Case Nos: 2402135/2019
2406309/2019
2405568/2020

EMPLOYMENT TRIBUNALS

Claimant: **Ms D Hale**

Respondent: **Cheshire & Wirral Partnership NHS Foundation Trust**

Heard at: **Liverpool**

On: **30 October-1 November 2023, 3 November 2023, 6- 9November 2023**
(In Chambers on 26 February to 28 February 2024 and 1 March 2024.)

Before: **Employment Judge Eeley**
Ms C Gallagher
Ms J Pennie

Representation
Claimant: In person
Respondent: Mr A Gibson, solicitor

JUDGMENT

1. At the relevant times, the claimant was a disabled person as defined by section 6 Equality Act 2010 because of hearing loss and a past cancer diagnosis.

2. The complaint of direct disability discrimination is not well-founded and is dismissed.

3. The complaint of harassment related to disability is not well-founded and is dismissed.

4. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

5. The complaint of victimisation is not well-founded and is dismissed.

6. The claim of constructive unfair dismissal as an act of discrimination is not well founded and is dismissed.

REASONS

BACKGROUND

1. The claimant presented three claim forms to the Tribunal arising out of her employment with the respondent. These were case managed at five preliminary hearings. The list of issues for determination included claims of direct disability discrimination, disability related harassment, breach of the duty to make reasonable adjustments, victimisation and constructive unfair dismissal. The list of issues for determination by the Tribunal was updated by the respondent's solicitor and was to be found at page 1861 of the hearing bundle. At the outset of the final hearing, the list of issues was discussed with the parties and agreed. It therefore formed the framework for the Tribunal's deliberations and decision in this case.

2. The case was heard over eight days in person in Liverpool Tribunal. The claimant has a hearing impairment and therefore, Employment Judge Johnson directed that the hearing take place in person so that the claimant could use the hearing loop facility in the Tribunal hearing room as a reasonable adjustment.

3. The Tribunal was provided with a hearing bundle which ran over five lever arch files and which contained 1935 pages. The claimant emailed several batches of further documents to the Tribunal at various stages during the course of the hearing. Some of these were admitted into evidence. We labelled those further admissible documents C1-C4. We gave full oral reasons for our decision on the admissibility of the batch of additional documents during the course of the hearing. We have not been asked to provide written reasons for that decision. We do not propose to repeat those reasons here in the interests of proportionality. Some of the 'new documents' were actually duplicates of documents already in the hearing bundle and so the duplicate copies were not added. Other documents were different versions of documents already in the bundle and these were added to the bundle so that the relevant witnesses could be questioned on the different versions and the impact this would have on the issues for determination by the Tribunal. The respondent consented to the addition of some of the new documents. Finally, some of the documents were entirely new and the Tribunal was not satisfied as to their relevance to the issues for determination in the case. As they were not relevant and necessary for the fair determination of the case, we did not add them to the evidence before the Tribunal in this case.

4. The Tribunal read only those documents in the bundle to which it was directed by the parties.

5. The Tribunal received written witness statements and heard oral evidence from the following witnesses:

    - Debra Hale, the claimant, formerly employed by the respondent as a Clinical Nurse Specialist;
    - Helen Massey, Clinical Nurse Specialist;
    - Denise Bromilow, Clinical Nurse Specialist;
    - Charles Ingram, Head of Clinical Services;
    - Sharon Vernon, Head of Operations;
    - Cathy Walsh, Associate Director of Patient Care and Experience;
    - Gary Flockhart, Director of Nursing, Therapies and Patient Partnership;

- Victoria Peach, Associate Director of Nursing.

6. At the conclusion of the hearing, the Tribunal received a written final submission from the claimant together with oral submissions from the claimant and the respondent's solicitor.

7. Numbers in square brackets below are references to page numbers within the hearing bundle unless otherwise indicated.

FINDINGS OF FACT

8. The claimant was employed by the respondent as a Band 7 nurse within the ADHD service. Her employment with the respondent commenced on 2 January 2018.

Evidence regarding disability at the start of employment

9. Prior to the claimant starting work with the respondent, Occupational Health completed a new employee health advice document [87]. This explicitly recorded, *"This employee has not declared any health conditions/impairment/disability which would require adjustments/support in the workplace."* She was cleared for employment in her new role. This document was apparently completed by Karen Wall, Nurse Adviser, on 5 December 2017.

10. During the course of the Tribunal hearing the claimant sought to suggest that she *had* declared a disability as part of her pre-employment checks. This apparently contradicted the Occupational Health document. The claimant maintained that the document at [87] is incomplete and misleading. She maintained that she filled in a questionnaire declaring her health condition before she started her job with the respondent. She maintains that she was not in a position to 'save' a copy of the online/computer documents and that the document at page 87 is the only document which was retained. However, the Tribunal notes that the document at [87] is not merely silent as to whether there is a disability or health condition. It actively asserts that there was *no* declaration of health conditions or disability. It positively contradicts the claimant's assertion rather than being silent on the point. The Tribunal is unable to understand how or why Nurse Wall would fill out the declaration in the way that she did at [87] if the claimant had in fact completed the questionnaire and pre-employment health checks in the way that she alleges. Nurse Wall would have to consciously ignore the claimant's information and/or deliberately create a misleading document. The Tribunal was not persuaded that the document at 87 was incorrect or misleading. We are content to rely upon it as evidence of what the claimant did or did not declare about her health prior to starting employment. We also note that this is the document which anyone within the respondent would have access to if they were looking to check the claimant's health/disability status. The respondent's employees or managers would be entitled to take this document at face value and as accurate in the absence of some clear warning that it was not safe to do so.

11. The Tribunal was also referred to a number of letters which pre-date the start of the claimant's employment. There is a letter at [89] dated 8 December 2017 confirming that pre-employment checks had been completed and that a start date could now be agreed with her line manager. The letter asked Angela Davies to reply with her agreed start date and to send some documents to the payroll department.

12. During the course of the Tribunal hearing the claimant disclosed two further versions of the same letter which the Tribunal labelled C2 and C4. These documents were not in the respondent's possession prior to their disclosure by the claimant in the middle of the Tribunal final hearing. At C2 instead of two 'actions' for Angela Davies, there are three numbered paragraphs. Paragraph 3 states*: "Occupational Health appointment for new- starter health- Occupational Health check status form identified protected characteristics due to Breast Cancer diagnosis and disability."* It continued: *"Pre-employment checks View pre-employment checks Check pre-employment checklist Health assessment-(hearing-eyesight-tests) plus Oncology report for fit to working environment."* It had two further pages which purported to be a form filled in from the claimant to consent to a medical examination (signed and dated on 12 December 2017.) Unlike [89] there was no signature from Cheryl Crowe at the bottom of the letter.

13. The Tribunal was concerned as to the provenance of the "C2" document. The grammar of the additions at paragraph 3 and below on the first page made no sense. Additionally, whilst it referred to an oncology report it did not make any statement about hearing loss, which is a little odd given that the claimant says that she disclosed this as part of her questionnaire. Even "C2" does not entirely match the claimant's account of what she told the respondent at this stage of the chronology. The additional parts of the document fitted conveniently with the evidence that the claimant had started to give in cross examination. This portion of the cross examination took place before a one-day gap or 'non-sitting day' at the Tribunal. The claimant disclosed this document the evening before the Tribunal hearing resumed after the non-sitting day.

14. The document at 'C4' was equally problematic. It purported to be a third version of the same letter. The action points for Angela Davies on page one of the letter differed significantly to [89] and C2, both in format and appearance. It stated: *"A) Reply to this e-mail by confirming your agreed start date. 1 Ensure you complete the necessary Payroll forms (ESR2 or ESR3) and return to the Payroll Department, HR and Wellbeing Services (HRWBS), Moston Lodge, 2 Countess of Chester Hospital, Liverpool Road, CH2 1UL."* This part of the letter seems to have been edited. Attached to the front page of C4 there was a new page of a form which included, amongst other things, a tick box section 'Section B' dealing with health surveillance requirements, complete with ticks in various boxes. The third page was new and had boxes ticked for health surveillance on an auditory impairment, skin problem and 'other' referred to as "Chemotherapy-Radiotherapy-Peripheral neuropathy." This was apparently signed and dated by the claimant. Unfortunately, the date of the signature is 12 December 2028 (i.e. in the future.) The document at C4 was introduced to the evidence by the claimant on day 4 of the hearing (3 November 2023).

15. The Tribunal is concerned about the provenance of documents C2 and C4. There are now three versions of what purports to be the same document. The claimant is the only person who has had custody of C2 and C4 prior to the Tribunal hearing. It is unclear why she did not disclose these documents before the hearing. The documents are suspicious on the face of them, given the substantial differences between the different versions. It is also notable that they only came to light once cross examination of the claimant had started. They seemed to be an attempt to corroborate the claimant's oral evidence. The two new documents were not consistent with each other or with the copy which was already in the hearing bundle. This further undermines the Tribunal's ability to rely on them as accurate copies of an original document produced by the respondent prior to the start of

the claimant's employment. The new documents are self-serving from the claimant's point of view.

16. The Tribunal concludes that C2 and C4 are of dubious provenance and probative value. The timing and manner of their disclosure by the claimant and the content and wording of the documents undermine the reliability and credibility of those documents. This leads the Tribunal to question the reliability of the claimant's evidence, particularly when taken together with other features of the case and the evidence. It is notable that these documents only appeared when problems were identified in the claimant's witness account to the Tribunal, as exposed during cross examination. The late disclosure appeared to be an attempt by the claimant to plug the gaps in her case and address inconsistencies in her case. She was attempting to deal with the absence of evidence to show that she had informed the respondent of her disability before she started work, as part of her pre-employment checks.

17. The claimant also sought to suggest that at the beginning of her employment she told the respondent that she was still undergoing treatment for cancer. In a grievance investigation meeting on 25 February 2019 the claimant apparently confirmed that she had treatment for the cancer and was fully recovered [657]. Although the claimant had put handwritten amendments on the notes of the meeting, she did not amend this part of the record. Then, on the following page, the claimant alleged that she met Ms Massey on 22 January and gave her a letter saying she was having treatment for breast cancer. She alleged that Ms Massey had made comments to the effect that the claimant would not be capable of doing the job with that condition and that it had been a mistake to appoint her to the post. (Ms Massey denies making such comments.) These two pages of the notes could be said to be contradictory: had the claimant fully recovered, or not? The letter that the claimant says she produced to Ms Massey in January 2018 has never been produced in evidence to the Tribunal.

18. In her evidence to the Tribunal, the claimant said that she handed Ms Massey a letter when she started employment which included her cancer treatment schedule. The claimant started work on 2 January and says that she gave this letter to Ms Massey on second day of employment (i.e. 3 January). However, this cannot be correct as Ms Massey was on annual leave at this point in time. In addition, she was not the claimant's line manager and confirmed to the Tribunal that, in those circumstances, she would not have accepted any medical records or letters from the claimant. Ms Massey maintains that she did not meet with the claimant until the middle of the week beginning 5 January (after she returned from annual leave.) She maintains that, even at that stage, the claimant did not provide any medical notes relating to her hearing disability. She maintains that she first became aware of the claimant's hearing loss at the meeting on 2 July 2018 (see below.) Ms Massey says that she first became aware of the claimant's previous diagnosis of breast cancer when the claimant mentioned it briefly during a work-related course on 5 and 6 March 2018. The conversation went no further and, as far as Ms Massey was aware, the claimant had made a full recovery and was not receiving any treatment for cancer when she started work with the respondent.

19. Having heard the evidence on behalf of both parties, having noted the absence of any written evidence confirming the claimant's cancer treatment schedule at this time, and having taken account of the pre-employment evidence that the claimant had not declared any medical conditions, the Tribunal prefers the respondent's evidence on this issue to that of the claimant. The Tribunal is not satisfied that the claimant informed Ms Massey of either of the medical conditions at the start of her employment, she did not indicate that she was still being treated

for cancer and she did not mention hearing loss until July 2018.

20. Regarding the March 2018 training course mentioned above, the claimant also sought to suggest that jokes were made about her hearing loss whilst at this residential course. Apparently, the claimant had slept through a fire alarm during the night. However, the respondent's witnesses denied making such jokes or being aware that the claimant had a hearing impairment. The claimant further sought to suggest that she had insisted on sitting at the front of a training session so that she could hear the speaker properly. However, the respondent's witnesses asserted that the claimant sat at the front of the training room because she and the respondent's witnesses had arrived late and this was the last available seating remaining. She had not indicated that she needed to sit at the front so that she could hear properly due to hearing loss. The claimant's colleagues did not become aware of the claimant's hearing problem during this training course. We find the respondent's evidence credible in this regard.

21. The only document that the claimant showed to the Tribunal relating to the medical treatment she was receiving in 2018 was the letter from the Ear Nose and Throat consultant dated 28 June 2018. This post-dated the start of the claimant's employment with the respondent by nearly six months. It was also a letter from the claimant's ENT consultant to the claimant's GP. It was not addressed to the claimant's employer (i.e. the respondent.) There is no evidence to suggest that this was provided to the respondent at the time or that they had seen it prior to the claimant disclosing it part way through the hearing. (It was one of the documents in the collection of papers labelled "C1".)

22. The claimant never provided the radiotherapy schedule to the Tribunal. This is the document she relied on to show that she told the respondent she was still undergoing cancer treatment when she started employment. The Tribunal could not understand why she did not provide this evidence if such exists. The claimant's Tribunal claims have been in process for several years (the ET1s having been presented in 2019). If the document exists then the claimant has had ample time to locate and provide it. If necessary, she could have sought a copy of the document from her medical records held by the hospital or her GP. She did not do this, even when she was represented by solicitors during part of the Tribunal proceedings. We also note that the claimant said in her grievance meeting [659], *"My cancer treatment was at the end and so there was no issue there…"* This again implies that there were no ongoing effects of cancer treatment which were relevant during her employment with the respondent.

23. Based on the evidence seen and heard by the Tribunal, Ms Massey's first knowledge of the claimant's hearing loss was at the meeting on 2 July 2018 (see below) and the first specialist or medical evidence received on the subject was the second Occupational Health report (5 October 2018, see below). Ms Massey confirmed in cross examination that she had never seen the letter from the ENT consultant in "C1" before the Tribunal hearing. She denied the claimant's assertion that this letter was the reason for the 2 July 2018 meeting. Rather, Ms Massey maintained that the 2 July 2018 meeting was a clinical supervision meeting. As set out below, the Tribunal is content that this meeting was indeed a clinical supervision meeting.

24. In light of these various inconsistencies and the absence of the relevant written documents, the Tribunal prefers the evidence of the respondent and Ms Massey to that of the claimant on this issue. The Tribunal is satisfied that the claimant did not tell Ms Massey (or the respondent) about either of her disabilities (cancer or hearing loss) at the start of her employment. We also accepted the evidence of Ms Bromilow that the claimant's other colleagues did not know any more about

the claimant's disability at the beginning of her employment than the respondent managers and Ms Massey did. All of them were unaware of the disabilities, both colleagues and management alike.

25. The Tribunal was referred to a document entitled "Protected Characteristic Questionnaire." There were two versions of the document in the bundle [919 and 1933]. Given the contents of the document at [1933] it must post-date December 2018 and cannot have been produced at the start of the claimant's employment, or earlier. The document at [919] is the appendix to an investigation report which, according to the index, was sent to the respondent in 2019. It also refers to dates as late as 3 September 2018 and so cannot date from the start of the claimant's employment. In short, this cannot be part of a pre-employment questionnaire as part of the claimant's pre-employment checks. All that Helen Massey knew by March 2018 (at the residential course) was that the claimant had previously had cancer but not that there were any ongoing difficulties arising from it or that the claimant was still being treated for it. As set out below, it was July 2018 before the claimant raised the issue of hearing difficulties with Ms Massey and Dr Mason during a supervision meeting.

<u>The claimant's team and the start of her employment.</u>

26. The claimant commenced employment with the respondent on 2 January 2018 as a Clinical Nurse Specialist in the Adult ADHD service run by the respondent. The claimant's role involved diagnosing and treating (including prescribing medication) Attention Deficit Disorder in adults.

