022 and from 27 July – 17 August 2022 because of 'shoulder and arm / hand pain'.
49. On 26 June 2022, Miss Donkin made a third OH referral. She noted that the claimant had been off sick medically certified with shoulder and arm pain since 14 February 2022 and was undergoing physiotherapy. Miss Donkin said there were work related adjustments in place such as not being allocated scalp cooling, and assistance when required to draw up medication, Miss Donkin said that the claimant was keen to think about returning to work in her current role and the claimant had asked her to make an Access to Work application to see if there was any additional support available. Miss Donkin said she was finding it challenging to think of an alternative role or any other reasonable adjustments and suggested a case conference with the claimant might be beneficial after OH had spoken to the claimant to discuss returning to work or whether temporary or permanent redeployment would be more suitable.
50. Also on 26 June 2022, Miss Donkin sent the claimant a link to Access to Work, asking her to apply as soon as possible, and the respondent's 'Supporting Staff who have a Disability' policy. She attached the referral form to OH and said she had made a new request for a case conference.
51. The case conference did not happen. At the time, OH was not doing case conferences because of its workload.

#### Stage 2: Absence Review Meeting

52. By way of overview of the Fit Notes again, the only reason given why the claimant was said to be unfit to work in the fit notes from 24 March 2022 – 17 August 2022 was because of 'shoulder and arm pain' or 'shoulder and arm/hand pain'. There was no further reference to bereavement, and stress at work was not mentioned as an additional factor until 16 August 2022. It was a live issue in the 25 March 2022 OH report but not in the May 2022 report.
53. The 'Supporting Staff Who Have a Disability Policy' says at paragraph 3.1 'If it is not possible to retain a member of staff in their current post, it is the manager's responsibility to facilitate redeployment to a suitable alternative post, where this is supported by occupational health and desired by the member of staff. Paragraph 3.2 says that although managers are not required to create posts or functions, they 'are required to do everything reasonably practicable to maintain employment of staff in line with the above principles'.
54. On 23 July 2022, Miss Donkin emailed the claimant to say a Stage 2 sickness absence meeting would take place on 12 August 2022 because the claimant had continued to be on sick leave since the last review meeting. The stated purpose was to discuss what help and support the claimant was accessing and what the respondent could do to offer support. There was no mention of redeployment, as Miss Donkin was still hoping the claimant would

return to the unit. A copy of the Trust's Sickness Absence Policy was attached and the claimant was told she could bring a trade union representative, colleague or friend with her. The date was rearranged to 8 August 2022 when the union representative could be available.

55. The claimant had a telephone OH assessment on 26 July 2022 with Dr Assoufi. He sent her his draft report for checking on 27 July 2022. The draft report (which management never saw at the time) said, 'As you are aware she has been suffering from pain and limitation of movement of her right arm ..... It seems now her pain is mainly in her right wrist'. The report said that the claimant continued to have symptoms related to her condition, but she would be fit to return to work in two weeks with adjustments. The adjustments were:
- 55.1. Avoid heavy lifting, pulling and pushing
  - 55.2. Minimise typing and have frequent breaks from using the computer and keyboard
  - 55.3. Carry out 50% of her working hours for the first week and 75% for a further week.
  - 55.4. Time off to attend hospital appointments.
56. On 28 July 2022, the claimant emailed OH asking to speak to Dr Assoufi regarding his draft report before it was sent to her manager. She said that she wanted to clarify the phased return to work plan as the length of time was different from the one in the March 2022 OH report. She said she was worried about being overloaded because of short-staffing, and that was how her hand injury had occurred in the first place. She said that the draft report stated the pain was mainly in her wrist, but that should be her right hand. Finally she said that her manager had mentioned a case conference in the referral form – could she speak to Dr Assoufi about that?
57. There was no mention of any mental health issue in the draft report, and the claimant did not raise it in her 28 July 2022 email.
58. Dr Assoufi did not get back to the claimant until 30 August 2022.
59. The Stage 2 absence review meeting was held on 8 August 2022. It was attended by Miss Donkin, the claimant, the Interim ER Manager, Richard Ephraim, and the claimant's then union representative, Ms Trina. Miss Donkin did not check with the claimant or OH prior to the meeting as to where the OH report was. Miss Donkin told the tribunal that she did not have time to chase up OH and that OH (which was an in-house department) were terrible about responding to queries because of their own workload.
60. The claimant also did not mention the OH report at the meeting. She understood from her union representative that it was policy not to mention the contents of an OH report while in draft form.
61. Again, no minutes were taken of the Stage 2 meeting. We find this very surprising. In our experience, minutes are invariably taken of such meetings. There is a dispute over what was said in the Stage 2 meeting, how long it

lasted and why it ended, but we have no minutes to help us. No informal notes were disclosed either.

62. The claimant indicated that she hoped to return on expiry of her current sick note, which ran till 17 August 2022, although the final say would be with her GP.
63. There was a discussion about the workload which the claimant would have when she returned. Miss Donkin explained that because of the new merged structure, there were different treatments and that although patient numbers had therefore increased, there would not be more workload as such. It would be a different way of working. The claimant would be expected to treat up to 7 patients when fully back at work, in keeping with all the current staff. The claimant said she felt a higher workload was not safe. She was worried about the effect of being short-staffed.
64. There was some discussion about the claimant having accrued a great deal of annual leave and therefore she could use some of it to bolster a phased return. (The Trust's system was that someone only had 30 paid hours to feed into a phased return and after that, had to use unpaid hours or annual leave. The claimant had already used 10 hours in February.) The claimant says that Mr Ephraim suggested during the Stage 2 meeting that she use some of her untaken annual leave before she came back on her phased return. It is unclear exactly what was said that gave the claimant this impression, but in any event, there was no specific agreement that she would take a week's annual leave before she came back.
65. The claimant had only been able to join the meeting by telephone, as opposed to Zoom, because of her technical difficulties. Nevertheless, she had said she wanted the meeting to go ahead.
66. The claimant says that the meeting was cut off abruptly before she had said everything she wanted to say because of technical difficulties. She says that the meeting ended after she heard Mr Ephraim saying 'What is she saying? What is she saying?' and it was decided to stop. Miss Donkin disputes this. She only remembers the technical difficulties at the beginning when the claimant could only join by phone. We discuss this further below.
67. Under the Sickness Absence Policy, the outcome letter should have been sent within 7 working days of a Stage 2 meeting. In fact, the outcome letter was not sent until 2 September 2022.

#### 25 August 2022 complaint/grievance

68. On 25 August 2022, the claimant submitted an email which she describes as a formal grievance and which the respondent describes as a complaint. The first line of the email states, 'Please except [sic] this email as a formal complaint that I wish to make in respect of Alexandra Donkin'.

69. We will call it a 'complaint' as a neutral term in these Reasons, but in our view, it would more naturally be described as a grievance.
70. The 'complaint' was emailed by the claimant's union representative, Mr Stubbs, to Mr Ephraim on 25 August 2022. There was no response to this until it made its way into the pack for the Stage 3 hearing (see below).
71. The 'complaint' referred to a conversation between the claimant and Miss Donkin on 15 August 2022, when according to the claimant, Miss Donkin raised her voice, was abrupt and rude and placed her under undue stress. She said Miss Donkin accused her of not being transparent at the Stage 2 meeting because she had not mentioned the recent OH report. The claimant says Miss Donkin accused her of having something to hide. The claimant says she told Miss Donkin that she had not received the report of the Stage 2 meeting or the back to work plan, both of which were imperative.
72. The claimant went on to say that Miss Donkin had refused her request for annual leave on 18 and 19 August 2022 (when there was a bus and tube strike) and to take 23 – 26 August 2022 off as she had a lot of leave outstanding. She said that Miss Donkin shouted that the claimant was paid to work and stated that a return date of 18 August was non-negotiable.
73. The claimant said in her 'complaint' that no date was given for when the meeting minutes and action plan would be supplied. The claimant said that the policy states she should have been supplied with these within 7 days of the meeting. She ended by saying Miss Donkin's behaviour had an adverse impact on her emotional mental health and well-being. She did not feel supported by her and felt further talking to her would affect her health. She stated that she needed 'someone else to be present in her place' for any further weekly calls and for the Stage 2 meeting.
74. Miss Donkin denies this account of the call, although she says she does not remember the call exactly. She says she had contacted OH about the report and had been told it was in draft because the claimant was making amendments. Miss Donkin says she was simply asking the claimant why she had not allowed the OH report to be released. Regarding annual leave, Miss Donkin says that what they discussed in the Stage 2 meeting was about using annual leave to support an extended phased return. She says that the claimant told her in the phone call that she had already booked a holiday for the week starting 22 August 2022. Miss Donkin says she does not remember specifically using the word 'non-negotiable', but she did tell the claimant that she must return on 18 August 2022.
75. The claimant says that she did not say she had already booked leave, and indeed she did not go on leave after the upset on the phone. She says she only asked for the leave because HR at the Stage 2 meeting had told her she had accrued large amounts of annual leave and said she could take some of it prior to returning.

76. Clearly this was a difficult call. Miss Donkin did refuse the leave request and she did say she expected the claimant back on 18 August 2022. It is likely Miss Donkin expressed her exasperation that the claimant was even asking for holiday. Miss Donkin was annoyed to find the OH report had not been approved. She may have raised her voice or adopted a tone which the claimant found uncomfortable. The claimant probably raised her voice too. Although we cannot say exactly what happened beyond this, the most important point is that the claimant experienced it as she described in her 'complaint'.
77. Following the discussion, Miss Donkin emailed the claimant thanking her for 'confirming this morning' that she was going to return to work and setting out a proposed return to work plan over 3 weeks starting the week commencing 18 August 2022.
78. On 17 August 2022, the claimant emailed Miss Donkin with a Fit Note stating she was not fit for work from 16 August – 16 September 2022 because of 'stress at work. Ongoing shoulder and arm/hand pain.' This was the first mention on a Fit Note of stress at work.
79. As mentioned above, the original intention had to be have a further Stage 2 meeting. Miss Donkin notified the claimant at some point that she had arranged a further Stage 2 meeting for 25 August 2022. The claimant emailed Miss Donkin on 23 August 2022 to say she would not be attending as the date arranged was a Thursday and she had already told Miss Donkin quite a few times that her union representative was only available Monday – Wednesdays. Miss Donkin made no attempt to arrange another date when the claimant's union representative could attend.
80. On 30 August 2022, Miss Donkin emailed Mr Ephraim, thanking him for the template regarding the management case, which she said 'was very helpful, to progress to the Stage 3 meeting as we discussed.' She continued, that given the claimant had declined the Stage 2 meeting because her representative was only available Monday – Wednesdays, she felt she should discuss with Miriam Phillip (the Deputy Divisional Director of Nursing for the Division of Surgery Cancer and Cardiovascular services) arranging the Stage 3 sickness meeting.
81. In the absence of notes or minutes, it is extremely difficult for us to resolve whether the original Stage 2 meeting was cut short because of technical difficulties. The claimant is convinced that was the reason.
82. On the one hand, the claimant did not mention technical difficulties in the Stage 2 meeting as a ground in her appeal against dismissal (see below). It is also not mentioned in the outcome letter, although that did not get sent until 2 September 2022, after Miss Donkin had decided to proceed direct to Stage 3. The particulars of claim, where the claimant first set out her case, refer to technical difficulties with hearing during the meeting, but not at the end. On the other hand, there must have been a reason why there was initially going to be a further Stage 2 meeting.

83. In any event, what we do know is that Miss Donkin at one point thought there needed to be a further Stage 2 meeting (or rather, a continuation of the same Stage 2 meeting), but then changed her mind after the claimant could not manage the date she suggested.
84. There were no further weekly conversations between the claimant and Miss Donkin after the 15 August 2022 conversation because the claimant did not want to have those communications with Miss Donkin any more.
85. On 2 September 2022, Ms Donkin emailed the claimant with the Stage 2 outcome letter. She told the tribunal the delay was because she had been off sick for four days, although this was more than four days late.
86. The cover note said she was waiting to hear from the claimant on their weekly wellness catch ups and 'please let me know if there is anything I can do to support you further'.
87. Miss Donkin told the tribunal that she did not see the 'complaint' at the time. She says she was unaware of it until after she had drafted the management case for the Stage 3 hearing. We find this surprising given that she was discussing the case with Mr Ephraim at roughly the same time that he received the complaint. We therefore believe it most likely that Miss Donkin was aware of it at this point.
88. Miss Donkin says she did notice the weekly calls had stopped. She did not explore why the claimant was now talking about stress at work in her Fit Note. Ms Donkin concluded that because the claimant had previously said she was fit to return, that the stress was because the holiday had been refused. Miss Donkin did not attempt to discuss with the claimant whether that was the reason.

#### Response to OH queries

89. On 30 August 2022, the OH administrator (Ms Wood) emailed the claimant with Dr Assoufi's reply to her queries. He advised 50% working hours for week 1 of her return and 75% for week 2 of her return. He said the Trust only provided 30 hours as a phased return and for a longer phased return, she would have to either use annual leave or accept a pay reduction. The email said that Dr Assoufi was not undertaking case conferences at present due to high workload. Ms Wood asked the claimant whether she would like the details regarding hours to be added to her OH report and whether a copy should be emailed to the referring manager.
90. The email did not fully answer the other queries which the claimant had raised.
91. In the event, the claimant did not reply till 25 October 2022 as she had become ill with workplace stress. Moreover, she had asked Dr Assoufi to ring her when available. Dr Assoufi did not ring her until 19 December 2022.

New line manager

92. In the summer 2022, Miss Donkin created a new post between her and her direct reports, and recruited Ms Nkansa, who had no previous management experience. Ms Nkansa started in August 2022 and would become the claimant's line manager; 3 day-to-day contact would be with her rather than with Miss Donkin. Ms Nkansa would deal with holiday requests but Miss Donkin would retain management of the sickness absence process. The claimant discovered a new ward sister had been appointed as a result of receiving an out of office message when she sent Miss Donkin a Fit Note on 9 September 2022.
93. On 13 October 2022, the claimant emailed Miss Donkin. She said she was 'currently working towards good health'. She added, 'As you are aware of the current grievance, to enable a successful return to work process could you please forward the name, email address and contact number for the new manager in post'.