27. Prior to the claimant's employment with the respondent, the Adult ADHD Service was managed by Paula Potter. Dr Peter Mason was the Consultant in Adult ADHD and the Lead Clinician within the service. This remained the case during the claimant's employment with the respondent. Jane Newcombe was the Clinical Services Manager and Ange Davies was the Deputy CSM for Complex Needs Service and Adult ADHD.

28. Prior to the claimant's employment, the respondent set up hubs for the ADHD service on the Wirral at GP surgeries. Practitioners in the team were based at the Stein Centre and held clinics both at the Stein centre and at external locations such as GP surgeries.

29. In mid-January 2018 the respondent Trust realigned to the care group model. The ADHD service moved from the Wirral locality to the Learning Disability, Neurodevelopmental Disorders and Acquired Brain Injury Care Group. The ADHD Service was in a state of transition during this time.

30. The decision to recruit further practitioners to the Service had been made in late 2017. The respondent was looking to recruit one part time and one full time Adult ADHD Clinical Nurse Specialist (Band 7). Band 7 was at the higher end of the scale and was considered a senior role with commensurate expectations in terms of the knowledge and skills related to the Band. By this stage Ms Potter had retired but had returned part time to work in the Service. She and Ange Davies conducted the interviews for the role. Ms Bromilow was appointed to the part-time position and the claimant secured the full-time role.

31. From early January 2018 the ADHD team consisted of four Band 7s (Massey, Bromilow, the claimant and Potter) plus two Clinical Support Workers (Phil Gadd and Sarah Miller).

32. As stated above, the team was based at the Stein Centre but operated clinics at a number of different locations. The ADHD team operated out of an open plan office, when not in clinic. Dr Mason had a separate office which opened onto the open plan office. The door to that office could be shut for privacy and to achieve a quieter working environment. Even though Dr Mason had a separate office (with computer and phone at the workstation), he habitually worked in the open plan office alongside the other members of the team. He did not use his separate office, as a general rule. Dr Mason made his separate office available to other members of the team if they wanted (or needed) to work in a separate or quieter room. This option was made available to the claimant, as well as to her colleagues.

33. Within the open plan office there was a desk and seating area for use by the Band 7s (and Dr Mason). There were six desks and chairs allocated for use by the ADHD team. There were three desktop computers on desks with phones and chairs at each station. The expectation was that the ADHD nursing team (i.e. the claimant and her colleagues) would 'hot desk' using these workstations. The two Clinical Support Workers had separate desks. None of the Band 7 nurses had a designated desk. They could sit at whichever workstation was available when they came into the office. The claimant was in no different position to her colleagues in this regard. The expectation was that she would be able to come into the office, find a workstation and do any necessary work tasks within the office as they arose.

34. The Tribunal was not satisfied that there was any shortage of workstations for the team or the claimant. It should be remembered that each Band 7 would be out of the office (in clinic) for a large part of their working time. Although they worked out of this open plan office, they were not based in the office for the majority of the working day. Theirs was not a 9-5 office-based job. Hence, we were satisfied that all Band 7s would be able to find a workstation in the office, as needed, using this hot-desking arrangement. The hot-desking arrangement was workable for the team.

35. During cross examination at the final hearing, the claimant suggested that when she started in post there was nowhere for her to sit and that she was reduced to standing at the end of the desks, near a photocopier. The Tribunal is satisfied that this does not accurately reflect the situation. We noted that the claimant asserted this for the first time in cross examination and that it was something of an embellishment to the existing evidence. The Tribunal finds that the claimant had access to adequate seating and desk space from the start of her employment with the respondent.

36. We were also satisfied that all of the team could log on to the desktop computers in the office to access any necessary records and information and to carry out their work. Each staff member would have an individual set of log on details and 'permissions' which they could use to log on to the desktop computers and access the respondent's systems. The desktop computers were not 'assigned' to individual employees and could be used by all with log on accounts at the respondent. Likewise, the phone system at the respondent meant that the Band 7s could sign in to use any phone at any desk, if required.

37. The Tribunal therefore concludes that all of the Band 7s (including the claimant) were treated equally and consistently in relation to workstations. All of them hot-desked. None of them had a designated workstation. All of them could work at any of the desks, or could access Dr Mason's private office, if required or

preferred. There was no evidence of insufficient seating or desk space causing problems for the claimant or any other member of the team. Indeed, during part of the cross examination the claimant seemed to accept that everyone was hot desking. Consequently, any suggestion that the claimant was treated differently in this regard is incorrect.

38. In addition to the desktop computers, laptop computers were provided to the claimant and her colleagues. Each individual nurse would be provided with their own laptop computer for work purposes. Naturally enough, these could be used when out of the office (e.g. at clinics.) At the outset of their employment neither the claimant nor Ms Bromilow had their own laptops. They had been ordered by the respondent but had not yet arrived. The claimant and Ms Bromilow subsequently received their laptops at the same time. The claimant drove herself and Ms Bromilow to a location at Ellesmere Port so that they could collect them.

39. In addition to the individually assigned laptops, there were some spare laptops which were available to the Band 7s. Thus, if a member of staff was awaiting the arrival of their individual laptop, they could use the spare laptops in the meantime. Again, the claimant and her colleagues could log on to the spare laptops using their own credentials (as is common on Windows laptops where it is possible to log on using a number of different user accounts.) We therefore do not accept that whilst the claimant was awaiting delivery of her individual laptop, she was precluded from using a laptop to do her work when outside the office. The Tribunal is satisfied that the claimant would be able to access the respondent's systems during clinics using a spare laptop.

40. The claimant sought to suggest that, until her own laptop arrived, she had to go into the office before each clinic, print off forms and summarise patient notes in the office before going out to do her clinics. She suggested that she could not access patient records during consultations and that she had to take notes during consultations and then go back to the office each evening in order to input them into the system on a desktop computer. We did not consider this account to be plausible, particularly in a clinical setting where access to patient records as and when needed (and whilst face to face with a patient) would be an important part of safe clinical practice. We also considered that if the claimant had been without access to a laptop during the early part of her employment, we would have seen some form of email correspondence chasing the delivery of a laptop so that she could carry out her role using the proper systems of work. The Tribunal was directed to no such 'chaser' correspondence within the evidence. The Tribunal does not accept that the claimant had to work in the way she sought to allege. We were satisfied, based on the evidence we heard, that she could (and should) have taken one of the spare laptops with her to clinics and accessed the records electronically whilst in clinic. There was no need for her to go into the office in the morning to get information off the system, and no need to return to the office to input information into the system after clinics. Indeed, we noted that the claimant only provided this account of her methods of working without a laptop during cross examination once she was aware that the respondent was suggesting that she 'must have had' a laptop to work on by the time she started working in clinics. This account appeared to be a response to developments in the evidence during the course of cross examination. The claimant's ET1s do not refer to her having to do work in the office in the mornings and evenings to get around the absence of a laptop, this is a later addition to the claimant's evidence.

41. In any event, we were satisfied that the claimant was likely to have received her own laptop computer by 8 February 2018, at the latest [1529].

42. In addition to use of landline telephones, the claimant and her colleagues were given individual mobile phones. Again, we are satisfied that the claimant received her mobile phone before she started doing work at clinics and that she had her mobile phone by 17 March 2018 at the latest [214]. Again, there was no evidence that she was treated any differently to her colleagues in relation to accessing mobile phones (albeit Ms Bromilow still had access to her phone from her previous post and could use this, if needed, whilst waiting for a new mobile.) Any suggestion that the claimant made that she was using the 'duty' mobile phone is not accepted. Duty work was primarily dealt with via a duty email inbox. Any phone calls could be put through to the office phones and we were not satisfied that there was a specific mobile phone used or allocated for 'duty' work.

43. The Tribunal heard some evidence about a tool called 'Winscribe.' It is a dictation application. The team could either use a dictation machine or install an 'app' on their phones. Letters are then dictated and are sent to the respondent's admin hub to be typed. The claimant and Ms Massey attended training on how to use Winscribe in early 2018. Ms Massey, Ms Bromilow, Dr Mason and the admin staff had also shown the claimant how to use it. The claimant did not flag up that that she had any difficulties using Winscribe. However, during the course of her employment it was discovered that the claimant was not using Winscribe as would be expected. Ms Massey alerted Mr Ingram to this issue on 11 July 2018 [793]. During the Tribunal hearing the claimant sought to suggest that she was not using Winscribe because she required special adaptations to use it because of her hearing impairment. However, the claimant had not raised the absence of the Winscribe adaptation. During a meeting in March/April 2018 the Band 7s were all asked whether they were using Winscribe/dictating letters and the claimant had indicated that she was. She was given the opportunity to raise any issues that she might have with Winscribe but did not do so. There is no evidence that the claimant, prior to July 2018, indicated that she needed an adaptation in order to use Winscribe. The evidence suggests that the claimant had the same access to Winscribe as the other employees and did not raise any problems about using it at the time.

44. Part of the claimant's job role included prescribing medication for patients. As part of her Tribunal claim, the claimant alleged that she had had difficulties in obtaining the necessary registration to be able to prescribe within the respondent Trust. The email correspondence within the hearing bundle [e.g. 1529-1531] indicates that the claimant was registered to prescribe. She confirmed that she was registered for prescribing by 7 February 2018, just over a month after her employment started. Given that the first part of the claimant's period of employment involved training and shadowing others, it appears that she was registered for prescribing early enough that she was able to do her job and issue prescriptions once she started seeing patients. The aforementioned email chain indicates that the claimant had asked about registration at induction on 6 February [1531] and the issue was referred to Mr Flockhart to sign off the claimant's authorisation to prescribe/paper work. The documents, when read in conjunction with the witness evidence we heard, suggest that the claimant was signed-off to prescribe from her own formulary (i.e. the range of medications that she personally was authorised to prescribe) and that if she wished to prescribe something which was not on her own authorised list/formulary, then this would be processed via a doctor who *was* authorised to issue the specific medication required.

45. During the course of cross examination the claimant suggested that she had approached Ms Massey, who had failed to assist her in getting registered for prescribing. The claimant maintained that she had to get help from someone in

the Pharmacy because Ms Massey had said it was not her responsibility to sort this out for the claimant. The respondent's solicitor put it to the claimant that, as a senior nurse, she would be expected to sort out this sort of registration for herself. The claimant confirmed that she accessed the relevant prescribing policy which contained the contact details for the Head of Pharmacy. She contacted the Head of Pharmacy and the issue was sorted out for her. The claimant's feeling was that normally a line manager would support her in this task. The claimant's evidence was that Ms Massey had to be involved and sign-off the claimant's competence before she could be put on the prescribing list as 'fit to prescribe.' Her position was that Dr Mason and Ms Massey had to sign this off. However, this is rather undermined by the documentary evidence suggesting that it was Mr Flockhart who signed this off for the claimant. It appears that Ms Massey had made the point that she was not the claimant's line manager at this point in time and, therefore, should not be signing off on prescribing authorisation for the claimant. As will be seen below, the Tribunal accepts that Ms Massey was not the claimant's line manager at the start of her employment (and therefore during the period in question for prescribing registration.).

46. In summary, the Tribunal was satisfied that there was no evidence that others went through a different or easier process in order to get signed off or authorised for prescribing. Furthermore, we were satisfied that Ms Massey acted reasonably and within the scope of her employment responsibilities in this regard. She did not make it more difficult for the claimant to be registered for prescribing or unreasonably fail to assist the claimant in this regard. It was not unreasonable to expect the claimant to get her authorisation from the Pharmacy and Mr Flockhart in all the circumstances. There were no particular or unfair barriers placed in the claimant's way.

Induction

47. The claimant started employment on 2 January 2018. Ms Massey was on annual leave when the claimant started work. She asked several teams whether the claimant could spend some time with them at the start of her employment, including CMHT, Crisis Home Treatment Team, Single Point of Access. She arranged for the claimant to spend some time with the Early Intervention team and the Community Mental Health team. Ms Massey was not the claimant's line manager but made these arrangements to ensure that new starters had a proper induction. (Ange Davies arranged the rest of the induction.) It was important for the claimant and Ms Bromilow to see how the ADHD team fitted into the Trust and to ensure that they understood the referral processes.

48. Ange Davies arranged an introduction week with mandatory training for the claimant. The claimant attended a Trust/corporate induction on 5 and 6 February 2018. (She accepted this during her oral evidence at the Tribunal hearing.) Within a month of attending this induction the claimant was due to complete the induction checklist which was to be signed off by the clamant and her manager. Hence, Ange Davies was responsible for signing and returning the induction checklist [346-347]. This documentation again supports the respondent's case that Ms Massey was *not* the claimant's line manager at this time and that primary responsibility for arranging the claimant's induction lay with Ange Davies.

49. In addition to the Trust/corporate induction, there was a more informal 'local' induction with Dr Mason within the first few weeks of the claimant's employment. He allowed the new starters to shadow him in clinic. (Ms Massey had done this too when she started in ADHD.) Shadowing would include watching Dr Mason write a care note entry and follow the pathway, watching him complete a clinical

risk assessment (via a CARSO), HONOS, clinical note and ADHD pathway. Dr Mason would then ask the new recruit to write the entry and complete the care notes under his supervision. The claimant's role would include ensuring that a patient's care notes were completed appropriately after each appointment so that someone coming to consult or read the notes could see the most recent information about the patient, including whether they are a risk to themselves, whether they have stopped, started or changed medication and whether they have been referred to another specialism. It is *not* within the claimant's remit (as a Clinical Nurse Specialist within ADHD) to diagnose or treat anything other than ADHD. This was made clear to all the Band 7s by Dr Mason. Shadowing continued until the claimant (and others) were able to undertake the tasks for themselves, first with supervision, and then on their own. Written typed instructions were also provided to the claimant and Ms Bromilow [1756-1757].

50. The claimant spent the first few weeks in clinic shadowing Ms Massey and Dr Mason. We accept that the claimant said that she found the time shadowing Ms Massey boring because she already had so much experience from her previous job. She was evidently keen to start doing her own clinics.

51. The Tribunal was satisfied, from the evidence presented, that the claimant did the formal Trust/corporate induction and Ange Davies signed this off, as her line manager. The claimant was also offered the more informal departmental induction with Dr Mason just like Ms Bromilow and Ms Massey had been. There is no evidence that the claimant was treated any differently from others in this job role in terms of the arrangements being made for her induction and initial training. There is also no evidence that Ms Massey failed to do what was required or expected of her with regard to the claimant's induction and initial training. She was not the claimant's line manager but helped to offer the claimant the same induction as others entering into the same job role had received or were to receive. We noted that the available documentation supported Ms Massey's evidence on this subject.

52. The claimant alleges that Ms Massey did not provide Dr Mason's email address to her until 3 March 2018. However, Ms Massey was clear that the claimant never asked her for the email address. The Tribunal could not understand what reason Ms Massey would have for refusing to provide the email address, if asked. Furthermore, given the location of the workstations in the office, it is not clear why the claimant could not (or did not) ask Dr Mason directly for his contact details. The evidence suggests that they were in close physical proximity either during the work shadowing part of the claimant's induction or, alternatively, when they were working from the office, as described above.

53. In addition to the above, the claimant gave inconsistent evidence to the Tribunal on this topic. Her case, as pleaded, was that Ms Massey did not provide her with Dr Mason's email address. In cross examination she asserted that the problem was not with the email address but rather with getting Dr Mason's phone number. She asserted that Ms Massey said that she could not give the claimant Dr Mason's phone number (which she needed for lone working reasons) but that Phil Gadd gave her the phone number without any problem. She asserted that Dr Mason never accessed emails and so she needed to be able to phone him. (Email traffic to and from Dr Mason which was contained in the hearing bundle would tend to contradict this assertion.) By the end of her evidence she had returned to asserting that it was the doctor's *email* address that she lacked.

54. On balance, we prefer Ms Massey's evidence on this issue. The claimant's

evidence was inconsistent and we could see no reason why the claimant had to get the details from Ms Massey or, indeed, what motive Ms Massey had for refusing to provide the information. We conclude that the claimant did *not* ask Ms Massey for the information and Ms Massey never refused to provide it to her.