Stage 3: Absence Review meeting and dismissal

94. We find that, in view of the 30 August 2022 email mentioned above from Miss Donkin to Mr Ephraim, the decision to move to Stage 3 was made on 30 August 2022.
95. Ms Phillip was appointed to chair a Stage 3 Absence Review meeting. She had had no previous dealings with the claimant. Around this time, Miss Donkin's line manager retired and Ms Phillip took a more active role supporting Miss Donkin and other nurses at her level. They did not have a great deal of contact, but Miss Donkin would go to her to sense check any matters, and it seems from Miss Donkin's 30 August 2022 email to Mr Ephraim that she spoke to her about setting up the Stage 3 meeting.
96. By letter dated 18 October 2022, Ms Phillip invited the claimant to the meeting. She said Mr Ephraim would be present to give advice and the claimant was welcome to bring a trade union representative, colleague or friend.
97. The letter said that the meeting 'is a normal next step and is stage 3 in our sickness absence policy.... At the meeting, we will also discuss the complaint you raised against your line manager, Alexandra Donkin.' The meeting would be held on Teams unless the claimant notified Ms Phillip by noon the previous day that she would like to come in. The reason for the meeting was to discuss the claimant's absence levels because there had been no improvement since the claimant's last meeting with her manager. If it was unlikely that the claimant would be able to return to work in the near future, 'we will be exploring all other options with you, such as considering whether there might be other jobs we have that you would be well enough to do. However, once we have explored all possible options ... we may need to, as a last resort,



decide to end your employment on the grounds that you are not able to return to your job or attend work to a sufficient level due to ill health.'

98. The reference to 'the complaint you raised against your line manager' was a reference to the 25 August 2022 email, which Ms Phillip had now seen. Ms Phillip was fairly sure it was the union representative who had sent it to her. She was unaware why the complaint had not been dealt with prior to this point. She did not consider it was a 'grievance'.
99. The letter attached a management report prepared by Miss Donkin and stated that Miss Donkin would talk through the report at the meeting and the claimant could ask questions. A copy of the Sickness Policy was also enclosed.
100. The summary of management case document dated 11 October 2022 stated that the claimant had been a valuable employee with a long record of service with the Trust. It stated that she was absent from 13 December 2021 to 13 January 2022 with COVID, which under Trust policy had not been factored into the management case. She worked two half days on a phased return and then suffered a close bereavement. She had been off sick since 14 February 2022 with shoulder and arm/hand pain. She had a previous diagnosis of carpal tunnel syndrome, for which she had workplace adjustments including not undertaking scalp cooling or drawing up certain medication. She had been referred to OH on 3 occasions since February, ie on 25 March, 25 May and 26 July 2022. Two of the reports were available. The May report said she could return to work if redeployed into a supervisory role with less hands-on clinical duties or given duties not requiring the prolonged use of her dominant hand. Miss Donkin said unfortunately that was not possible because there were no non-clinical roles in the unit or Clinic 8. In total, the claimant had been absent 117 days. Miss Donkin listed the dates and reason for each Fit Note. Miss Donkin concluded that the claimant had been offered support to return to work with reasonable adjustments. She had already utilised 10 hours of Trust-supported return to work, leaving a remaining 20 hours. Those could be supported with her annual leave. Miss Donkin said she felt she had been supportive but unsuccessful in getting the claimant back to work.
101. There is no mention in the case of the possibility that the claimant might be disabled. There is no explanation of why the July OH report is not available. There is no mention of the impact of the absences on the service and the team, which is supposed to be in the case summary.
102. The Stage 3 meeting took place on 25 October 2022.
103. At the start of the meeting, the claimant's union representative, Mr Stubbs, asked how the 'complaint' was going to be dealt with. Ms Phillip stated that it would be a separate process outside of the Sickness Absence meeting. There was some discussion with Mr Ephraim regarding which process should be used and whether the claimant wanted it to be a formal or informal

complaint. Mr Ephraim said he would discuss the process with the claimant's union representative outside of the Stage 3 meeting.

104. Ms Phillip was not part of any further discussion which took place and she did not look into the content of the 'complaint' email at any stage prior to taking her decision to dismiss.
105. As with the two previous absence review meetings, no minutes were taken, and again, no notes from HR or other informal notes were disclosed. We were very concerned that a meeting which ended with dismissal did not have any formal notes taken.
106. Ms Phillip provided the claimant with the outcome letter on 26 October 2022. The letter dismissed the claimant on grounds of capability because of her ill-health. The claimant was given 11 weeks' notice, with 11 January 2023 as her last day at work.
107. Ms Phillip said in the letter that the claimant could not provide a date when she expected to return to work. She noted that the latest OH report (26 July) was not released by the claimant because the claimant wanted to clear things up with the Doctor. She recorded that the claimant had told her she had suffered 6 bereavements of close relatives and that the current reason for her not attending work was stress at work. Regarding her arm/hand injury, the claimant had stated that she was expecting a review in January 2023 but it could take up to a year to get back to normal. Ms Phillip said that Miss Donkin had told her that adjustments were made from December 2021 including removing the need for the claimant to undertake scalp cooling, drawing up certain medication, and connecting/disconnecting machines, When Ms Phillip asked the claimant why she had not returned as soon as the adjustments were made, the claimant had said she had mental health problems and she had not received notes of the August 2022 Stage 2 meeting.
108. Ms Phillip went on, 'I do not think you gave a satisfactory account of the reasons for your absences. I do not accept that you failed to attend work for several months because a letter was not received .... I conclude that adjustments were made for you, but you did not attend work... Your pattern of absence has been long and you offered no prospect of providing reliable service at any stage in the future'. The claimant had said at the Stage 2 meeting on 8 August 2022 that she expected to return to work on 17 August 2022, but had never returned. The claimant had offered no evidence of any programme to improve her health. 'Furthermore you have not cooperated by sharing the most recent OH advice and therefore I can rely only upon the facts as presented (including two previous OH reports) and what you have told me. Whilst I considered redeployment, you have not suggested this option. I cannot see where you would be placed where I might expect any improvement in your attendance.' She concluded, 'I have to let you know that I do not believe there is any reasonable prospect of you returning to work in any capacity in the foreseeable future and therefore ... I have taken the decision to end your employment on the grounds of capability because of

your ill health'. The claimant was given 11 weeks' notice and her last day of employment was 11 January 2023.

109. Ms Phillip did not explore with the claimant the impact of her bereavements on her, or the nature of the mental health difficulties which she was having. That is not addressed at all in the outcome letter. She did not consider whether the claimant might be disabled. Indeed we wonder whether she had an understanding of legal disability since, when questioned in the tribunal, she said that to her knowledge the claimant was not 'registered disabled' – which is not the basic concept under the Equality Act 2010. Although the claimant had put 'stress at work' on her latest certificates, Ms Phillip did not explore with the claimant the possibility of a new line manager or alternative roles in the wider Trust.
110. Ms Phillip did not discuss redeployment options with the claimant at the Stage 3 meeting. Nor did the claimant raise it. Under cross-examination in the tribunal, Ms Phillip said that they wanted the claimant to come into work and try the adjustments they had put in place before considering any redeployment opportunities. When asked why the claimant could not be redeployed to a non-clinical role, Ms Phillip said the claimant would then be at risk of losing her nurse registration. Ms Phillip made the assumption that this was a key factor for the claimant, but did not discuss it with her at the Stage 3 meeting. Ms Phillip said that if the claimant had returned to work, tried the reasonable adjustments and found they did not work, then the respondent might have considered an administrative post if the claimant was willing to lose her registration.
111. We note here that the adjustments were all in relation to the hand / arm pain and did not relate to the stress at work. It's clear from the outcome letter and from Ms Phillip's evidence to the tribunal that she was not thinking about adjustments for mental health.
112. Although the outcome letter says she considered redeployment, we believe that Ms Phillip's tribunal evidence is a more accurate guide to her thinking. She did not consider it outside the department that the claimant worked in.
113. Regarding impact on the service, which Miss Donkin had not addressed in the statement of management case, Ms Phillip did not discuss this during the Stage 3 or give it specific thought. She relied on her general experience as a nurse of the impact of not having enough staff to deliver a service and the pressure on other staff in terms of increased workload. Nor did she consider the effect of the claimant now being on half pay, potentially freeing up some funds for bank staff. She said the pay element was not a consideration for her.
114. Ms Phillip did not have the OH report arising from the referral in June 2022, because – as already explained - the claimant was in the process of querying it with OH. Ms Phillip took the view that the claimant was

'withholding' the report. She did not consider waiting any longer for it or chasing it up herself if OH were being slow to respond.

115. As Ms Phillip did not have the latest OH report, she relied on the previous OH reports. She does not appear to have taken on board that since the May 2022 OH report, the claimant's medical condition had changed from the issue with her hand, which reasonable adjustments might resolve, to include an issue with stress and depression.
116. The claimant says she found it difficult to focus during this meeting. We accept that. Her answers were not always clear as a result. There is no evidence that either the claimant or her union representative said in the Stage 3 meeting that the claimant was having significant difficulty concentrating through the meeting. However, we accept that is true, even if the respondent was not explicitly told, because on 10 November 2022, the GP notes record 'Pt reports has lost job on basis of a zoom meeting where she felt she was not fully focused due to MH issues; is seeking appeal ... has started St Johns Wort OTC; will consider if wants prescribed anti-depressant in due course'.
117. The claimant was shocked to lose her job. She had been hoping to return to work on around 21 November 2022 on a phased return after her course of counselling was completed. As a result of the dismissal, she had to have some additional counselling sessions.

#### Impact on the service of claimant's absence

118. The tribunal was not given any systematic evidence about the impact of the claimant's absence on the service. In answer to a question from the tribunal, Miss Donkin said that she had massively depleted staff from January 2022 but by the summer, the Trust had heavily recruited and many staff had returned from sickness. Moreover, she said that as the two units had now amalgamated and there were 17 employees working in teams, the skill mix was better and there was more flexibility to cope with absenteeism. Miss Donkin said the staff had the skills to cover all the claimant's job tasks.

#### Appeal

119. The claimant appealed by letter dated 9 November 2022 to Ms Oxton, the Divisional Director of Nursing. Her grounds were that:
- 119.1. Just as she was preparing to return to work, the matters she had referred to in her grievance severely impacted her mental health and prolonged her absence.
- 119.2. Elements of the Stage 3 meeting were related to the grievance and she had not previously been told by HR what process to follow on the grievance.
- 119.3. The Stage 3 meeting proceeded without the OH report. She was still waiting to be contacted by the OH doctor to make the changes to his report which she had thought relevant.

- 119.4. She had not been discharged by her physiotherapist who said her injury could take 9 months – 1 year to recover from the initial date of injury. She was awaiting a steroid injection and then she would be reviewed in January.
- 119.5. She had applied to Access to Work and was awaiting their reply.
- 119.6. There had been occasions when she had been allocated patients who required scalp cooling and had not been allowed to swap with another nurse.
- 119.7. The outcome of the Stage 2 was sent on 2 September 2022 – not 15 August 2022 as stated. Her manager had said she would not discuss any aspect of the phased return to work plan and the return to work date was not negotiable.
- 119.8. In conclusion, the claimant was unwell at the time of the disciplinary meeting and was still unwell. She was signed off with stress and problems relating to her hands. She was undergoing counselling and she had said she had difficulty concentrating.
120. Mrs Watts was provided with an appeal pack which included the dismissal letter, the invitation to the Stage 3 meeting, the Appeals Policy and Ms Phillip's management response to the appeal (dated 9 January 2023).
121. Regarding the OH report, Ms Phillip stated in the Management Response that the claimant had stated she did not fully agree with the report and was waiting for the OH doctor to amend it. She was unable to provide a timeline for this.
122. Mrs Watts did not take any steps to see what was happening with the OH report. The HR advice had been to discuss the matter at the appeal hearing.
123. Ms Phillip concluded her Management Response by stating that she saw no reasonable expectation of the claimant reliably attending work or any real likelihood of any redeployment being successful.

Fixing the appeal date and deemed 'withdrawal'

124. Meanwhile, Ms Oxtan had replied to the appeal letter on 18 November 2022 saying that Ms Phillip was now away on emergency leave until 7 December and asking if the claimant was content to wait or they could arrange it earlier. On 24 November 2022, Ms Oxtan emailed again to ask if the claimant was happy to wait Ms Phillip's return, but this would now be approx. 16 December. The claimant agreed to wait.
125. Linda Watts was appointed to chair the appeal hearing. On 13 January 2023, she wrote to the claimant offering the dates of 19 or 20 January 2023 at 2 pm. The claimant was told she could be accompanied by a trade union representative, colleague or other companion. The email stated that if she chose to accept neither date, and did not agree alternative arrangements, it would be assumed that her appeal had been withdrawn.