Organisation of clinics etc

55. The Tribunal heard a good deal of evidence to explain how the ADHD clinic system operated. Clinics were organised geographically (Wirral, Liverpool, Bolton, Macclesfield and Winsford.) For funding reasons, most of the clinics were held in Liverpool and on the Wirral. The Clinical Nurse Specialists chose where and when they wanted to do their clinics. The claimant did her clinics on the Wirral on Tuesday, Wednesday and Friday and in Liverpool on Thursdays. Monday was the claimant's 'admin day' which provided her with time to catch up with paperwork. All three of the Band 7s (Massey, Bromilow and the claimant) had clinics on the Wirral. The claimant did clinics in Bolton and Liverpool. Ms Bromilow did clinics in Macclesfield and Liverpool and Helen Massey did all her clinics on the Wirral.

56. Clinics were organised in half hour slots. An appointment with a patient would vary in length depending on the nature of the appointment. A new assessment would take 3 slots (1 ½ hours). A reassessment would take 2 slots (i.e. 1 hour). A follow-up appointment would take 1 slot (1/2 an hour). Each 'clinic' would be 3 hours long and would be made up of 6 slots. The precise allocation of slots between patients would depend on the types of appointments needed and how many slots such appointments required. It was anticipated that a full time Clinical Nurse Specialist would see around 40 patients per week in half hour slots. A nurse would see between 8 to 12 patients per day depending on how the slots were filled. The Tribunal heard that in early 2018 the nurses were actually using 10 to 12 slots per day because of the increased demand on the service. This was subsequently reduced to 10 slots per day because of the strain on staff from the increased workload.

57. The Clinical Nurse Specialists did not determine how their clinic slots were filled. They were not supposed to do more than two new assessments per day. Clinics were allocated to the Nurses by the Admin Hub. The allocation of appointments would depend first on geographical area: which location could the patient attend? The next factor was timing and availability: when/how soon was the appointment needed and when was the next available slot at a clinic in the correct geographical location? Aside from those factors, allocation of appointments between the different Nurses was random. The name or identity of the nurse was not the consideration. Rather, whoever was running the clinic in the right location with an available appointment at the correct time would be allocated the patient in question. So, if an appointment was required in Bolton and the claimant was the Nurse running that clinic on the day, she would be allocated the appointment with that patient. The Admin Hub was itself a relatively new innovation within the Trust. It had only been in place since 2017 and so the allocation was of appointments was still a little chaotic in early 2018. However, the Tribunal is satisfied that these initial problems were encountered by all of the nurses in the team. The claimant was not singled out or targeted for problematic allocation of appointments.

58. During the course of her evidence the claimant suggested that the Admin Hub "RAG-rated" the appointments before allocating them and that she received a disproportionate number of the "red" patients. "RAG-rating" refers to "Red Amber Green," with 'red' being the more risky or complex patients and 'green' being the

most straightforward or routine patients, with 'amber' patients falling somewhere in the middle. However, the Tribunal accepts the respondent's evidence that this RAG-rating was *not* done. The staff working in the Admin Hub were not clinicians and would not have the necessary skills or experience to be able to carry out such RAG-rating reliably. We find that patients were not RAG-rated prior to allocation and that the claimant did not receive a higher proportion of difficult or risky patients than her colleagues. Subject to geography and timing or availability, the appointments were randomly allocated. The claimant perceives that she was given a harder workload than her colleagues, but this perception is not objectively verifiable. It certainly could not be deliberate in the circumstances of the respondent's organisation and systems. Furthermore, the Tribunal questions how the claimant would know whether her colleagues were seeing 'easier' patients than she was? She would not routinely see the details of the patients to be able to compare. It is certainly *not* the case that Ms Massey would have input into patient allocation. She had no power to allocate complex cases to the claimant so that she could keep the easier ones for herself. We also heard evidence that Dr Mason, as lead clinician, tried to see the complex and high risk patients himself rather than leave those consultations to the nurses. However, that was an aspiration rather than always being the reality in every case.

59. The claimant sought to allege that she was kept busier in clinic than her colleagues. In particular, she sought to suggest that Ms Massey would regularly finish her clinics at 3pm. However, as they would often not be working in the same location, it is hard to see how the claimant could assert this as a fact with any degree of certainty.

60. The claimant made particular allegations about 17 April in the list of issues but there was nothing specific about it in her witness statement and none of the documents in the bundle seemed to relate to this allegation.

61. The claimant asserted that she had more of the crisis referrals, three in one day, and that her colleagues did easier follow-up appointments. The claimant was unable to direct the Tribunal to any evidence in the bundle to substantiate this assertion.

62. When questions were asked about the number of appointments and clinics Mr Dempsey provided the data [432]. He confirmed that, as of September 2018, each full day clinic had increased from 8 to 10 slots for *everyone*. (The claimant has made no allegations about Mr Dempsey as part of her Tribunal claims or sought to undermine the integrity of the data which he provided) The data showed the number of appointments per week for the clinicians as follows:

- Dr Mason 40-42
- Ms Massey 51-57
- Ms Bromilow 42 (part-time employee)
- Ms Hale (the claimant, full-time employee) 38
- Ms Potter (part-time employee) 24
- Ms Ghetau 18

The surrounding email correspondence confirms that these numbers reflect the number of ½ hour slots per week, irrespective of the week in question. When questioned about this data, the claimant went on to argue that, even if those slots were available, her colleagues were unlikely to fill their slots. Again, the claimant had no documentary evidence to support this view.

63. When further questioned on this topic the claimant went on to assert that her colleagues had the benefit of more DNAs ('Did Not Attend') appointments than

she did. However, 'DNAs' (as opposed to cancellations made in advance) are, by their very nature, unpredictable. It is not possible to say with any degree of confidence which patients will fail to turn up to their appointments. The Tribunal remained unconvinced that the other nurses did, in fact, have more DNAs. However, even if they did, this was not evidence of the claimant being 'targeted' or 'singled-out' for the reasons just explained. The important point to note is that all of the Nurses were offering the same number of slots per clinic/day. It is a matter of chance if, say, the appointments on the Wirral on a Tuesday turn out to be more difficult or challenging appointments than some of the others on different days or different locations. That is not evidence of the claimant being targeted, it is evidence of how the appointment system functions. It is a matter of 'swings and roundabouts.' During one particular week the claimant's patients may 'DNA' and during another week she may have challenging referrals to deal with. The same would be true of her nurse colleagues.

64. During the course of a subsequent investigatory meeting, Karen Case (from the Admin Hub) explained how the clinic and appointment system operated. She confirmed that admin allocate from the waiting list. The next person on the list gets seen by the clinician with the next appointment free [1522]. The interview as a whole corroborates the respondent's witnesses' evidence about how the booking and appointments system operated. It undermines any suggestion that the Admin team triaged work or RAG-rated patients. It was also consistent with Ms Bromilow's evidence that the nurses would write on the lists whether they had made a follow-up booking or if there was a DNA and then hand the list back to Admin for them to use the information to update the lists and send out the relevant documents. The follow-up appointment would not necessarily be with the same clinician who did the initial assessment. This meant that, if there were gaps in the claimant's record keeping and note taking, this would be seen and picked up by the next clinician meeting the patient who had previously seen by the claimant (see below).

65. Dr Mason also indicated that the system did not always run smoothly but he also indicated that this was a problem for all of the team, not just the claimant [724]

66. In terms of work allocation, we also saw evidence of the consultation and negotiation with the claimant about how her clinics should be run. For example, at [210] we see a chain of email correspondence where Ms Massey is actively consulting with the claimant about her preferred ways of working to try and adapt the process to fit the claimant's needs and balance these with the needs of the service. We can see that Ms Massey notes that clinics can be moved to enable staff to attend meetings on Wednesdays, if required. The email also notes that, because Ms Massey is taking on the manager's role at this point (April 2018) she has been allocated 20% less time in clinic than the other nurses in order to enable her to pick up the manager's role and responsibilities. The emails show Ms Massey's attempt to consult with all the team and to treat the nurses equitably and as flexibly as the needs of the service would allow.

Team meetings

67. The team was in a state of transition. Ange Davies was no longer the Deputy Clinical Services manager of Adult ADHD. The Band 7 nurses, including the claimant, had no direct line management. Where Ms Massey or Ms Bromilow had concerns about the claimant, they raised them with Ange Davies as the most appropriate person available in the circumstances. Ange Davies put in place regular team meetings which were due to start in July 2018. These were originally

due to take place on Wednesdays but they clashed with some of the claimant's clinics. The meetings where therefore moved to Fridays instead.

68. The minutes from the team meetings suggest that the claimant was, in fact, present at the meetings, despite her assertions to the contrary [788-828,1695-1711]. The claimant sought to suggest that someone had added her name to the attendee list even though she was not present. However, she is referred to as contributing to the substance of the conversations, not just as a name on the list of attendees. It is hard to see how this could be a fabrication rather than a genuine record of the claimant's contribution to discussions.

69. The claimant also complained that it was unfair that the meetings took place on Wednesdays. She noted that Ms Bromilow and Ms Massey had their admin days on Wednesdays and were therefore free to attend, whereas the claimant's admin day was Monday. The Tribunal accepted the evidence that the claimant had been able to choose her own preferred admin day. Monday was not imposed upon her. When it became apparent that she would struggle to attend meetings, those meetings were moved to facilitate her attendance.

70. The claimant further sought to complain that it was unfair that her two colleagues had chosen the same admin day and could therefore work together. However, there was nothing to suggest that the claimant could not have chosen a different day. Ms Bromilow and Ms Massey had their own individual caseloads to administer and so would not be able to 'share' the relevant admin work and make it easier for themselves just because they were doing admin tasks on the same day of the week.

71. There was some suggestion that the clashing clinic on Wednesdays was the Bolton clinic. However, the respondent thought that the claimant only went and did the Bolton clinic once and that, thereafter it was covered by Ms Bromilow because the claimant had complained. In any event, the fact that the claimant was in a clinic on Wednesdays would not necessarily be a bar to attending meetings the same day, depending on the time of day at which the meeting was held.

72. In the course of cross examination, the claimant's evidence developed into an assertion that there were two different types of meeting and that the minutes we were being referred to were about the admin meetings rather than clinical meetings. She seemed to accept that she had attended one or two admin meetings where there were admin handovers. However, an inspection of the minutes (e.g. [816]) indicates that the attendees were clinicians (i.e. the nurses and the consultant) rather than administrative staff. The respondent's representative pointed out to the claimant that there was a record of a clinical discussion at [828] which referred specifically to the claimant. The claimant maintained that her name had just been put on the minutes by someone even though she was not actually present at the meeting in question. On the other hand, Ms Bromilow's evidence was that there was only one type of meeting and that it would cover both clinical and administrative issues. She did not accept the claimant's characterisation of separate meetings with the claimant only having attended the administrative meetings.

73. The Tribunal, taking the evidence in the round, finds that there was only one type of team meeting and that the claimant was present at those meetings. Whether the day of the week on which the meetings took place was changed or not, steps were clearly taken to ensure that the claimant could attend and participate, which she is recorded as doing. She was not excluded from team meetings.

74. The claimant made allegations that she was double booked and was expected to 'be in two places at once.' She alleged that she was prevented from cancelling the double booking. The list of issues refers to an instance of this on 20 March 2018. However, the documentary evidence available to the Tribunal indicates that it is more of an issue over a period of time and that Ms Massey was actually trying to manage it [212-214]. All she was saying in the correspondence was that the team needed to be careful how many clinics were cancelled. They had obligations to patients to provide the necessary service and she was trying to find ways to ensure that the clinics were covered by the available staff. It is not true to say that only the claimant suffered the problem of double bookings (as Dr Mason's letter tended to confirm.)

75. There is further email traffic between Dr Mason, Ms Massey and other members of the team [765-769]. In this correspondence the claimant was challenging the number of slots in her clinics with the admin team. Dr Mason got involved and told the admin team *not* to cancel the claimant's appointments in order to ensure that patients were not let down. He also noted that some of the patients in the list were re-referrals who only needed an hour each, whereas they had been booked in for longer appointments. So, although the number of patients may not have been reduced, the actual number of slots needed for the relevant type of appointment had been corrected. This was at the instigation of Dr Mason (the Clinical Lead) for patient service reasons. A subsequent comment after the event by Ms Massey [766] makes it clear that the numbers in the claimant's clinic were not as high as the claimant stated and that Dr Mason picked up the assessments leaving the Claimant with seven 30 minute slots. As three of the patients never attended, the claimant actually did two hours of work on that day.

76. The Tribunal also had regard to the correspondence at [263]. This shows a receptionist sending the claimant a clinic list for Bolton on 18 April. It appears that the claimant's Bolton clinic was double booked with an appointment at St Hilary's on this day. Jane Lewis asked the claimant for clarification as to what she was doing that day and to confirm what, if anything, needed to be cancelled. It appears that Ms Bromilow actually took the appointment at St Hilary's in order to resolve the double-booking problem. Again, this is not evidence of the claimant being targeted or impeded in her work.

77. During cross examination, the claimant suggested that the emails were in the bundle to show that Dr Mason said *not* to cancel any cases. However, the claimant was taken to various documents within the bundle and it was suggested that none of them were the emails that she was referring to. The claimant confirmed that the emails at [216, 263] were not the documents she was referring to. The claimant seemed reluctant to accept that the emails at [209] showed Ms Massey clarifying who was doing what and arranging cover for clinics as needed. Eventually, the claimant accepted that the original decision about not cancelling clinics came from Dr Mason rather than from Ms Massey. She still maintained that there was fault on Ms Massey's part in not giving adequate guidance, even though Ms Massey was not directing her to go to two places at the same time. She suggested that Ms Massey would not cover any of the claimant's clinics.

78. The documentary evidence shows that, in practice, all the colleagues in the team were juggling a system which was operating under considerable pressure. In practice, the claimant did not always have as much work as the appointments paperwork would suggest, depending on changes made by colleagues (such as Dr Mason) and depending on which patients DNA'd. The documentation shows co-operation between colleagues. There are several examples of colleagues stepping in to help out and take work *off* the claimant. There is no suggestion in the documentary evidence that the claimant is being targeted or deliberately

overloaded. Everyone suffered from problems with double bookings, not just the claimant. The claimant's allegation about Ms Massey preventing cancellations is *not* made out. It is actually Dr Mason who wishes to prevent cancellations. The correspondence shows the respondent attempting to balance the nurses' workload against the needs of the patients. The claimant's factual allegation at (g) in the list of issues is not made out.

Supervision and appraisal

79. A few weeks after the claimant and Ms Bromilow started work, the team had a meeting with Jane Newcombe about how the team would be managed. It was agreed that, as Band 7 nurses, they could manage themselves and could do each other's supervision in team meetings together with Jane and Ange. Supervision is an opportunity for supervisees to reflect upon the content and process of their work. Clinical management was carried out by Dr Mason. Operational Management was carried out by Jane or Ange. The team agreed to have bi-monthly meetings for supervision. Dr Mason had an 'open door policy' and encouraged the Band 7s to liaise with him regarding any concerns or questions.

80. The claimant's supervision dates were at [972] and indicated supervision sessions in January, February, April, July and August of 2018. The email correspondence at [386] shows that a supervision session had been arranged for July.

81. As regards appraisals, Mr Ingram explained to the Tribunal that appraisals would take place once a year. Appraisals were generally arranged in blocks of time once a year. In the claimant's case, it was intended that her appraisal would take place in July 2018 which would be approximately 6 months into her period of employment with the Trust.

82. Regarding the claimant's appraisal, the emails at [763] indicate that Ms Massey was attempting arrange the appraisal with the claimant in June. By August, the appraisal had not taken place and Ms Massey was trying to arrange it [825-826]. Ms Massey explained the intervening events which had prevented her from completing the claimant's appraisal. She also indicated that she was due to be on leave for 2 ½ weeks. Consequently, she was seeking to find someone else who could do the appraisal with the claimant.

83. Mr Ingram asked Ange Davies to do the claimant's appraisal in August. The claimant sent her completed appraisal workbook to Ange Davies on 21 August 2018 [829] (even though it was dated 28 May 2018) but the appraisal did not take place. The Tribunal accepts that, although the claimant put a May date on the appraisal workbook, she had not actually completed it and sent it to the respondent until August 2018. At [362-369] the Tribunal notes that Ms Massey actually sent another workbook to the claimant for her to fill in. It is unclear why she would do this if the claimant had in fact already completed and submitted said workbook. This is another example of the discrepancies in the claimant's documents which undermine the Tribunal's ability to rely on her evidence without question.

84. Upon Ms Massey's return from leave in September 2018, she attempted to arrange another date to complete the appraisal. However, the claimant was on sick leave during the second week of September and was removed from clinical practice shortly thereafter.

85. All of the above shows that the appraisal was supposed to be done in July and for various reasons was not done in July or August. Thereafter, the claimant was

removed from clinical practice and the appraisal could not be completed. The appraisal was not due to be done until 6 months into the claimant's employment. The claimant presented the case as though her appraisal was several months late. In fact, it was about 2 months late (for good reasons) and then it became impossible to carry out an appraisal as the claimant was no longer in the workplace. The documentary evidence suggests that Ms Massey fully intended and wanted to arrange the claimant's appraisal. It was not a case of the respondent deliberately avoiding the appraisal or targeting the claimant in some way. Rather, it was an unfortunate but explicable delay.

July 2018 supervision

86. On 2 July 2018 the claimant attended a supervision meeting with Helen Massey and Doctor Mason [1782-1783]. The record of supervision is at [1782]. The relevant portions of the written record of the discussion state:

> "*Physical and emotional wellbeing informed deaf in one ear- 80% in. slight in other. Winscribe -ok, long letters difficult due to not hearing own voice- reassurance given should be ok now as now have hearing aids… "Discussed if this causes issues phone etc. Deb stated no-advised that changes could be made if required- Now winscribing stated no issues. -Referral to Occ Health- Done by Deb- I will support any suggestions. Stress with number of clinics inappropriate referrals/risks discussed reduce clinics and appropriate referrals. E-learning Debra stated at 88% but ESR showing 45%. Will check with education and feedback- confirm what is completed."*

On the following page the discussion is recorded as:

> *"Discussed clinics and targets explained that it will increase to 10 patients daily. If struggling will re look- Deb stated can do increased patients. Advance nurse practitioner post- will apply. ADHD Duty- discussed- everyone responsible- no issues. Care note- to complete notes in given time as per policy. Advance practitioner discussed not to put this on letter due to patients expectation- agreed. Discussed assessments-putting notes scanned in notes up to date no issues. Appraisal- Debra will email it to me I will look then we will sit together to sign off- 3 day. referral to OH- due to 80% deafness for support. Done by Deb and I will receive report. Deb will discuss if issues with clinic/numbers/winscribe."*

87. The Tribunal considered this written document in conjunction with the surrounding witness evidence. The Tribunal was satisfied that the claimant informed Ms Massey and Dr Mason of her hearing loss for the first time at this meeting. It came as a surprise to them. We accept that there had never been any indication before that she had any issues with her hearing and this was consistent with the pre-employment documents which indicated that no disability had been declared by the claimant (see above). We accept the evidence of the respondent that the claimant was often able to join a conversation from the other side of the room and she had never indicated before this date that she had any hearing difficulties. We also accept that, even at this July meeting, the claimant did not suggest that any patient complaints were related to her hearing loss. She did not suggest that she had been complained about because she had misheard the patients or because it might take her longer to do things because of hearing difficulties. We accept that Ms Massey asked the claimant if her hearing caused any issues with any aspect of her work, including using the phone and that the claimant responded 'no.' This is in line with the written record, which has been

signed by the claimant as well as by Dr Mason and Ms Massey.

88. At the meeting Ms Massey had suggested an Occupational Health referral but the claimant told her that she had already self-referred. Ms Massey asked if she could have a copy of the Occupational Health report so she could consider if reasonable adjustments were required and the claimant agreed to this during the meeting. However, she never actually sent a copy of the Occupational Health report to Ms Massey or the respondent. The first Occupational Health report (following the claimant's self-referral) was never disclosed to the respondent before the claimant was removed from clinical practice. The only Occupational Health report seen by the respondent was that which followed the *management* referral and which was provided in early October 2018 (see below).

89. At the meeting Ms Massey confirmed that if the claimant was struggling with 10 slots when this resumed, she should tell Ms Massey and they could look at this again. Ms Massey confirmed that care notes had to be completed within the given time and that all clinicians were responsible for dealing with ADHD duty emails. The claimant accepted this at the meeting but it appears she may still not have been entirely willing to contribute to the Duty work with the rest of the team.

Occupational Health reports

90. It appears that the claimant self-referred to Occupational Health on 26 July 2018. This resulted in the first Occupational Health report within the bundle which was dated 30 July 2018 [974-975]. This was not disclosed to the respondent and the claimant's colleagues and managers were not aware of the content of the report at this stage. We accept Ms Massey's statement and evidence about this. It was because she had not seen this first Occupational Health report that she made her own managerial Occupational Health referral later in the chronology. This is despite a sentence within the first report which might suggest that the respondent would be allowed to see it.

91. On 19 September Helen Massey submitted a referral to Occupational Health in respect of the claimant [976-978]. This resulted in the production of an Occupational Health report [979] which was only provided to the respondent *after* the claimant had been removed from clinical practice.

92. The Tribunal notes that the claimant accepted during her oral evidence to the Tribunal that she made a self-referral to occupational health initially. She went on to suggest that although she was entitled to self-refer, any such self-referral could only be about mental health conditions rather than physical problems. The Tribunal does not accept this as accurately reflecting the position for the respondent's employees. There is nothing in the respondent's policy documents to indicate that any self-referral must only be in relation to mental health issues. Nor do any of the documents from Occupational Health indicate such a limitation on self-referrals. Indeed the contents of the report at [974] refers to the claimant's physical conditions (including her hearing loss) even though she accepted that this was the product of a self-referral to occupational health. We do not accept that there was any such limitation on the claimant's ability to self-refer.

93. We note that the first report indicated that the claimant had hearing loss following chemotherapy: moderate on the right side and severe to profound on the left side. It noted that hearing loss is particularly noticeable when there is background noise and is more challenging for the claimant when she is on the phone. The claimant's specialist had suggested that her speech comprehension was likely to have been affected by the hearing loss but that further testing in relation to this was expected. In the first report the claimant is recorded as telling Occupational

Health that she was able to undertake all her duties and responsibilities which included dealing with service users in a clinical situation and dictating reports satisfactorily. It was easier to dictate reports in a quiet room rather than in the office. She reported having some difficulty in taking phone calls in the main office due to background noise. The first report also refers to a catalogue of assistive listening devices and indicates that the claimant could contact Access to Work for advice as to the appropriate devices for purchase.

94. Despite all these recommendations in the first Occupational Health report, the respondent was unaware of this advice whilst the claimant was still in work in the department. This report was not provided to them.

95. The Tribunal also noted that [977] showed that the reason for the management referral was because, despite indicating that the respondent would be able to see the report from the self-referral, when the respondent asked to see it, this was refused. Ms Massey confirmed in evidence that she did chase disclosure of the first report but was refused access to it. Occupational Health apparently confirmed that the claimant had refused to let the respondent have access to the report.

96. When read carefully, the Occupational Health reports indicate that the claimant made a self-referral first of all (26 July 2018) but the resulting report was not disclosed to the respondent. The respondent then made a management referral to Occupational Health but the claimant made a second self-referral just before the management referral was received by Occupational Health [980]. The second self-referral was on 19 September 2018 [979]. The report at [979] is therefore the product of both the claimant's *second* self-referral and the respondent's *first* management referral.

97. As this second Occupational Health report was not seen by the respondent until October 2018, the respondent had not seen *any* medical evidence about the claimant's hearing loss before she was removed from clinical practice in September.

98. The second report (dated 5 October 2018) repeated the contents of the earlier report regarding difficulties with background noise and when using the phone. It went on to state: *"Debra wears bilateral hearing aids to assist with this condition, and it is clear today that Debra is able to communicate well on a normal level within everyday conversation."* The claimant had confirmed that she was able to undertake all her duties and responsibilities including dealing with service users within a clinical situation. She was able to dictate reports satisfactorily although this was easier in a quiet room than in the main office. The claimant had reported some difficulty with the phone when in the main office. The report referred to the claimant's second self-referral and noted that the claimant had reported seven additional workplace stressors.

99. In the second report Occupational Health recommended that the respondent meet with the claimant in a supervision environment and discuss the claimant's stressors as she perceives them. A workplace stress risk assessment was suggested. The report suggested that Access to Work had been contacted about equipment and that the claimant was to be issued with a Nova pen to assist with report writing. The report recommended, if operationally possible, allocating the claimant a quiet room for telephone use and reporting writing so background noise from the main office did not contribute to her hearing difficulties. The report noted that with support the claimant was able to undertake her role and there was not a requirement for restrictions on her role.

Recorded conversation with Ms Bromilow

100. On 30 August 2018 a conversation took place between the claimant and Ms Bromilow which the claimant recorded on her mobile phone. A transcript of the recording was produced and considered by the Tribunal [813-814]. During the course of the proceedings (and during the Tribunal hearing) the claimant challenged the accuracy of the transcript and indicated that it was necessary for the Tribunal to listen to the recording in order to assess the tone and manner of the exchange between the witnesses. The Tribunal *did* listen to the recording in the presence of the parties. The Tribunal noted that the transcript produced by the respondent *was* in fact *accurate* and that the *tone* of the exchange was *not* as described by the claimant. It did not support her case in the way that she had suggested. At this point, the claimant sought to suggest that the material part of the exchange (on which she sought to rely) had actually taken place *before* she was able to start the recording. This was a material change in the claimant's position. Along with other aspects of the evidence in this case, it undermined the credibility and reliability of the claimant's evidence to the Tribunal as a whole. It was one example where, when her submission or evidence to the Tribunal was tested, it was not substantiated in the way that she had led the Tribunal to expect. The claimant then sought to change her position to accommodate the evidence before the Tribunal.

Concerns about the claimant and removal from clinical practice

101. Dr Mason raised some concerns about the claimant's practice with Mr Ingram. They met to discuss those concerns on 19 September 2018. Dr Mason had carried out an audit, which he provided to Mr Ingram (see further, below.)

102. As a result of those concerns, Mr Ingram met with the claimant (and a note taker) on 20 September 2018 in order to inform her that she would be removed from clinical practice with immediate effect [737-738]. He told the claimant that she should not discuss the issues with anyone or access care notes. He took care to tell the claimant on a number of occasions that this was *not* a suspension. He offered to re-run the meeting with a representative present but had wanted to act quickly once the issues were raised as needing to be addressed.

103. The claimant was subsequently involved in a road traffic accident and commenced sick leave on 28 September 2018.

104. Mr Ingram sent the claimant a letter dated 4 October 2018, which confirmed her removal from clinical duties and explained the parameters of the restriction [916-917]. Mr Ingram's letter confirmed the removal from clinical practice and confirmed that temporary redeployment would be sought.

Qualifications

105. One of the issues about which the Tribunal heard a great deal was the claimant's training and qualifications. The claimant wanted to apply for an ANP course (an MSc course) which could lead to a Band 8a Advanced Practitioner role. Mr Ingram was confused by this as he had thought that in her application she had said that she had obtained an MSc. However, it appeared to the Tribunal that the claimant had not completed the dissertation component of the course and had therefore not completed the course. She had not been awarded the certificate/qualification. This was later confirmed in emails [191, 802] where

Tracie Haskell (Consultant Nurse) indicated that the application reads as if the MSc had been completed but the claimant had confirmed to her that she had *not* completed the Level 7 dissertation.

106. The claimant told Mr Ingram that she was willing to do the whole course again in order to get the certification/qualification. He asked her to put in writing how the course would support her and the team and indicated that she needed to discuss it with her manager. The claimant was not happy about this. She may have assumed that she would be allowed to do the course. The Tribunal is satisfied that Mr Ingram had to manage the competing priorities of individual employees with the needs of the service. Whilst the respondent would support employees where the training was clinically relevant and where the request could be accommodated, it could not be assumed that requested training would always be allowed.

107. The Tribunal was satisfied that the claimant did apply for the course but the respondent did not shortlist her for the ANP course. Her application indicated that she had completed the course and Mr Ingram took the view that it would not have been appropriate for the claimant to repeat that learning. When the claimant was told about this decision, she emailed to point out that she needed to complete the MSc pathway and achieve 60 credits (the dissertation) and she asked the respondent to reconsider the application. The relevant correspondence [801-804] makes it clear that it was not an efficient way of using NHS money in that it would mean paying for the claimant to do a full two-year programme when she actually only required one module (the dissertation) in order to get the qualification. The respondent, therefore, had a sound rationale for its decision in this regard.

108. The respondent's evidence was in contrast to the claimant's oral evidence to the Tribunal on this subject. It became increasingly difficult to get clarity from the claimant as to whether she accepted that she had not got the qualification (or not.) The claimant contradicted herself on a number of occasions. The claimant went on to say that Ms Massey was the substantive impediment to her doing the course. She alleged that, irrespective of Mr Ingram's decision on the post or the course, Ms Massey would block the claimant from taking up the offer as she would be able to stop the claimant being released from work to do her studies. She asserted that Ms Massey, as manager, would be able to thwart even a successful application to do the course. The claimant was asked questions about who had the authority to make these decisions but deflected away from that issue and talked about the issue of whether it was an application for a module or for the whole course. When she subsequently returned to this issue, she then contradicted her previous evidence.

109. The reality of the situation, the Tribunal finds, is that the decision about whether to approve the application would lie with Mr Ingram who was senior to Ms Massey within the respondent's structure. However, as Mr Ingram never gave the claimant the necessary authorisation, the opportunity for Ms Massey to thwart the claimant's aspirations never actually materialised. Ms Massey never actually had to decide whether to release the claimant from her work so that she could complete her course. The claimant was therefore basing her allegations against Ms Massey on a hypothetical scenario which never actually transpired. The claimant cannot establish that Ms Massey would have blocked the qualification if given the opportunity. All the documentation supports the respondent's account on this issue.

110. There was a separate but related issue about how the claimant chose to describe herself in written correspondence. The claimant was employed as a 'Clinical Nurse Specialist' and *not* an 'Advanced Nurse Practitioner.' They are two

separate and distinct things. The Tribunal was satisfied that Advanced Nurse Practitioners focus on managing whole episodes of complete clinical care. By contrast, a Clinical Nurse Specialist will focus on discrete aspects of a patient's care. The claimant was describing herself as an Advanced Nurse Practitioner in some letters to her patients and that was not a correct description of her employment with the respondent. It appears that the claimant had a tendency to refer to herself as an Advanced Nurse Practitioner even though this was not her job role with the respondent (and she did not have the relevant qualification for such a role.) She had apparently described herself as an Advanced Nurse Practitioner when meeting Ms Massey too. Once Ms Massey realised that this was misleading, she advised the claimant *not* to sign off her letters as "Advanced Nurse Practitioner" during the supervision meeting on 2 July 2018 (see above.) Even if the claimant *had* got the relevant degree/qualification it still would not have been appropriate to sign herself off in this way as this was not the job that she was employed to do. She was not operating as an Advanced Nurse Practitioner in the course of her employment with the respondent.

111. The claimant's propensity to misdescribe her qualifications and/or job role is another example of the claimant misleading others. It further undermines the Tribunal's ability to rely on the claimant's evidence. Where there was a material dispute between witnesses in this case, the Tribunal was generally minded to prefer the evidence of the respondent's witnesses as being more consistent, coherent and reliable than that of the claimant. The issue of the claimant's qualifications and job title is another example as to why the Tribunal takes that approach. We also note that Ms Massey does not seem to have had the degree of power and decision making authority within the workplace that the claimant suggests. The claimant seems to have been of the view that Ms Massey stood behind all (or most) of the decisions and events which did not go in the claimant's favour. By contrast, the evidence presented to the Tribunal showed that no single person had this degree of control or power within the department. Many decisions were taken by more than one person and most decisions were subject to scrutiny by one or more third parties. This diffusion of decision making undermines the claimant's core case that Ms Massey was out to target her and that she had the means at her disposal to do so successfully and without intervention from elsewhere within the organisation. Furthermore, it is apparent that, as the claimant's period of employment with the respondent progressed, various individuals within the respondent organisation started to question the reliability of the claimant's representations. Hence, others within the respondent's organisation might set out to verify or check the accuracy and reliability of what the claimant was saying and doing in the course of her employment.