126. Mrs Watts said she would be joint decision-maker with an independent external panel member. Ms Phillip would also attend and the letter enclosed Ms Phillip's response to the points of appeal. Someone from the People & OD team would also be present.
127. On 18 January 2023, Mrs Watts chased up the claimant for a reply. On 18 January 2023, the claimant emailed to say that she was unable to attend the appeal hearing this week and she would get back with available dates. On 19 January 2023, Mrs Watts responded, 'I am very disappointed you are choosing not to attend on either of the 2 dates offered and I am minded to consider your appeal to be withdrawn. If you are unable to attend you have the option to provide a written submission or have a person attend on your behalf... It is important this is dealt with in a timely manner. Please can I have your response today'. The claimant replied the same day saying she had been awaiting an alternative date from her union representative, who would be available at 2 pm on 27 January. She added that the union representative said the appeal and grievance meeting should be dealt with separately. Mrs Watts replied that she could only rearrange diaries for noon on 24 January 2023. The claimant answered the next day that she could not make 24 January 2023 because of a previous appointment and her union representative was only available on 27 January 2023. She said she was awaiting her union representative to provide an alternative date.
128. Mrs Watts emailed back that day (20 January 2023) to say the Trust had offered four separate opportunities to hear the appeal, ie prior to Ms Phillip's leave; 19, 20 and 23 January 2023. We interpose here to say the date offered had been 24 January not 23 January 2023. The letter went on to say that the claimant had been told she could alternatively provide a written submission or send a representative to attend on her behalf. She had declined all those options. In the light of the seriousness of the appeal and the requirement to ensure the Trust dealt with this matter in a timely manner, 'I consider your appeal to be withdrawn'.
129. On 7 February 2023, the claimant responded saying it had always been her intention to attend the appeal. Also she had submitted a grievance and received no date for that. On Mr Ephraim's advice, Mrs Watts did not respond to this letter.
130. Mrs Watts told the tribunal that if the union representative could not attend, the claimant could have brought a friend instead. She said that the external panel member could not manage 27 January 2023. She said that she did not factor into her decision that the claimant was disabled. She said there was nothing in the pack she had been given to say the claimant had a disability and it had not crossed her mind.
131. When pressed in the tribunal, Mrs Watts said the external panel member could not make any further date till April 2023. The tribunal asked why the respondent could not have found another external panel member. Mrs Watts said that Mr Ephraim had already explored that. However, we did not hear from Mr Ephraim and we were given no detail except that statement as an

afterthought when pressed. We therefore do not accept that it was not possible to find an alternative panel member at an earlier date. Nor are we satisfied that the external panel member really could not make any alternative date prior to April. That is not the reason given in the emails to the claimant at the time.

Draft amended OH report

132. The claimant was eventually able to speak to Dr Assoufi again on 19 December 2022 and she received his amended report on 2 February 2023. The report refers to 19 December 2022 as the clinic date. It says that she has been having physiotherapy and her condition has been improving, although she still has symptoms relating to her arm and hand. He says she is unfit for 6 weeks (ie from 19 December 2022) and on her return she should avoid any heavy lifting, pushing or pulling; she should minimise typing and have frequent breaks from the computer and keyboard; she will need time off to attend hospital appointments; and a phased return to work of 50% working hours in week 1 and 75% for week 2. There is no mention of stress or the claimant's mental health.
133. The claimant did not know what to do about the report as she had been dismissed at that point.
134. Meanwhile the claimant resubmitted her 'complaint' as a formal grievance in an email to Mr Ephraim on 11 January 2023. Her union representative had not considered this was necessary as he believed he had already correctly submitted the grievance in August 2022. However, the claimant sent it just in case.
135. Mrs Watts acknowledged this by email dated 16 January 2023, saying, 'You will be provided with the opportunity to explain the relevance of the points raised at your appeal'.
136. The grievance never did get heard.

**Law**

Unfair dismissal

137. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2), eg capability.
138. Under s98(4) '... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.’

139. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision.
140. Before dismissing a claimant for ill-health, employers should take steps which are sensible in the circumstances to discuss the matter with the employee and inform themselves of the true medical position. The decision whether to dismiss is a question for the employer in the light of the available medical evidence. Therefore, when seeking medical advice, employers must ask questions suitably adjusted to the circumstances. (East Lindsey District Council v Daubney [1977] IRLR 182, EAT.)
141. Where an employee has been absent from work for some time due to sickness, the critical question is whether in all the circumstances of the case, a reasonable employer would have waited any longer before dismissing. If an employee states they are anxious to return to work as soon as they can and hope to be able to do so in the near future, that works in their favour. If on the other hand, they state they are no better and do not know when they can return to work, that is a significant factor against them. There is a need to take steps to discover the employee’s medical position and their likely prognosis. Length of service is not automatically relevant, but it might show that the claimant is a good and willing worker with a good attendance record, someone who would do their utmost to return to work as soon as they could. (BS v Dundee City Council [2014] IRLR 131, CSIH.)

#### Discrimination arising from disability

142. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondent treated the claimant unfavourably because of something arising in consequence of the claimant’s disability. The respondent has a defence if it can show such treatment was a proportionate means of achieving a legitimate aim.
143. The respondent will not be liable under section 15 if it shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

#### Failure to make reasonable adjustments

144. The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act 2010 and in Schedule 8. Where a provision, criterion or practice applied by the employer or a physical feature of the premises or a lack of an auxiliary aid puts a disabled person at a substantial disadvantage in comparison with people who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage or provide the auxiliary aid. ‘Substantial’ means more than minor or trivial (EqA s212(1)).



145. The House of Lords in Archibald v Fife Council [2004] IRLR 652 said this about the duty to make reasonable adjustments:

'The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.'

146. At para 6.28, the EHRC Employment Code says the following factors may be relevant to whether an adjustment would have been reasonable: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial and other resources; the availability to the employer of financial or other assistance to make adjustments eg advice through Access to Work; and the type and size of the employer.

147. Under Schedule 8, paragraph 20(1), the employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement

148. The EHRC Employment Code says at para 6.19 that employers must do all they can reasonably be expected to do to find out if someone has a disability and is likely to need adjustments.

149. It need not be certain that making the adjustment would remove the claimant's disadvantage. It is not even necessary for there to be a 'good' or 'real' prospect of that happening. It is sufficient simply if there is a prospect of the adjustment removing the disadvantage. However, the likelihood of it succeeding may affect compensation. (Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10; Redcar and Cleveland Primary Care Trust v Lonsdale UKEAT/0090/12.)

#### Burden of proof under Equality Act 2010

150. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

151. Although it might seem strange to a non-lawyer, the fact that a dismissal is discriminatory does not necessarily mean it is unfair (and vice versa). That is because there are different legal tests for discrimination and unfair dismissal. For unfair dismissal law, the tribunal must not substitute its own opinion for that of the employer. The tribunal might not agree with the employer or might think another employer would have not dismissed the claimant, but if the tribunal thinks that dismissal was a reasonable option, the dismissal will not be unfair. Unfair dismissal law gives a significant latitude of judgment to an employer. On the other hand, the test under s15 of the Equality Act is an

objective one according to which the tribunal must make its own judgment. (City of York Council v Grosset [2018] IRLR 746, CA; Knightly v Chelsea & Westminster Hospital NHS Foundation Trust [2022] EAT 63.)

Polkey / Chagger

152. In assessing compensation for a discriminatory dismissal, it is necessary to ask what would have happened if there had been no unlawful discrimination. (Chagger v Abbey National PLC [2010] IRLR 47, CA.) This is similar to the Polkey question in unfair dismissal claims. If there is a chance that a fair and non-discriminatory dismissal would have happened anyway at that point or at some time afterwards, the compensatory award should be adjusted accordingly.

Discrimination: relevant time-limits

153. The relevant time-limit is at section 123(1) Equality Act 2010. Under s123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts.

154. Under s123(3), failure to do something is to be treated as occurring when the person in question decided on it. Under s123(4), in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when he or she does an act inconsistent with doing it, or If he or she does no inconsistent act, on the expiry of the period in which he or she might reasonably have been expected to do it. A failure to make reasonable adjustments is a failure to do something. For limitation purposes, the time-limit will start to be counted from when one of the circumstances in s123(4) is satisfied. However, it is possible for there to be a continuing omission, in which case, time will continue to run (Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288, CA).

155. When the discriminatory act complained of is dismissal, the time-limit for bringing a claim is counted from the effective date of termination and not from any earlier date when the claimant was given notice of dismissal. (Lupetti v Wrens Old House Ltd [1984] ICR 348, EAT)

156. Under s123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable. This is essentially an exercise in assessing the balance of prejudice between the parties

## Conclusions

### Unfair dismissal

*What was the reason for the claimant's dismissal?*

157. The reason for the dismissal was capability, ie Ms Phillip did not believe there was any reasonable prospect of the claimant returning to work in any capacity in the foreseeable future.

*Was that reason a potentially fair reason for dismissal?*

158. That is potentially a fair reason for dismissal. The question is whether it was fair in the circumstances.

*Did the respondent act reasonably in the circumstances, including its size and administrative resources, in treating the reason as sufficient for dismissing the employee?*

159. We first consider whether reasonable procedures were followed around the dismissal and appeal.

160. In terms of the final meeting where dismissal was decided, the claimant received appropriate notification. She was sent the relevant policies and management's statement of case. She was told she could be accompanied. She was given adequate notice. The claimant was accompanied by her trade union representative at the hearing itself. HR was present. The meeting was chaired by an appropriate person. The decision was communicated in writing promptly afterwards.

161. There were similar notifications in terms of the appeal. However, our concern is that the appeal was treated as withdrawn rather than a new date found which the claimant and her representative could attend. There was only one week between when Mrs Watts put forward two alternative dates and when Mrs Watts said she was treating the appeal as withdrawn. During that time, the claimant had engaged with the respondent on finding a suitable date. Her initial suggestion of 27 January 2023 was only a week later than Mrs Watts' original suggestion. Indeed the respondent bears by far the greatest responsibility for the delay. It was the respondent who sought the initial delay of about 6 weeks – although it offered to squeeze in the appeal immediately, the respondent's implicit preference in its communications with the claimant was to wait. Then the reason the respondent did not wait for the claimant to hear from her union representative and suggest an alternative date beyond 27 January 2023 was apparently because the external panel representative, who the respondent had initially selected, would not be available until April. If that was indeed the case, and we have some doubts whether there was such categoric unavailability, we would have expected the respondent to find another external panel member.

162. The idea that the claimant could provide written submissions or send someone along in her place missed the point. This was not an employee who could not face attending a hearing. Mrs Watts' casual suggestion in the tribunal that the claimant could be accompanied by a friend if her trade union representative was unavailable was unreasonable. There is a difference between a trade union representative and a friend.
163. We appreciate that the respondent's Appeal Policy says that it will be assumed that an appeal is withdrawn if an employee cannot attend a rescheduled date and does not take up one of the other options instead. However, the claimant had made it clear that she wanted to attend the appeal, she was not withdrawing it, and she was working on finding a date with her union representative. Her suggestions were all within a short time scale. The respondent applied a very short time-scale despite having let the matter wait while Ms Phillip was away. In those circumstances, no reasonable employer would have rigidly applied the Appeal Policy or considered that the appeal was withdrawn.
164. The claimant had important points on appeal. For this reason alone, we would consider that the dismissal was unfair on procedural grounds.
165. In terms of the substantive reason, there are a number of interrelated points.
166. Under the Sickness Procedure, three stages would normally be followed and that was the management intention in this case. A further Stage 2 meeting was deemed appropriate by Miss Donkin, but she gave up on this as soon as the claimant could not make the suggested date.
167. The Stage 2 process had not been perfect. There were some technical difficulties on the Zoom call. The topics were not fully explored, the claimant did not feel she had finished raising her concerns about workload, and the outcome letter was delayed. On the other hand, the meeting did cover most of the necessary grounds. The claimant was saying she expected to return on expiry of her Fit Note. Miss Donkin was describing the new way of working. They discussed but did not finalise the staged return to work plan. The claimant was expressing anxiety about workload. In itself, we might have said that there was sufficient discussion at Stage 2. But what concerns us is that a Stage 2 meeting was planned and then so easily abandoned when the union representative was not available because the wrong day of the week had been suggested, and further, that as early as 30 August 2022, Miss Donkin intended to move to Stage 3, albeit that this was not put into effect until some time had passed.
168. Regarding the reason for dismissal, in principle it can be fair to dismiss if there is no prospect of an employee coming back in the foreseeable future. The difficulty here is the surrounding circumstances.
169. This period of hand/shoulder/arm pain had only been from 25 February 2022, ie 8 months. The bereavement absence started 2 weeks before that.

The evidence before Ms Phillip was that the claimant had been on the verge of returning in terms of her arm / shoulder / hand pain on 18 August 2022. Ms Phillip knew there had been a telephone conversation about her return to work on 15 August 2022 which had triggered the claimant's 'stress at work' on her medical certificates. She knew the claimant had submitted a 'complaint' about the way her line manager had spoken to her and was saying that it had affected her mental well-being. She knew the 'complaint' had not been dealt with. That 'complaint' had been sent by the claimant's representative to Mr Ephraim on 25 August 2022.

170. No reasonable employer would have failed to acknowledge the 'complaint' at the time and investigate it immediately or at the very last, ask if the claimant wanted it treated formally. No reasonable employer would have failed to look into the 'complaint' prior to holding the Stage 3 meeting, given the time that had elapsed and its obvious relevance to why the claimant was still off work. No reasonable employer would have failed, as Ms Phillip failed, to consider it during the Stage 3 meeting. It was not only relevant to why the claimant continued to be off, but also relevant to potential solutions such as redeploying the claimant to work under a different line manager or ensuring she now work with Ms Nkansa. Instead, it was not until the start of the Stage 3 meeting, almost 2 months after she had raised her 'complaint', that the claimant was told the 'complaint' would need to be dealt with in a separate process after Stage 3. This was not satisfactory because of the possibility that the claimant would by then have been dismissed.
171. Ms Phillip records in the Stage 3 outcome letter that the claimant had said she had mental health problems. Ms Phillip was also aware of the 6 bereavements of close relatives. She had seen the 25 March 2022 OH report which at that point referred to 'broken sleep and fluctuating mood, memory, concentration, focus and concentration level. She remained symptomatic with both pain and mental health symptoms due to bereavement'. Although there was no live mental health issue at the time of the May 2022 OH report, Ms Phillip had seen the complaint which on 25 August 2022 was talking about 'an adverse impact on emotional, mental health and wellbeing' and she knew the recent Fit Notes included 'stress at work'.
172. Ms Phillip did not explore with the claimant the impact of her bereavements on her, or the nature of the mental health difficulties which she was having. That is not addressed at all in the outcome letter. As we have said, she did not consider whether the claimant might be disabled.
173. Even if she considered that the claimant was at fault for holding back the most recent OH report, the report was a response to a referral in June 2022 and assessment in July 2022, prior to the revival of the mental health problems in August 2022. A reasonable employer would have attempted to obtain an up-to-date OH report which addressed the mental health issues.
174. For these reasons, we would also say that the dismissal was unfair.