112. On 5 October 2018 Occupational Health produced the report in relation to the claimant [979-981] and sent it to Helen Massey [130]. This was the first time it was seen by anyone at the respondent.

<u>Grievance, complaints, disciplinary</u>

113. On 25 October 2018 the claimant sent a formal grievance to Helen Massey [924-928]. This raised grievances about Ms Massey. The grievance was therefore acknowledged by Mr Ingram and he sent a letter to the claimant on 2 November 2018 arranging an informal meeting to discuss the grievance [929].

114. Unfortunately, on 15 November 2018 the claimant sent an email to Mr Ingram accusing him of failing to support her [139]. A further email made further allegations against Mr Ingram [141]. Mr Ingram consulted with HR in light of the claimant's comments about him. The clamant sent Mr Ingram a further formal grievance dated 20 November. It was attached to an email sent on 22 November

[1141-1142.] As a result, Ms Vernon sent the claimant a letter on 23 November suggesting that the two of them should meet.

115. On 10 January 2019 there was an informal meeting with the claimant, her RCN representatives, Ms Vernon and Carmel Hopkins.

116. On 11 January 2019 the claimant submitted another formal complaint/grievance [182-183(a)-(d)].

117. On 5 March 2019 the claimant submitted her first ET1 claim form to the Tribunal.

118. On 12 March 2019 the claimant was sent the Terms of Reference for the disciplinary investigation [289, enclosing 1093-1095]. On 20 March 2019 the claimant attended the disciplinary investigation interview.

119. On 27 March 2019 the claimant submitted her resignation letter [1146-1147]. Her last day in employment was stated to be 29 March 2019. Her letter of resignation was acknowledged by Ms Vernon on 3 April 2019 [321]

120. On 7 April 2019 the claimant sent a letter requesting that all future correspondence should be directed to her solicitor John Halson [511 a-c].

121. Tracey Collins completed a grievance investigation report on 28 May [625-654 plus appendices to 1021].

122. On 20 June 2019 the claimant submitted her second ET1 claim form to the Tribunal.

123. On 21 June 2019 the respondent's solicitor emailed the claimant's solicitor inviting her to attend a grievance hearing [1025]. The grievance hearing took place in the claimant's absence on 9 July 2019. Victoria Peach sent the claimant a letter on 10 July 2019 confirming the outcome of the grievance hearing and offering the claimant a right of appeal [1028-1029].

124. On 20 January 2020 the disciplinary investigation report was completed by Lorraine Haynes [1037-1092], with appendices to 1785].

125. On 24 January 2020 Ms Vernon sent a letter to the claimant's solicitor inviting her to the disciplinary hearing [1786-1787].

126. On 21 February 2020 the claimant sent a letter to Ms Vernon stating that she would not attend the disciplinary hearing [1793-1795].

127. On 24 February 2020 the disciplinary hearing took place in the claimant's absence. It was conducted by Ms Walsh.

128. One of the constituent parts of the claimant's case is that she alleges the disciplinary hearing should not have gone ahead in her absence. We heard much evidence concerning arrangements for the disciplinary hearing, why the claimant did not attend, and why the hearing went ahead in her absence.

129. When the claimant resigned in March 2019, she confirmed in her resignation letter that she was prepared to continue to engage in the disciplinary and grievance processes. She also confirmed this during the final hearing. She wanted these matters to be resolved. She said she would attend the meetings with the respondent. She wanted to defend her practice. She also requested that

all correspondence from the respondent should go direct to the solicitor that she had instructed. The letter inviting the claimant to the disciplinary hearing was at page [1786]. It was addressed to the claimant, 'care of' her solicitor, John Halson and was also sent via email to the solicitor. The invitation letter (amongst other things) confirmed that the claimant was entitled to be accompanied by a trade union representative or workplace colleague (or someone else of her choice). However, only a trade union representative or work colleague could *represent* the claimant during the hearing. The claimant was given the option of calling witnesses to the hearing and was asked to notify the respondent of the witnesses by 13 February so that arrangements could be made for them to be present at the hearing. The letter also noted that if the claimant did *not* want to attend the hearing and wanted the meeting to proceed in her absence then she could let Ms Quinn know and she would still be able to submit any relevant documents or evidence to be considered at the hearing. Such documents should be provided at least five days prior to the hearing.

130. The invitation letter confirmed that the allegations against the claimant were allegations of gross misconduct which could result in a dismissal outcome (even though the claimant had already resigned.) The letter concluded by asking the claimant to confirm her attendance at the hearing and to confirm who would be attending with her. She was asked to do this by 31 January 2020.

131. It appears, therefore, that the claimant was given a month's notice of the disciplinary hearing. During the Tribunal hearing the claimant sought to assert that the invitation was sent to the wrong address and that it was not sent to the correct place until 21 February 2020. However, this could not be correct as the email of 19 February from Mr Halson indicated that he had forwarded the emails regarding the hearing to the claimant on the previous Monday evening (which would have been 17 February at the latest.) Furthermore, when Mr Halson asked for a postponement, there was no suggestion by Mr Halson that he had *not* received the papers on or about 24 January 2020 [1789]. Mr Gibson had confirmed that the papers were sent out on 24 January in his email of 6 February [1788] and we did not see any correspondence from the claimant's side which contradicted this. This would tend to suggest that the disciplinary papers and invitation were in Mr Halson's hands by the first week in February.

132. Mr Halson asked for more time for the claimant to take advice and to consider whether or not she would participate in a disciplinary process. He also noted that the claimant would need to book time off work in order to participate. Mr Halson explained this in his email of 19 February [1790] and gave dates to avoid for any relisted hearing. He did not indicate that these were *his dates* to avoid. Rather, an objective reading of the email would indicate that these were the claimant's own dates of unavailability.

133. The respondent's solicitor responded by email on 19 February [1790]. He confirmed that all the necessary papers had been sent to the claimant on 24 January so that she would have had a month to decide whether she wanted to attend or not. The respondent considered that the claimant had had ample time to make that decision. The respondent indicated that the hearing would go ahead as planned and asked Mr Halson to indicate in advance whether the claimant intended to attend or not.

134. Rather than confirm whether the claimant would be attending, or explaining what her difficulties were, Mr Halson's response just asked the respondent's solicitor (Mr Gibson) whether there was any reason why the respondent could *not* postpone hearing. This seemed to presuppose that the claimant had good

reasons for the postponement which meant that the onus was on the respondent show that it was *not* able to postpone. However, the claimant had not actually explained why she would not be able to attend (or indeed whether she intended to attend.) Objectively speaking, before the respondent would be required to consider a postponement, they would need to know whether the claimant would attend any rearranged hearing. The respondent would also need to know whether there was a good reason why she could not attend the original hearing. The claimant's reasoning on the issue of a postponement was somewhat 'back to front' in this regard.

135. The correspondence from the claimant's side seems to suggest that she might *not* be intending to go to the disciplinary hearing because she had resigned from the employment over a year ago [1789]. However, in cross examination, the claimant suggested that this was in response to the respondent saying that it was not going to change the *date* of the hearing. She asserted that when she left employment, she thought that the disciplinary hearing was not going any further. However, Sharon Vernon had told the claimant that the disciplinary process was continuing. The claimant had indicated in her resignation letter that she would participate in the ongoing process. The correspondence from Mr Halson dated 19 February [1790] makes it plain that the claimant had not decided whether she would be attending any disciplinary hearing. In those circumstances, the Tribunal accepts that the respondent could not be expected to postpone a hearing without a good reason why the claimant could not attend and some firm reassurance that she would, in fact, attend on any rearranged date. During the course of the Tribunal hearing the claimant sought to suggest that the dates to avoid were in fact her solicitor's dates to avoid. However, there was no indication from Mr Halson that he would be attending the hearing with the claimant or that there he himself had any diary clashes to take into consideration when arranging the hearing.

136. We heard that it was Cathy Walsh who decided to go ahead with the disciplinary hearing in the claimant's absence. She was provided with a letter that the claimant had written to Sharon Vernon on 21 February [1793-1795]. In that letter the claimant stated: *"I have been advised by the Equality and Human Rights Commission, ACAS and an independent legal representative, that I am under no obligation to accept your invitation to a disciplinary hearing under employment law you cannot invite someone no longer employed or after almost 12 months from constructive dismissal due to gross victimisation and discrimination."* This would tend to suggest that the claimant did *not* intend to attend the disciplinary hearing in any event, as she felt she should not be being disciplined so long after her resignation.

137. In all the circumstances (and in the absence of confirmation that the claimant would attend at a later date) the Tribunal concludes that the respondent was entitled to press on and hear the disciplinary in the claimant's absence. We accept the respondent's evidence that it does sometimes continue with disciplinary procedures even after the relevant individual has left their employment. The Tribunal accepted and was satisfied that, in clinical areas in particular, the respondent would have to investigate issues relating to patient safety or professional obligations irrespective of a resignation. Such issues have wider implications than the continuation (or not) of the individual's employment. This reflects the fact that the respondent and Trust and professional clinicians (including the claimant) owe a duty of care to various groups and individuals, including patients and professional or regulatory bodies.

138. We find that the claimant had received the relevant disciplinary documents and

the respondent had given her fair warning of the allegations, the evidence and the date of the hearing. It is unclear what more the respondent could be expected to do in those circumstances. It was surely for the claimant to explain why a postponement was required. The respondent had been told to correspond with the claimant's solicitor and had done so. As far as the respondent was aware, the claimant's solicitor was properly instructed and was dealing with the issue on the claimant's behalf. It was not incumbent on the respondent to go behind the solicitor-client relationship and check that this was correct. The respondent had exhausted the reasonable lines of enquiry and there was nothing in the evidence requiring them to postpone on the 'off chance' that the claimant had a good reason for not attending on the designated date.

139. At the Tribunal hearing the claimant was asked to explain the alleged link between her protected acts (Tribunal claims) and the decision to go ahead with the disciplinary hearing in her absence. It was pointed out to her that the disciplinary hearing took place a year after her resignation so that any link to earlier events might look tenuous. Her explanation was that there was due to be a Tribunal preliminary hearing shortly after the date of the disciplinary hearing. She felt that the respondent wanted to go ahead with the disciplinary hearing on the designated date so that they could use whatever happened at that hearing against her in the Tribunal preliminary hearing. Hence, she thought that it was important to the respondent not to postpone the disciplinary hearing in order that it could build its Tribunal case. The Tribunal panel reflected on this assertion but concluded that it was based on a fundamental misunderstanding (on the claimant's part) of the purpose of the preliminary hearing in question. The preliminary hearing in question, so far as the Tribunal can discern, is the preliminary hearing which took place on 24 June 2020. (It had originally been scheduled to take place on 24 March 2020 but was postponed due to the Covid 19 pandemic.) In any event, that was a preliminary hearing for case management purposes and the claimant was represented at the hearing by counsel. The hearing was *not* listed to hear evidence or to determine any substantive matters. It was a private preliminary hearing conducted by telephone. This means that the respondent would not be able to 'use' the events of the disciplinary hearing against the claimant at the Tribunal's preliminary hearing, even if it had wanted to. The respondent would not be presenting any evidence at that Tribunal hearing. The timing of the disciplinary hearing was irrelevant and there was no litigation incentive for the disciplinary hearing to go ahead on the February date.

140. The Tribunal accepts Ms Walsh's evidence that she spent the whole day of the disciplinary hearing going through the papers and considering the evidence. This reflects a genuine desire to consider the allegations fairly and to make a decision based on the available evidence. Ms Walsh asked for sight of further documents (such as Dr Mason's audit.) We accept that she went through the records in relation to all five of the patient cases and questioned the investigator in relation to her disciplinary investigation conclusions.

141. One of the claimant's allegations in this case is that the respondent proceeded to hear the disciplinary in her absence in the knowledge that the claimant had raised a serious allegation against Ms Vernon but chose to ignore it. During the course of the Tribunal hearing the claimant never really explained what allegation against Ms Vernon she was referring to. Even after listening to the claimant's evidence during the hearing the Tribunal is *still* unclear what allegation she made against Ms Vernon.

142. In cross examination the claimant alleged that the grievance procedure was

dismissed and all the claimant's evidence in relation to her grievance. However, the evidence the Tribunal has reviewed shows that the claimant's grievance was fully investigated and an outcome provided. Victoria Peach provided the outcome to the grievance on 10 July 2019 and offered the claimant a right of appeal against the grievance outcome. The disciplinary hearing did not take place until 24 February 2020. Furthermore, as set out herein, it was Ms Walsh who decided to go ahead with the disciplinary hearing in the claimant's absence and for the reasons already stated. There is nothing to indicate that she was aware of a serious allegation against Ms Vernon, that such an allegation was ever drawn to her attention, or that this had any impact on her decision to proceed with the hearing in the claimant's absence. There is nothing to show that a complaint about Ms Vernon was in Ms Walsh's mind at the time she decided to go ahead with the disciplinary hearing in the claimant's absence. The reference to a complaint about Ms Vernon appears to be a red herring.

143. On 5 March 2020 Ms Walsh sent the claimant a letter confirming the outcome of the disciplinary hearing [1796-1800]. In that letter Ms Walsh carefully set out her conclusions regarding the patient records that she had considered. Her overall conclusion was that the records revealed real concerns in respect of the standard of patient care given by the claimant. Some of the notes were incomplete and on occasion the claimant seemed to be making decisions which were not supported by the notes or clinical history (or not adequately explained because of the lack of proper record keeping.) She considered that proper and accurate record keeping is a fundamental part of a nurse's professional duties. There was evidence that the claimant had stopped a patient's medication and that this was a poor clinical decision. There was evidence that the claimant had recorded an incorrect diagnosis on care notes, failed to make an onward referral and that there were no CARSO and HONOS records. The incorrect diagnosis on the care records had the potential to impact on ongoing treatment. There was also evidence that the claimant made a secondary diagnosis that was beyond her remit as a nurse within the ADHD service. The scope of the claimant's professional practice was within ADHD rather than making other diagnoses. One patient's records disclosed no record of prescription, no record of CARSO and HONOS, no record of ADHD assessment being completed and the claimant had failed to send a clinic letter after the clinic. There were failures to make onward referrals ad incorrect entries on patient records.

144. In coming to her conclusions, the Tribunal can see that Ms Walsh took into consideration any mitigation, explanation or other documents which had been put forward by or on behalf of the claimant. She also considered whether any of the problems could be explained by lack of supervision or training etc. Ms Walsh concluded that the problems identified were unlikely to have resulted from any lack of training or supervision by the respondent. In particular, she noted that proper record keeping and note taking is fundamental to what is expected of a nurse, particularly an experienced nurse. In other words, this is intrinsic to the claimant being a nurse at Band 7 level. The respondent would (reasonably) not expect to have to train a nurse at this level of seniority on this fundamental part of their professional role or job. This is not an example of the claimant not knowing what to do in order to carry out her duties properly. It suggests that this is not a training issue or a matter which should be dealt with under a capability process. Rather, it is the claimant failing to carry out a core function of her role which, given her level of training and experience, she would already know how to do properly.

145. It was particularly notable that after reviewing the records Mr Walsh was concerned about the claimant's apparent lack of insight and reflection into the issues raised in relation to her professional practice. She was concerned that this

had potential consequences for patient safety. As the claimant had already left employment with the respondent, the respondent would not be able to ensure that the claimant reflected on the issues appropriately or improved her practice so as to ensure adequate patient care and safety. If the claimant lacked insight, then the respondent could not be reassured that she would make the appropriate changes and improvements independently without oversight from the employer or other third parties. The following quotation from the outcome letter was particularly notable and reflected the way that the claimant had presented to the respondent and also how she tended to present herself to the Tribunal too:

> *"It appears that the Investigating Officer was met with challenge and deflection rather than any acknowledgement of accountabilities and responsibilities that you have as a registered nurse."*

It was in light of this observation that the respondent decided to recommend that a referral be made to the NMC. The respondent had a duty of care to patients. If it was aware of potential patient safety issues which it could not address with its employee, it arguably had a duty of care to refer the claimant to her professional regulator so that it could take any appropriate steps to safeguard patient safety and standards of care. It would be a matter for the NMC whether they concluded that they needed to take further steps but an NMC referral would ensure that the respondent had discharged its own professional duty of care to patients. This line of reasoning was reflected in the last few paragraphs of the disciplinary outcome letter [1799-1800].