175. Finally, in regard to unfair dismissal, we are concerned about the complete failure to discuss or look for redeployment outside the claimant's department. The claimant may not have pushed for this, but the onus is on the employer to raise it. It was suggested in both the March and May 2022 OH reports. The respondent is a large Trust with many employees. It is extraordinary that this option was not looked into. For this reason alone, we would have found the dismissal unfair.
176. We add that the 'Supporting Staff Who Have a Disability Policy' says at paragraph 3.1 'If it is not possible to retain a member of staff in their current post, it is the manager's responsibility to facilitate redeployment to a suitable alternative post, where this is supported by occupational health and desired by the member of staff. Paragraph 3.2 says that although managers are not required to create posts or functions, they 'are required to do everything reasonably practicable to maintain employment of staff in line with the above principles'.

Polkey

177. The matters which we have identified as causing the dismissal to be unfair were the enforced withdrawal of the appeal; the failure to explore the claimant's mental health issues at the Stage 3 hearing; the failure to get an up-to-date OH report about the claimant's mental health; making the decision to dismiss when the 'complaint' had not been dealt with; the failure to go through with the further Stage 2 meeting, having decided to have such a meeting, and at that point deciding to progress to Stage 3 (albeit this was not actioned for a few months) and the failure to look for redeployment outside the claimant's department.
178. Had the employer acted reasonably, we find that it would have taken 12 weeks from the Stage 3 hearing to obtain an up-to-date OH report, have someone hear the outstanding 'complaint', look for potential vacancies, hold a further proper Stage 3 meeting and make a decision.
179. The question then is what is the percentage chance of a fair and non-discriminatory dismissal on 19 January 2023. The relevant factors would include:
- 179.1. The state of the claimant's physical and mental health on 19 January 2023.
- 179.2. Potential vacancies and whether the claimant would have been interested.
180. While we have sufficient evidence to reach a view on the claimant's physical health, including the draft amended OH report based on the 19 December 2022 phone call, we do not have adequate evidence regarding what her mental health would have been and the prognosis at that point. We know that the claimant's mental health has now significantly deteriorated, but we do not know to what extent that was caused by the dismissal and / or lack of resolution and would not otherwise have occurred. We also do not have any concrete evidence of the type of post which might have been available

and suitable. We need this evidence for the Remedy hearing and we leave that part of our decision until the Remedy hearing..

Discrimination arising from disability (section 15)

*Did the respondent know, or could it reasonably have been expected to know, that the claimant was disabled?*

181. The respondent accepts the claimant was disabled by reason of (i) depression and stress and (ii) spinal stenosis at the material time. The respondent confirms its date of knowledge was February 2022 (depression); August 2022 (stress) and February / March 2022 (spinal stenosis).

182. We agree that the respondent did know or ought to have known from the content of the Fit Notes, the OH reports, the claimant's email of 30 June 2022, statements in her 'complaint' of 25 August 2022 and other available information that the claimant had these disabilities at the material time, and in particular that at the date of the decision to dismiss, she was disabled with spinal stenosis and with depression/stress. The March 2022 OH report actually stated that management should consider reasonable adjustments under the Equality Act

*What was the 'something arising in consequence' of the claimant's disability?*

183. The 'something arising' was the claimant's inability to work and being signed off sick. The claimant's sickness absences were all due to one or other of these disabilities.

*Did the respondent treat the claimant unfavourably because of the 'something arising in consequence' of her disability?*

184. The claimant was dismissed because of the 'something arising'. At the time of her dismissal, she was signed off sick with both stress and shoulder / arm / hand pain (due to spinal stenosis).

185. The respondent admits that the only contested issue before the tribunal on the section 15 claim is whether the respondent has proved the justification defence.

*If so, can the respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?*

186. The respondent sets out its aims as:

- a. Ensuring the claimant is supported to maintain a suitable level of attendance.
- b. Ensuring patient safety is maintained by ensuring staffing ratios are not impacted by sickness.
- c. Ensuring other members of staff are not overworked as a consequence of the sickness absence of colleagues.

- d. Ensuring that the respondent provides cost efficient services to its community.
  - e. Having a healthier and more efficient workplace by managing and improving sickness absence rates, resulting in high quality patient care.
187. We accept that those aims are legitimate and that the respondent was acting in pursuit of aims b and c in dismissing the claimant. We cannot see that aims a and e are achieved by dismissal. Regarding aim d, Ms Phillip said the pay element did not come into it.
188. However, the respondent did not satisfy us that dismissing the claimant at that point in time and in the particular circumstances was a proportionate means of achieving any of those aims. The impact on the claimant of the treatment was severe. She had been hoping to return on a phased return in about late November 2022 when her counselling was finished. She lost a job which she had held for many years and she loved. The dismissal set her back. She had to have additional counselling sessions.
189. The respondent provided no evidence of any substance regarding the impact of the claimant's absence on the unit. Ms Phillip said she was just going on her own general knowledge and experience as a nurse that short-staffing causes difficulties. Miss Donkin did not set out any specific difficulties in the Management Case as required by the Sickness Policy. In answer to a tribunal question, Miss Donkin said that she had been very short-staffed in the first half of 2022, but that by the summer, the Trust had heavily recruited and many staff had returned from sickness; there were now 17 staff members in the unit with a good skill mix, covering the claimant's skills and more flexibility to cope with absenteeism.
190. She did not give evidence of other staff members being overworked or patient safety being impacted by the claimant's absence. There was no evidence whatsoever about costs. When considering whether it was proportionate to dismiss the claimant in October 2022 and why the respondent could not wait any longer, we do not have any specific evidence about problems on the unit because the claimant was not there. In the absence of concrete evidence, we do not consider the abstract proposition that an absent staff member must increase the workload of others or reduce patient service to an unacceptable extent to be sufficient where there are 17 staff members with multiple and flexible skills. Nor was there any explanation why some of the pay freed up by the claimant going onto reduced sick pay could not be used to supplement with some bank staff if needed.
191. Weighing up the impact on the claimant against the employer's reasonable needs, we find the dismissal was not justified at that point in time.
192. We add in relation to proportionality, that at the time of the dismissal, the respondent had not properly explored the claimant's mental health or the prognosis for that; it had not obtained an updated OH report related to mental health; it had not looked into the 'complaint' and whether that had contributed to the claimant being unable to work; and it had not looked for redeployment



outside the claimant's department which, given the size of the respondent, we would thought was realistic. For all these reasons too, bearing in mind the impact of the dismissal, it was not proportionate.

Failure to make reasonable adjustments

193. The claim for reasonable adjustments is that the respondent did not redeploy the claimant at any stage from February 2022 onwards. The OH report of 25 March 2022 first raised the possibility of redeployment, stating 'redeployment to another work area where there are not many hands-on duties would be beneficial'. The 25 May 2022 OH report said that the claimant could return to work if she could be redeployed into a supervisory role with less hands-on clinical duties and/or be given duties not requiring prolonged use of her dominant right hand.