146. Importantly, even though Ms Walsh concluded that the claimant was responsible for gross misconduct, she decided that the outcome would *not* have been dismissal. She would have issued a final written warning with a down banding as an alternative to dismissal. This reflected the fact that the offer of an alternative post would have provided the respondent with an opportunity to work with the claimant to address the shortcomings. This would have given the claimant the opportunity to rectify the errors in her practice because the errors and shortcomings identified in the disciplinary process had not been raised with the claimant at the time. The reasons for not raising the shortcomings with the claimant at the material time were not explained to Ms Walsh by witnesses at the disciplinary hearing. Therefore, she would have given the claimant the opportunity to demonstrate that she could practice safely under guidance or greater supervision rather than dismiss her from her post with the respondent.

147. The claimant also complained that the disciplinary matters should properly have been addressed under the capability procedure rather than the disciplinary procedure. The respondent's disciplinary procedure was in the Tribunal hearing bundle at [1148]. The flowchart at the start of the policy tracks the progress of matters through the two different policies. At the outset it makes a distinction between 'won't do' issues (i.e. conduct matters) and 'can't do' issues (referred to as performance issues.) 'Can't do' issues are generally dealt with under the capability procedure whereas 'won't do' issues are referred under the disciplinary procedure. Given the nature of the allegations against the claimant (particularly in relation to core elements of her role as a professional nurse (e.g. record keeping) the respondent has characterised this as a conduct matter. The disciplinary policy also contains examples of misconduct and gross misconduct [1164]. Gross misconduct at work includes the following within the policy:

- Serious negligence which causes or might cause unacceptable loss

damage or injury.

- Serious infringement of governance/risk management/ health and safety rules.
- Negligent or deliberate failure to comply with legal requirements and/or the Trust's policies concerning clinical/medical matters.

148. One of the triggers for the disciplinary process in relation to the claimant was the concerns raised by Dr Mason. By September 2018 he was raising concerns with Mr Ingram about the claimant's poor clinical judgment potentially impacting patient safety. Dr Mason had done an audit of the patient care notes for the whole team. The audit showed that only 5 of 7 clinical notes had been completed by the claimant and none of the other required clinical records (e.g. risk assessments, outcome measures etc) had been done by the claimant. The other practitioners within the team were all close to or at 100% complete. Of particular note is the fact that Dr Mason had raised the absence of a patient letter with the claimant. The said letter should have been sent 6 months previously but it was missing. The claimant's response to this was to complete the letter but to backdate it so that the letter looked as though it had been done on the relevant, correct date. This is an example of the claimant deliberately completing patient documents in a way which is misleading. It is clearly important that patient records are accurate, contemporaneous and correct. Errors should be explained. It appears that the claimant was prepared to alter documents to give a misleading and inaccurate picture to the reader. The Tribunal notes that, as a professionally qualified nurse, this would reasonably be viewed as an issue of conduct rather than capability. It is hard for the Tribunal to accept that the claimant would not know, as a result of her professional training and qualifications, that backdating documents in this way is inappropriate and misleading. It is hard to accept that this is something the claimant would not have known or that she would need further training about this. This is but one example of a 'won't do' matter as opposed to a 'can't do' matter.

149. This information was relayed to Mr Ingram on 19 September 2018. He discussed the situation with the then Director of Nursing (Ms Delaney) on 20 September 2018. The decision was taken to remove the claimant from clinical practice on the same day in order to conduct a fact finding into the concerns around the claimant's record keeping and risk to patient safety.

150. Ms Vernon confirmed to the Tribunal that she considered the respondent's policies and determined that the concerns about the claimant should be investigated under the disciplinary policy rather than the capability policy. She noted that appendix 16 of the Capability Policy states that "If the matter is considered to be serious or gross misconduct then it will be investigated and managed in accordance with the Trust's disciplinary policy." The view taken was that the allegations were serious enough to merit consideration under the disciplinary policy rather than as a matter of capability. This was still the case once the disciplinary investigation report was completed. A review of the disciplinary investigation report discloses enough instances of 'won't' rather than 'can't' for the disciplinary process to be applicable. Rather than a training issue it is relevant to consider the claimant as a professional woman who has a duty of care in relation to accurate record keeping and patient safety. This is not an issue of training. The disciplinary report does not flag up capability issues as opposed to conduct issues. The Tribunal is satisfied that the respondent was entitled to consider the evidence as relating to conduct rather than capability.

151. The Tribunal also considered what substantive difference it would have made to the claimant if her case had been considered under the capability process rather

than the disciplinary process. Both procedures would require investigation, a right of reply for the claimant and possibly a hearing. The claimant in fact resigned before the final hearing took place.

152. Part of the claimant's case appears to be that the management side representatives and hearing panel were aware of her hearing loss but gave no consideration to the actual adjustments she required. As the claimant was not present at the disciplinary hearing, the Tribunal can only conclude that this part of the allegations relates to the investigation meeting. The claimant presented a further copy on the minutes of that hearing for consideration by the Tribunal as "C3" (this was presented and considered by the Tribunal for the first time on 3 November in the middle of cross examination of the claimant.) This relates to the hearing on 20 March 2019 conducted by Lorraine Hayne. This is the claimant's version of the minutes of the hearing. The respondent's version of the minutes was contained in the hearing bundle at [1176]. A further version with proposed amendments by the claimant was at [1204]. The disciplinary statement of case notes that this version of the minutes includes additions by the claimant which, according to the respondent, were not said [1041]. Whilst the claimant's version of the minutes was accepted by the respondent as the claimant's statement, the respondent noted the differences and additions made by the claimant by comparing the two documents. The respondent attached the comparison document as appendix 12 [1231.] Document C3 was presented by the claimant for the first time during the Tribunal hearing when she was in the middle of cross examination. This was a different version to those previously before the respondent and the Tribunal.

153. Looking at C3, the record shows that the claimant was accompanied by her husband at this meeting. The first question Ms Haynes asks is to check whether there is any more support needed by the claimant. The claimant's response is to confirm that she had got her hearing aids in and there was nothing further required by way of adjustments. She did indicate that she found interviews difficult due to her having to focus on questions and read lips etc. Ms Haynes told the claimant that if she did not understand (as Ms Haynes has an accent) then she could repeat what she said and they could take breaks.

154. When asked about this allegation in cross examination the claimant said that the adjustment which should have been made related to them not allowing for representation. However, we note that the claimant was accompanied by her husband and there were two people taking notes (one from the respondent plus the claimant's husband.) The claimant said that there should have been someone in the hearing to help her. However, it appears that this is what her husband was there to do and there is no indication at the start of the hearing that the claimant has asked for someone else or an additional person to be present or that such request had been refused.

155. Clearly this part of the claimant's allegation cannot relate to the disciplinary hearing which took place in her absence. There were no reasonable adjustments that the respondent could make in relation to a hearing where the claimant was not present.

156. We also note that the Occupational Health evidence before the Tribunal indicates that when wearing her hearing aids, the claimant was able to hear sufficiently well to do her job. This suggests that there would be no particular difficulty or need for adjustments during a disciplinary investigation hearing if the claimant was wearing her hearing aids for a face to face meeting and was additionally accompanied by her husband who could take notes during that meeting.

157. Part of the claimant's case was her allegation that the disciplinary hearing panel formed unreasonable and biased conclusions. This allegation cross refers to paragraphs 19-21 of the Further and Better Particulars (which were written by the claimant's second solicitor.) The essence of the allegation is that because the claimant was not present at the disciplinary hearing, the respondent was not in a position to draw conclusions about her character such as that she lacked insight. Such conclusions were, say the further particulars, based on the written evidence and none of the panel knew the claimant as an individual. Thus, it was argued, they were not in a position to make a fair assessment of the claimant or come to a fair disciplinary decision.

158. The Tribunal noted that the respondent's decision maker took account of the answers the claimant had given during the disciplinary investigation and also took into account the content of all the documents that were available to it. The Tribunal, as set out above, considered that the respondent was reasonably entitled to go ahead with the hearing in the claimant's absence. We also note that the disciplinary outcome is based firmly in the evidence that Ms Walsh had available to her. Ms Walsh gave consideration to the fact that, if she had been present, the claimant would have presented a different point of view. As a result of that, Ms Walsh came to the conclusion that the claimant would not have been dismissed even though she was liable for gross misconduct. This was Ms Walsh doing her best to take account of the fact that the claimant was not present at the hearing and was not in a position to demonstrate at that hearing, in person, that she had gained insight into her conduct during the course of the disciplinary process. Ms Walsh mentioned in cross examination that the claimant had not had the issues and problems highlighted to her at the time they had occurred and if she had been present at the hearing, she would probably have given her rationale for acting in the way that she did. As the claimant did not have the opportunity to do that at the hearing, Ms Walsh effectively gave the claimant the 'benefit of the doubt' when determining the appropriate sanction. Ms Walsh was not dismissing the claimant but rather would have given her the opportunity (via the down banding) to show that she had gained insight and would make appropriate changes. To that extent, Ms Walsh was giving the claimant the benefit of the doubt because of her absence from the hearing. Furthermore, although the claimant was not present at the hearing, she had nonetheless had the opportunity to provide any written documents that she wanted the panel to consider.

159. When asked about this in cross examination the claimant sought to suggest that the conclusions were unreasonable and biased because they were based on lies that had been told about her refusing supervision and the lie that she had no insight.

160. In essence the claimant felt that the outcome was unfair biased and unreasonable because the respondent had gone ahead in her absence and had not accepted her version of events or explanation of the evidence. However, finding against one person's case and in favour or another is not evidence of bias. Rather, Ms Walsh had a decision to make and she went ahead and made it based on a review of all the available evidence. It was a decision which was reasonably open to her based on that evidence, even though it was a decision with which the claimant disagrees.

161. On 15 May 2020 the claimant submitted her third ET1 claim form to the Tribunal.

<u>Complaints</u>

162. The claimant alleged, as part of her Tribunal claims, that Ms Massey tried to get patients to make complaints about the claimant. The Tribunal finds that, where a

patient was unhappy with the service provided to them, the respondent operated a complaints procedure. Insofar as Ms Massey did anything, the Tribunal is satisfied that when she became aware of patients' dissatisfaction, she signposted them to the proper procedure for making any complaints that they wished to pursue. Any complaint would need to be put in writing and sent to the appropriate place in order to be dealt with appropriately by the respondent. The is a long way away from encouraging or soliciting patients' complaints against the claimant. Indeed, this is the appropriate response where a patient indicates dissatisfaction. All Band 7s would refer such a patient to the relevant complaints procedure. Indeed, the claimant accepted as much during cross examination.

163. The Tribunal found that Mr Ingram's description of the situation during the grievance investigation chimed with the Tribunal's own observations of the claimant and of the evidence in the case as a whole. Mr Ingram said [700]:

> *"Debra and the team to be fair is that they had developed from nothing. the ADHD team grew with Pete Mason and demand grew from CCG for assessments. It grew to consultant, 3 nurses and 2 support workers but there was no consideration of how the team would be managed and operated unless at service manager level. The team also didn't know how to manage the complaint process and in this case there was a complaint about her (Debra's) care but she was trying to resolve it in the background with PALS. Debra escalated for a need of RCN rep but no disciplinary process had commenced. I think this is a pattern. Helen was saying (to Debra) a complaint was received and she was going to investigate so Debra has gone on to interpret this as saying you are investigating me and it is an example of a disproportionate response, highly reactive to something which is just a protective process."*

164. The disciplinary investigation report looked into this issue and concluded that there was no evidence that patients had been asked to complain about the claimant [1080]. The claimant was asked about this during cross examination at the Tribunal hearing. She asserted that she sent in two texts from patients during the grievance investigation. She maintained that in these two texts, the patients stated that they were asked to complain. She asserted that those text messages were in the appendices to the grievance. However, she was unable to direct the Tribunal to those documents within the hearing bundle (which contained the grievance documents and appendices.) They did not appear in the itemised list of appendices. The evidence collated relating to patient complaints was summarised at [644] and appendix 11. The indication in relation to at least one of the complaints is that PALS facilitated a meeting with the patient's family and this resulted in an agreed resolution. This does not mean that the respondent was encouraging patients' complaints about the claimant. Rather, it shows that when patients complained there were various options to resolve the complaint. If it could be resolved via an informal process with the help of PALS, this does not mean that the complaint was 'encouraged' or was unsubstantiated. Rather it means that the complaint had been resolved through informal means without the need to go via the formal route. This does not suggest that the respondent was conducting a 'fishing expedition' in order to get patients to complain about the claimant.

165. Having considered all the available evidence the Tribunal prefers the respondent's account in relation to this part of the claimant's case. The respondent's explanation makes sense on its own terms and is consistent with the evidence that we have seen. The claimant has never produced the evidence which she says backs up her allegation. The disciplinary and grievance procedures never unearthed such evidence either. Furthermore, for reasons we

have set out elsewhere in this document, the claimant's credibility as a witness was generally poor. We had no difficulty in preferring the evidence of the respondent's witnesses in this regard. The Tribunal was unable to go on a search for the missing documents itself. As is standard procedure, we read those documents to which we were referred by the parties during the course of the Tribunal hearing.

166. As set out at various points in the findings of fact above, the Tribunal considered that the claimant's evidence lacked credibility. A further example of this relates to the claimant's recording of the alleged altercation/argument between herself and Ms Bromilow. The transcript in the hearing bundle did not confirm the matters alleged by the claimant. At the claimant's instigation the Tribunal listened to the recording because she was of the view it confirmed her account to be accurate. On listening to the recording it was apparent that the transcript was accurate and there was nothing about the tone of the exchange which would lend credence to the claimant's allegations. She then asserted that, in fact, the matter about which she was complaining happened before she was able to start the recording. This is an example of the claimant changing her position when the evidence did not come up to proof in relation to her allegations. It undermines the Tribunal's ability to rely on her assertions. When tested, they are seldom backed up by other available sources of evidence.

NMC referral

167. On 11 June 2020 the respondent referred the claimant to the NMC [1801-1812.]. This issue was referred to Mr Flockhart, who was the respondent's Director of Nursing. He was given a copy of Ms Walsh's disciplinary findings. He noted that the claimant had resigned several months earlier. However, he noted that the fact that the claimant was no longer the respondent's employee wasn't a reason *not* to make an NMC referral if it was felt professionally appropriate to do so. Mr Flockhart decided that an NMC referral was appropriate in view of the panel's findings and concerns. The concerns related to the claimant's standards of practice in regard to clinical decision making and judgment. This led to concerns about patient safety and record keeping falling short of the respondent's policy. They also included concerns about her failure to demonstrate a level of communication (both written and verbal) expected of a registered nurse. Mr Flockhart was also concerned about the claimant's lack of insight, particularly as the claimant was no longer in employment with the respondent. The respondent would not be able to work with the claimant to address those concerns as party of a capability plan or other employment measures. In light of these matters, he decided that an NMC referral was appropriate and he instructed that one be made.

168. Mr Flockhart explained his reasoning in relation to the NMC referral when cross examined by the claimant during the Tribunal hearing. It was clear that, although the claimant took issue with the finding that she lacked insight, this was not the only reason for the NMC referral. Part of the reason for the referral related to the problems with the claimant's record keeping. That was a matter of written record and an important part of the disciplinary case. The integrity and comprehensive nature of clinical records was (and is) of vital importance to the respondent Trust. It would also be an important feature of a clinician's fitness to practice which should not be dropped solely because the practitioner changes employment. If there is inadequate record keeping with one employer, then there is a risk that this will continue with the next employer. That is a matter for the professional regulator to look into and reach a decision on. The respondent did not reach a

decision about the claimant's professional fitness to practice. It merely referred the issue to the appropriate professional body as part of discharging its own duty of care to patients.