*Did the respondent know, or ought it reasonably to have known, that the claimant was disabled?*

194. This is answered above in relation to the section 15 claim. The respondent had the necessary knowledge.

*If so, did the respondent apply the following provision, criterion or practice to the claimant: a requirement that chemotherapy nurses be fit and well to fulfil their contractual duties?*

195. At the time of the claimant's dismissal, the respondent did apply a provision, criterion or practice that chemotherapy nurses were generally fit and well to fulfil their duties.

*Did the provision, criterion or practice put the claimant at a substantial disadvantage in comparison with people who do not share her disability?*

196. This provision, criterion or practice did put the claimant at a disadvantage compared with those who do not share her disabilities because her disabilities were causing her to be absent through sickness and therefore unable to perform her duties.

*Did the respondent know, or ought it reasonably to have known, that the claimant was likely to be placed at a disadvantage as a result of her disability?*

197. The respondent did know this.

*If so, did the respondent take reasonable steps to find a suitable alternative role for the claimant?*

198. This is the disputed issue on the reasonable adjustment claim.

199. The respondent argues it was not required to make the reasonable adjustment of redeployment because it had put in place adjustments to the

claimant's post which alleviated her disadvantage because of her spinal stenosis.

200. The first problem with that is that at the time of dismissal, there was another disability in play, the claimant's depression/stress. No adjustments at all were explored or offered in relation to that. Redeploying the claimant elsewhere may have helped her return to work within a reasonable time-frame.
201. As regards the physical disability, some adjustments had been put in place, eg in terms of not using the scalp cooling machine or drawing up heavy medicine, but otherwise it was unknown whether the new medical procedures and patient mix on the merged unit together with the in-team flexibility would make it possible for the claimant to work successfully. The March 2022 OH report is clearly concerned with the risk of the claimant exacerbating her condition and managing her symptoms over time, with talk of risk assessments and monitoring. OH in the May 2022 report knew from what Miss Donkin had said in the referral that the scalp cooling and heavy medication adjustments had been put in place, but was still recommending redeployment or duties not avoiding prolonged use of the claimant's dominant hand. The topic of different work areas came up in phone calls between the claimant and Miss Donkin following the May 2022 report, if not before. The claimant suggested carrying out pre-treatment consultations, but those had been moved to a charity. Miss Donkin considered Clinic 8 but there were no vacancies. So at that time, redeployment as a potential solution was seen as a live issue, but Miss Donkin did not consider opportunities outside her department. In her 26 June 2022 OH referral, Miss Donkin addressed this again. She said she was finding it challenging to think of an alternative role or any other reasonable adjustments. Miss Donkin also sent the claimant the 'Supporting Staff who have a Disability' policy around this time. The policy talks about the manager's responsibility to facilitate redeployment at paragraphs 3.1 – 3.2.
202. Miss Donkin's Statement of Case for the Stage 3 hearing says that the May 2022 OH report had recommended redeployment into a supervisory role with less hands-on clinical duties or that she be given duties not requiring prolonged use of her dominant hand, but unfortunately that was not possible because there were no non-clinical roles in the unit or in Clinic 8. We take this as recognition that even the adjustments which Miss Donkin had in mind did not avoid prolonged use of the claimant's dominant hand.
203. It was therefore reasonable for the respondent to explore redeployment outside the department and offer suitable vacancies from at least 25 May 2022 onwards. It was an option which might have resolved the difficulty and enabled the claimant to return. The Disability policy envisaged redeployment as an option. OH thought it would be beneficial. The Trust is a large employer with an HR department. Matters of redeployment are regularly addressed by this type of employer in a variety of situations.
204. For these reasons, we find a continuing failure from 25 May 2022 onwards to make the reasonable adjustment of exploring and redeploying the claimant to

an alternative role within the Trust. At the remedy hearing, we will consider the chance of a vacancy arising which would have been suitable to the claimant and which she would have accepted.

Chagger

205. In relation to the discrimination claims, we adopt the reasoning we used in relation to Polkey on the unfair dismissal claim.

Time-limits

206. The claimant was given notice of dismissal on 26 October 2022 and the effective date of termination was 11 January 2023. ACAS was notified under the early conciliation procedure on 7 March 2023 and issued its certificate on 18 April 2023. The claim form was presented on 17 May 2023. Any action prior to the 8 December 2022 would therefore be outside the primary time-limit.

207. As the respondent accepts, the unfair dismissal and the section 15 claims are in time as the 3 months are counted from the effective date of termination.

208. The respondent failed to make the reasonable adjustment of offering redeployment to the claimant at any time from 25 May 2022 until the termination of her employment. There were numerous opportunities to make this adjustment as circumstances continued to evolve and the matter came before several managers at several points. This was a continuing omission right up to the termination date. An appeal had been lodged within this period so the claimant was still interested in continuing to be employed. The reasonable adjustment claim is therefore in time as an omission extending over a period of time continuing up to 11 January 2023.

209. If we are wrong about this, the time should be counted from the decision to dismiss, which is when the respondent did something inconsistent with redeploying. Up to that point, there had been no concrete refusal to redeploy and it just had not happened yet. This would mean the reasonable adjustment claim was out of time (if continuing discrimination did not apply). However, we would consider it just and equitable to allow the claim in late.

210. The claimant did not give clear evidence regarding why she had not put her claim in earlier and appeared somewhat bewildered by the question. She mentioned that her mental health was not good at the time, which we accept. But her main point was that her union representative had told her the deadline was three months from termination. The claimant had adhered to that three month deadline, which is why her other claims are in time.

211. More importantly, we have weighed up the balance of prejudice to the parties in allowing in the late claim or not. The respondent gave no evidence of any particular prejudice. Indeed, other than having to face an additional claim, it is hard to see what the extra prejudice would be, since the issue of redeployment had to be considered anyway in relation to the unfair dismissal

and section 15 claims. Admittedly there would not be much prejudice to the claimant in excluding the claims for the very same reason. However, the claim is slightly different and it would be artificial to exclude it. The claims about the dismissal itself were brought in time and the respondent had to deal with them anyway. On balance, we would consider it just and equitable to allow the reasonable adjustment claims out of time.

**Remedy**

- 212. The remedy hearing will take place on **28 – 30 April 2025**. Although three days have been set aside bearing in mind the need for reasonable adjustments, this estimate must incorporate time for the tribunal to reach a decision. The parties should therefore aim to complete any evidence and submissions by midday on day 2 or the end of day 2 at the latest.
- 213. The parties will be notified of a preliminary hearing so that preparation for the remedy hearing can be discussed. In the meantime, it is recommended that the parties start to discuss this. There will need to be disclosure of vacancy lists from the time, and if these are no longer available, a broad description of the types and numbers of potentially suitable posts. Medical evidence might also be relevant regarding when the claimant would have been able to return to work in the light of physical and mental health had there been no unlawful acts and as a separate matter, regarding the impact of the unlawful acts specifically.
- 214. The parties may be able to reach a negotiated settlement of remedy now that the liability decision has been made, and this would be a sensible approach. If a settlement is reached, the parties should notify the tribunal as soon as possible.

\_\_\_\_\_  
Employment Judge Lewis

Dated: 24 October 2024.....

Judgment and Reasons sent to the parties on:

30 October 2024

.....

.....  
For the Tribunal Office