169. The Tribunal noted that there was no evidence with which to challenge Mr Flockhart's decision to make the referral. In reality, he was a fresh pair of eyes on the issue as he had not really been involved in the disciplinary or grievance processes. The only other involvement he had had was when he was asked to comment on whether the claimant would be permitted (or expected) to make a secondary diagnosis in light her job role and qualification. This was a discrete issue and was based on his professional knowledge and expertise. It did not prejudice him against the claimant to the extent that he could not be asked about the issue of the NMC referral. (Likewise, Ms Walsh was a fresh pair of eyes when she was commissioned to deal with the disciplinary process. She did not know the claimant and had not worked alongside her. She was reasonably considered to be impartial enough to do the disciplinary process.) To the extent that the claimant seeks to make a link between the people in the department who she says had an axe to grind with her and the people who decided to make the NMC referral, the Tribunal can find no such link. Those who made the NMC referral came to the issue afresh without having worked with the claimant in the ADHD team.

170. When questioned, Mr Flockhart made it clear that he was not aware of any protected acts or protected disclosures or the claimant's disability when he made his decision about the NMC referral. He clarified that he made the referral based purely on the disciplinary outcome which involved five lots of gross misconduct. He would not have considered mitigating factors as part of the referral decision. Effectively, that would be a matter for the NMC to look at, if they took further action. His main concern was that the respondent would not be able to work with the claimant to improve her performance and so the only way to safeguard against future problems was to make the NMC referral and let the NMC take whatever action it deemed appropriate in the circumstances. He also noted that he did not think he was aware of a request for reasonable adjustments by the claimant at the time that he made his decision.

171. The Tribunal also had regard to paragraphs 24-26 of the claimant's further particulars in an effort to understand this element of her case. With due respect to the author of that document, it seems to miss the salient point. It seems to suggest that because the claimant was no longer employed by the respondent, then the respondent should not have made the referral. In fact, the opposite is true. The employment was at an end and so the respondent had no other way to discharge its duty of care to patients to guard against future problems arising out of the claimant's clinical practice. As a responsible employer, such an important issue could not be dropped just because the claimant had resigned. The further particulars seem to assume that the risk to patients was no longer 'live' because the claimant had left her job. This does not accurately reflect the situation. The risk to the *respondent's* patients may have ended when the claimant left her job. But there might well be a risk to patients in future employment if these issues were allowed to fall away without being properly addressed. Mr Flockhart did not have another mechanism by which to ensure future safe practice, so the NMC referral was required. It would then be a matter for the NMC (as regulator) to determine whether there were further risks after following due process with the claimant.

172. The Tribunal also considered the copy of the referral which was made to the NMC

[1801]. We note that the focus is more on the claimant's record keeping as a risk to patients and less on her lack of insight. We note that the respondent also disclosed the fact that the claimant had raised grievances and made complaints about others in the body of the referral document [1810].

173. In complaining about the NMC referral the claimant also alleged that the respondent had stated untruths when making the referral. On reading the NMC referral document the Tribunal could not identify any untruths that the claimant might be referring to.

174. The Tribunal notes that as part of the disciplinary outcome the claimant was told that an NMC referral was being considered and that she would be sent a copy of the referral if the respondent decided to make one. We note that there is no document within the hearing bundle indicating that the claimant was told that a decision had in fact been made to make a referral. This was not a requirement of the respondent's own disciplinary procedure. All that procedure said (paragraph 12 at [1159]) was that the Director of Nursing should be consulted in relation to referring clinical staff to the appropriate professional body at any stage of the process. The disciplinary process was complied with in this regard.

175. There was no document or witness evidence to tell the Tribunal whether the claimant was informed when the referral was made, just that she was warned of the possibility in advance. However, the claimant did not address this with the respondent's witnesses in cross examination either.

176. The claimant also alleged that the referral letter to the NMC wrongly stated that the claimant had refused to engage in any supervision, any support or mediation to resolve the issues in her workplace. The Tribunal reviewed the referral but could locate nothing within the document which could be said to match this allegation. At most, the referral referred to the claimant's lack of insight (as already discussed) and the problems with getting the claimant to address the issue through her own reflection.

177. The last part of the claimant's Tribunal case was that Ms Massey made 'substantially the same false allegations' in an interview to the NMC investigation. The claimant referred to a three page report from Shadae Riley of the NMC dated 12 April 2022. The Tribunal was not provided with a copy of the notes of this NMC interview or a copy of the three page report from 12 April 2022. We cannot, therefore, make findings of fact about what Ms Massey did or did not say in the course of the NMC's investigation. The Claimant did not raise this issue in cross examining Ms Massey either. The NMC documents which the claimant seems to rely upon are not in the Tribunal hearing bundle.

The law

Disability

178. Section 6 Equality Act sets out the definition of disability. It states:

(1) A person (P) has a disability if-
   a) P has a physical or mental impairment, and
   b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to day activities.

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

(3) In relation to the protected characteristic of disability-
   a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability.
   b) A reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)-
   a) A reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
   b) A reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

179. Section 212 of the Equality Act 2010 defines 'substantial' as more than minor or trivial.

180. The definition of 'long term' is set out in Schedule 1 to the Act. It states that the effect of an impairment is long-term if:
- It has lasted for at least 12 months,
- It is likely to last for a at least 12 months, or
- It is likely to last for the rest of the life of the person affected.

181. The definition also states that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is 'likely to recur.' 'Likely' has been defined for the purposes of the Act as 'could well happen.' (See e.g. Boyle v SCA Packaging Ltd and also the 2011 'Guidance on matters to be taken into account in determining questions in relation to the definition of disability.')

182. In looking at the impact of the impairment the focus should be on what an individual cannot do or can only do with difficulty rather than on the things he or she can do.

183. Normal day-to-day activities are activities that are carried out by most men or women on a fairly regular and frequent basis (Appendix 1 EHRC Employment Code). It is not intended to include activities which are only normal for a particular person or group of people. The indirect effects of an impairment should also be considered.

184. Paragraph 5 of Schedule 1 to the Act deals with the effects of medical treatment. The impairment is to be treated as having a substantial adverse effect on the ability of the person to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. Thus, unless the treatment is completely curative of the underlying impairment, the treatment or measures are disregarded in terms of whether the impairment has a substantial adverse effect on the claimant. The Tribunal seeks to determine what the position would be for the claimant in the absence of the treatment, the 'deduced effect.'

185. Certain medical conditions, such as cancer, HIV and multiple sclerosis, are deemed to be disabilities by virtue of paragraph 6 of Schedule 1 to the Act.

186. The time at which to assess whether the definition of disability is met is at the date of the alleged discriminatory act. The Tribunal should consider the evidential

position as at the date of the alleged discriminatory act (see e.g. McDougall v Richmond Adult Community College [2008] ICR 431.)

187. There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause (see para 7 Appendix 1 EHRC Employment Code).

Knowledge of disability

188. The issue of knowledge of disability arises in reasonable adjustment claims.

189. Paragraph 20(1) of Schedule 8 to the Equality Act 2010 indicates that the employer will only come under the duty to make reasonable adjustments if it knows, not just that the relevant person is disabled, but also that the relevant person's disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). The EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions: Did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially? If not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT) It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

190. In Wilcox v Birmingham CAB Services Ltd EAT 0293/10, Mr Justice Underhill, took the view that the effect of the knowledge defence in the predecessor Disability Discrimination Act was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (i) that the employee was disabled, and (ii) that he or she was disadvantaged by the disability in the way set out in section 4A(1) (i.e. by a PCP or physical feature of the workplace). The second element of this test will not come into play if the employer does not know the first element.

191. The EHRC Code of Practice on Employment indicates that employers must do all they can reasonably be expected to do to find out whether a claimant has a disability. Whilst an employer may have a duty to make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry (*Ridout v TC Group 1998 IRLR 628, EAT,*)

192. An employer cannot claim that it did not know about a person's disability if the employer's agent or employee (for example, an occupational health adviser, HR officer or line manager) knows in that capacity of the disability. The EHRC Employment Code indicates that such knowledge is imputed to the employer (see paragraph 6.21). However, the Code confirms that information will not be imputed to the employer if it is gained by a person providing services to employees independently of the employer, even if the employer arranged for those services to be provided (see paragraph 6.22). The case law also shows that, depending on the particular circumstances of a given case and the way in which the adviser was instructed, there may be circumstances where the information/knowledge passed to the adviser will not be imputed to the respondent (e.g. In *Hammersmith and Fulham London Borough Council v Farnsworth [2000] IRLR 691, EAT* and in the EAT in *Q v L EAT 0209/18*). In Hartman v South Essex Mental Health

Community Care NHS Trust [2005] IRLR the Court of Appeal held that if an employee discloses *confidential* information about their health to their employer's occupational health provider, the employer should only be deemed to have knowledge of the information *actually* provided to it by the occupational health provider.

193. Paragraph 6.20 of the EHRC Employment Code indicates that the Act does not prevent an employee from keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employee could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer- or someone acting on their behalf- with sufficient information to carry out that adjustment.

194. When considering whether an employer is to be regarded as having constructive knowledge of a worker's disability so as to trigger the duty to make reasonable adjustments, it is irrelevant that a formal diagnosis has yet to be made, so long as there are other circumstances from which a long term and substantial adverse effect of a mental or physical impairment can reasonably be deduced.

195. A failure by an employee or job applicant to cooperate with an employer's reasonable attempts to find out whether he or she has a disability could lead to a finding that the employer did not know, and could not be expected to know, that the employee or job applicant was disabled.

196. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage (paragraph 20(1)(b), Schedule 8 Equality Act)

197. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know if it had made such an enquiry. A Ltd v Z [2020] ICR 199 shows that determining whether an employer had constructive knowledge involves a consideration of whether the employer could, applying a test of reasonableness, have been expected to know, not necessarily the employee's actual diagnosis, but of the facts that would demonstrate that he had a disability, namely that he was suffering a physical or mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. In *A Ltd v Z* the tribunal had failed to apply the correct test, asking itself only what more might have been required of the employer in terms of process without asking what it might then reasonably have been expected to know. Given the tribunal's finding that Z would have concealed her disability, if the employer had taken the additional steps that the tribunal considered would have been reasonable, it could not reasonably have known of the employee's disability.

Direct discrimination

198. Section 13 Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

199. Section 23 of the Equality Act 2010 provides:

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

200. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott)*

201. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL* Lord Nicholls stated: "*a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

202. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

203. The relevant comparator must not share the claimant's protected characteristic. There must be no material difference between the circumstances relating to each case. The circumstances of the claimant and the comparator need not be identical in every way. Rather, what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator (paragraph 3.23 EHRC Employment Code.) With the exception of the prohibited factor (the protected characteristic) all characteristics of the complainant which are relevant to the way his case was

dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. (Macdonald v Ministry of Defence, Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937). Whether the situations are comparable is a matter of fact and degree (Hewage v Grampian Health Board [2012] ICR 1054.)

Section 26: harassment

204. Section 26 states:

> (1) A person (A) harasses another (B) if-
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) The conduct has the purpose or effect of-
> (i) violating B' s dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
> ….
>
> (4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account-
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

205. 'Unwanted' conduct is essentially the same as 'unwelcome' or 'uninvited' conduct.

206. Harassment will be unlawful pursuant to section 26 if the unwanted conduct related to a relevant protected characteristic had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

207. The harassment has to be "related to" a particular protected characteristic. The tribunal is required to identify the reason for the harassment with a particular focus on the context of the particular case. In Unite v Naillard [2017] ICR 121 the EAT indicated that section 26 requires the tribunal to focus upon the conduct of the individual(s) concerned and ask whether their conduct is associated with the protected characteristic. In that case it was not enough that an individual had failed to deal with sexual harassment by a third party unless there was something about the individual's own conduct which was related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction. So long as the tribunal focuses on the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic. As stated in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, "there must still … be some feature or features of the factual matrix identified by the tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found have led to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is

not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be."

208. The test as to the effect of the unwanted conduct has both subjective and objective elements to it. The subjective element involves looking at the effect of the conduct on the particular complainant. The objective part requires the tribunal to ask itself whether it was reasonable for the complainant to claim that the conduct had that effect. Whilst the ultimate judgement as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered. So, whilst the victim must have felt or perceived her dignity to have been violated or an adverse environment to have been created, it is only if it was reasonable for the victim to hold this feeling or perception that the conduct will amount to harassment. Much depends on context. See the guidance Richmond Pharmacology v Dhaliwal [2009] ICR 724 revisited in Pemberton v Inwood [2018] IRLR where Underhill LJ stated:

In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

The context of the conduct and whether it was intended to produce the proscribed consequences are material to the tribunal's decision as to whether it was reasonable for the conduct to have the effect relied upon. Chawla v Hewlett Packard Ltd [2015] IRLR 356.)

As stated in Dhaliwal:

'If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.

Victimisation

209. Section 27 Equality Act 2010, so far as relevant, provides that:

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

(a) B does a protected act…

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

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

210. A protected act requires that an allegation is raised which, if proved, would amount to a contravention of the Equality Act 2010. No protected act arises merely by making reference to a criticism, grievance or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of the Equality Act 2010: Beneviste v Kingston University UKEAT/0393/05/DA [29].

211. The test for detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his perception must be 'reasonable' in the circumstances.

212. The employee must be subjected to the detriment 'because of' the protected act. The same principles apply in considering causation in a victimisation claim as apply in consideration of direct discrimination (see above). The protected act need not be the sole cause of the detriment as long as it has a significant influence in a Nagarajan sense. It need not even have to be the primary cause of the detriment so long as it is a significant factor. Detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail Essex County Council v Jarrett EAT 0045/15.

Section 20/21: reasonable adjustments.

213. Section 20 (so far as relevant) states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

…

Section 21 states:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) …

214. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

(a) Identify the PCP applied by or on behalf of the employer,
(b) Identify comparators (if necessary),
(c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

215. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

216. In Ishola v Transport for London [2020] EWCA Civ 112 it was noted that the phrase PCP should be construed widely but remarks were made about the legislator's choice of language (as opposed to the words "act" or "decision".) Simler LJ stated, *"I find it difficult to see what the word "practice" adds to the words if all one off decisions and acts necessarily qualify as PCPs…. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice." It is just done; and the words "in practice" add nothing….The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee…To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply…. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. …In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP of "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one. …in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of an element of repetition about it."*

217. Even if the duty to make reasonable adjustments is not triggered by a relevant PCP, it may nevertheless be triggered by the lack of an auxiliary aid. An auxiliary

aid is a piece of technology or equipment that is intended to assist a disabled person. In the Equality Act the terminology also includes an auxiliary service

218. A 'substantial disadvantage' is one which is 'more than minor or trivial.'

219. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

220. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503. It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The fundamental question is what steps it was reasonable for the respondent to have to take in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'

221. An employer can satisfy the duty to make reasonable adjustments even if the adjustments adopted are not the adjustments preferred by the employee (Garrett v Lidl Ltd UKEAT/0541/0).

222. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry.

Burden of Proof

223. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act including direct discrimination, harassment, indirect discrimination, discrimination arising from disability under section 15 and the failure to make reasonable adjustments under section 20. Although similar principles apply, what needs to be proved depends, to a certain extent, on the nature of the legal test set out in the respective statutory sections.

224. The wording of section 136 of the act should remain the touchstone.

225. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

226. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

227. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

228. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

229. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation.

230. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

231. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

232. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

233. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason

(i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

234. In a case of harassment under section 26 of the Equality Act the shifting burden of proof in section 136 will still be of use in establishing that the unwanted conduct in question was "related to a relevant protected characteristic" for the purposes of section 26(1)(a). Where the conduct complained of is clearly related to protected characteristic then the employment tribunal will not need to revert to the shifting burden of proof rules at all. Where the conduct complained of is ostensibly indiscriminate the shifting burden of proof may be applicable to establish whether or not the reason for the treatment was the protected characteristic. Before the burden can shift to the respondent the claimant will need to establish on the balance of probabilities that she was subjected to the unwanted conduct which had the relevant purpose or effect of violating dignity, creating an intimidating etc environment for her. The claimant may also need to adduce some evidence to suggest that the conduct could be related to the protected characteristic, although she clearly does not need to prove that the conduct *is* related to the protected characteristic as that would be no different to the normal burden of proof.

235. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

236. In a victimisation claim where there is clear evidence of the reason for the treatment (which forms the detriment) there is no need for recourse to the shifting burden of proof in section 136. However, where the shifting burden of proof does come into play it is for the claimant to establish that he/she has done a protected act and has suffered a detriment at the hands of the employer. Applying the approach in Madarassy would suggest that there needs to be some evidence from which the tribunal could infer a causal link between the protected act and the detriment. One of the essential elements of the prima facie case that the claimant must establish appears to be that the employer actually knows about the protected act (Scott v London Borough of Hillingdon [2001] EWCA Civ 2005).

Constructive dismissal

237. In this case the claimant is not pursuing a claim of unfair dismissal within the meaning of the Employment Rights Act 1996. Rather, she asserts that one element of the disability discrimination claim is that she was constructively dismissed. In such circumstances the provisions of the Employment Rights Act 1996 are not applicable. Unless an employee has more than two years' service she is not entitled to claim 'ordinary' unfair dismissal. An employee with less than two years' service can claim that she was 'automatically' unfairly dismissed because of one of the proscribed reasons. The claimant in this case makes no

such claim. Rather, she says that she was constructively dismissed and that this amounts to discriminatory treatment within the meaning of section 39 Equality Act 2010.

238. A constructive dismissal occurs when the employer commits a fundamental or repudiatory breach of the contract of employment which entitles the employee to resign and treat herself as dismissed. A constructive dismissal requires a fundamental breach of contract by the employer. The employee must resign in response to that breach of contract and must not wait so long before resigning that she is taken to have waived the breach and affirmed the contract.

239. The breach of contract can be a breach of an express or implied term of the contract. An employee will often rely upon a breach of the implied term of mutual trust and confidence. This is the implied term that neither party will, without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee. Given the core status of the implied term of mutual trust and confidence, any breach of that particular implied term will be considered to be a fundamental breach of contract.

240. In a case where the constructive dismissal is said to be an act of discrimination, the tribunal must consider whether any of the acts relied upon as being part of the breach of contract were discriminatory. Without the discriminatory element to the respondent's breach of contract, the resulting constructive dismissal cannot be said to be discriminatory.

TRIBUNAL CONCLUSIONS

Disability

241. The respondent conceded that the claimant was disabled by reason of her previous cancer diagnosis. The respondent did not concede that the claimant was disabled by virtue of her hearing loss. The Tribunal was unsure why the respondent did not accept that this second condition amounted to a disability. Based on the evidence that we have heard, it is evident that the claimant's hearing is impaired to the extent that she needs hearing aids to remedy the defect. All of the available evidence from Occupational Health etc, indicates that the claimant was suffering from this degree of impairment during her employment with the respondent. Indeed, the claimant raised the issue in her supervision meeting on 2 July 2018.

242. This impairment clearly had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities given that 'substantial' need only be 'more than minor or trivial.' The claimant required hearing aids and some other adaptations in order to reduce the adverse effect. Without this her ability to have normal conversations and professional or social interactions would be impaired. Her ability to react appropriately to the sounds she was surrounded by would be impaired.

243. The hearing loss apparently developed as a result of the claimant's treatment for

cancer, which took place before she started work with the respondent. There is nothing in the evidence presented to the Tribunal to indicate that the hearing loss was curable or, indeed, that it was likely to improve over time. All the indicators are that the hearing loss is permanent. Hearing aids assist in reducing the impact of the hearing loss but they do not remove the underlying disability itself.

244. In those circumstances we are satisfied that the claimant was disabled, within the meaning of section 6 Equality Act 2010, during the relevant period by reason of her prior cancer diagnosis *and* by reason of her hearing loss.

Knowledge of disability

245. Knowledge of the claimant's disability is a separate issue from proof of the disabilities themselves. We are satisfied that the respondent's employees/managers were made aware that the claimant had been diagnosed with cancer at the training course on 5 and 6 March 2018, although they were unaware of any ongoing treatment or symptoms related to the cancer. This is sufficient notice for the respondent to have knowledge of this particular disability from 5 March 2018 onwards. However, there is no evidence that they had actual or constructive knowledge of any continuing effects or impact of the previous cancer diagnosis.

246. The position is different in relation to the hearing loss. The respondent's employees and managers were told nothing about the claimant's hearing loss until 2 July 2018. It was at the supervision meeting on 2 July 2018 that the respondent was first put on notice of the hearing loss and could (or should) have made further enquiries about the nature and extent of that hearing loss so as to better equip itself to manage the claimant's hearing disability.

247. However, the issue of knowledge of the disability itself is not the only relevant legal question relating to knowledge in this case. For the purposes of the reasonable adjustments claims in particular, the respondent needed to have actual or constructive knowledge of the disability and actual or constructive knowledge that the PCPs put the claimant at a substantial disadvantage as compared to someone without the disability.

248. As set out above, once Ms Massey and Dr Mason were made aware of the hearing loss, they sought Occupational Health evidence to see what adjustments were required. They actively took steps to get the relevant knowledge of the impact of the disability in the workplace.

249. The claimant refused to let Ms Massey see the first Occupational Health report (which was produced following the self-referral.) Ms Massey could not force the release of this report to the respondent.

250. Ms Massey then made a management referral when it became apparent that she would not be able to see the first report. The second Occupational Health report was only disclosed to the respondent on 5 October, which was after the claimant had been removed from clinical practice. This meant that, during the period that the claimant was at work, the respondent had no evidence to show how the employment arrangements or PCPs impacted on the claimant in relation to her disabilities. They had no guidance to indicate the sort of adjustments that the claimant required. They had knowledge of the disabilities from the dates stated, but they did not have actual or constructive knowledge of any substantial disadvantage from the combination of the 'PCPs' and the disabilities.

Direct discrimination claim (paragraph 9.1(a) to (l) of the list of issues.)

251. Each of the factual allegations relied upon as acts of direct discrimination is prefaced by a paragraph in the list of issues which states: "Did Helen Massey continue to conduct herself towards the claimant in a way calculated to cause her difficulties in the following respects…" Thus each factual allegation includes an assertion that it was an example of Ms Massey conducting herself in a particular way which was calculated to cause the claimant difficulties. The claimant was asserting, not only that Ms Massey behaved as alleged but also that it was part of a deliberate course of on conduct done either deliberately to cause the claimant difficulties or, at the very least, in full knowledge and consciousness of the difficulties it would cause the claimant.

9.1(a) Did HM fail to provide C with essential facilities and equipment which other staff were provided with to carry out her role by denying her a chair, desk, computer and phone?

252. The claimant alleged that the respondent failed to provide her with essential facilities and equipment which was provided to other staff. She alleges that the respondent denied her a chair, desk, computer or phone. We do not accept that this allegation was proven on the facts (see in particular paragraphs 32-42 above.) The claimant was provided with the said necessary equipment and it was provided on the same basis as it was to other members of staff. The claimant had what she needed as essential equipment for the role and was not treated any differently or less favourably than other staff within the team. The claimant may have had to 'hot desk' in the office but this was the same for all members of the team. She was not treated differently to the others. She had the same access to chair, desk, computer and phone as the other members of the team. She also had her own laptop and mobile phone.

253. This allegation of direct discrimination must therefore fail and be dismissed. The factual allegation is not proven. It is not proven that Mr Massey failed to provide the equipment and the claimant has failed to prove that she was treated any differently or less favourably than other staff on the team. The detrimental treatment is not proven and the Tribunal is not satisfied that the claimant was treated less favourably than an appropriate hypothetical comparator would have been treated in the same or sufficiently similar circumstances. In those circumstances the Tribunal does not have to consider whether 'the treatment' of the claimant was 'because of' the disabilities.

9.1.(b) Did HM fail to assist C in being equipped to do her job, specifically it was left to C to find out how to register with the Trust for prescribing?

254. There was no evidence that it was part of Ms Massey's responsibilities to assist the claimant in registering for prescribing. At this stage of the proceedings she was not the claimant's line manager and there was no evidence to suggest that she would be involved in helping to get any nurse registered for prescribing. In fact, in line with our findings of fact, it was Mr Flockhart who was involved in this (together with individuals working in the Pharmacy.) The claimant followed online protocols to get registration. The claimant managed to get registered and there is no evidence that she was put in any more difficult a position than any new nurse joining the respondent. As a professional it was part of her job to ensure she was

registered to prescribe and she managed to do this and start prescribing at an appropriate juncture. (See findings of fact e.g. at paragraphs 44-46).

255. As a result the claimant's assertion, as set out in the list of issues, is not proven. There was no evidence that there was a failure on the part of Ms Massey in this regard or that others were or would have been treated more favourably. The detriment and the 'less favourable' treatment than an appropriate comparator are not made out.

256. There is no evidence that the claimant was treated any differently than other members of staff or that Ms Massey conducted herself in a way designed to cause the claimant difficulties in this regard. Ms Massey did not get in the way of the claimant being registered to prescribe. Indeed, the claimant was registered to prescribe and was able to do so.

9.1(c) Did HM exclude C from team meetings from 18 March 2018 by booking the team meetings on a Wednesday afternoon when C worked in Bolton?

257. In line with our findings of fact (see e.g. paragraphs 67-73), we did not find that the claimant was excluded from team meetings by Ms Massey. That did not reflect the true position. She attended the meetings and, if necessary, steps were taken to rearrange the meetings so that she could attend. The minutes from the meetings demonstrate that she was present and indeed actively participated in the meetings.

258. As the allegation of detrimental treatment is not proven it is not possible to conclude that the claimant was less favourably treated than a relevant comparator or that it was because of disability and so this allegation of section 13 discrimination fails must be dismissed.

9.1(d) Did HM leave it until 3 March 2018 before providing C with Dr Mason's email address?

259. In line with our findings above (e.g. paragraphs 52-54), the Tribunal concludes that this factual assertion is not proven. The claimant never asked Ms Massey for the email address and there is no evidence that she delayed in giving this information to the claimant. Indeed, it was open to the claimant to ask Mr Mason for any necessary contact details (whether email or phone) as she worked alongside him like others in the team. There is no evidence that C did not have his email address before 3 March 2018 or, if so, that it was in any way the fault of Ms Massey. In such circumstances the detrimental treatment is not proven and it is not possible to say that the claimant was treated less favourably than an appropriate hypothetical comparator. The complaint of direct discrimination therefore fails and is dismissed.

9.1(e) Did HM fail to manage the number of appointments booked for C despite C indicating that she was being given too much? On 17 April 2018 C indicated to senior management that she was being given too much namely issuing 14 'slots' for that day comprising of 3 suicidal crisis referrals, a child protection case and 7 new referrals in one day.

260. In line with our findings of fact (e.g. paragraphs 55-66), we are satisfied that the claimant has not proven the specific allegation in relation to 17 April. Nor are we satisfied that the claimant was in any different situation to the rest of the ADHD team. This was a team in a state of transition and working under pressure. It is apparent from all the evidence that all members of the team sometimes had problems with workload and felt under pressure of the demands of the job. In this the claimant was treated no differently. Where complaints about workload were made, the respondent took steps to try and share the load. There are examples, as set out above, of the claimant's work being picked up by others, including Dr Mason, as appropriate.

261. Thus, although the claimant may have struggled with the workload, she was not treated any differently in this regard from the rest of the team. Workload was managed insofar as workforce resource allowed. The claimant was no worse off than the others. Indeed, the available data suggests that she was seeing fewer patients than others (some of whom were not full time employees, unlike the claimant). There is certainly no evidence that any failure to manage workload should be laid at the door of Ms Massey or that she was acting in this way to cause the claimant difficulties.

262. As the claimant has not established that she was treated less favourably than an appropriate hypothetical comparator, this allegation of direct discrimination fails and must be dismissed.

9(1)(f) Did HM give C more difficult and time consuming referrals, specifically complex mental health referrals where there was presentation of risk to self or others due to ADHD and often a criminal record, and keep easier ones for herself, between January and September 2018?

263. The claimant has not proved the factual basis to this allegation (see e.g. paragraphs 55-74 above). We have made findings of fact above about how work was allocated between clinics and nurses. The system did not allow for the claimant to be specifically targeted as an individual in the work which was allocated to her. The work was given out according to geographical location and the timing of available appointment slots. We are not satisfied that the claimant did have more complex and time consuming referrals than Ms Massey and we are certainly not satisfied that work allocation was manipulated to target or allocate particularly difficult work to the claimant. There were other determining factors in work allocation which were not related to the claimant or her individual characteristics or circumstances.

264. In light of the above, the factual allegation is not proven as pleaded. The claimant cannot show that she was treated less favourably than an appropriate hypothetical comparator. Furthermore, in light of the evidence about how work allocation was done, we would have been satisfied, if the burden of proof had shifted to the respondent, that the respondent was able to prove that the reason for the work allocation was nothing whatsoever to do with disability. Work was routinely allocated to nurses according to a metric which was applied across the board to the nurses in the ADHD team irrespective of disability issues.

265. In light of the above this claim of direct discrimination fails and must be dismissed.

9(1)(g) Did HM on 20 March 2018, refuse to let C cancel appointments when she had

been booked to be in two places at the same time?

266. In light of our findings of fact above this was not proven (in particular paragraphs 74-78). The evidence shows that it was Dr Mason who did not want clinics cancelled (rather than individual appointments). We could not find evidence relating to the events of 20 March 2018 specifically but the surrounding evidence shows that the team as a whole were trying to juggle resources so that all appointments could be honoured. On occasion, others would 'chip in' to cover work that the claimant was not able to do. There is no evidence that Ms Massey did as the claimant alleges or that the claimant was treated differently or less favourably than others in the team. The team would do their best to honour appointments and clinics in order to ensure standards of service for patients. This was true across the board. Where there were unmanageable clashes, work would be reallocated to another nurse, if possible, to avoid a cancellation. As the claimant says, she could not be in two places at once. She could not simultaneously do two appointments. Therefore a solution would be found or an appointment would be cancelled or rearranged.

267. The Tribunal is not satisfied that the claimant's factual allegation is proven or that she was treated any differently or less favourably than others in the team. The detrimental treatment is not proven and nor is the allegation that she was treated less favourably than an appropriate hypothetical comparator. This allegation of direct discrimination therefore fails and is dismissed.

9(1)(h) Did HM try to get patients to complain about C by booking the most difficult service users with C? C says that HM encouraged patients to complain during the period January to September 2018. She says her allocated service users were more difficult because they were adults who were at risk to themselves or others (including children) and involved in substance misuse.

268. The Tribunal finds that this factual allegation is not proven. In line with our previous findings there was no deliberate allocation of more difficult patients to the claimant and no evidence that anyone encouraged complaints against the claimant (see e.g. paragraphs 161-165). The evidence, taken at its highest, would indicate that where patients expressed dissatisfaction, they would be 'signposted' to the relevant complaints procedure and left to take what steps they thought fit. Likewise, they would be able to use the PALS service where appropriate. This was not under the control or the direction of Ms Massey or anyone else within the team. It is the process and resource which would, rightly, be available to a dissatisfied patient who had been treated by any clinician within the respondent Trust.

269. In light of this there is no proven detrimental treatment and no less favourable treatment of the claimant than of a hypothetical comparator. This allegation fails and is dismissed.

9(1)(i) Did HM misrepresent complaints made by service users about the service as being complaints about C?

270. There is no evidence on which to basis this allegation and the Tribunal finds it not

proven. There is no evidence that Ms Massey misrepresented the position as alleged. The complaint therefore fails and is dismissed.

9(1)(j) Did HM fail to assist C to complete her induction training. C says this should have happened between January and March 2018 and that HM refused to take responsibility for the induction despite being line management.

271. The Tribunal found, based on the available evidence, that the claimant did in fact complete the induction training during the relevant period. Ms Massey was not the claimant's line manager at the relevant time but still made significant arrangements to facilitate the necessary induction training. The remainder of the training was arranged by others within the team, as appropriate given the prevailing line management structure. (See paragraphs 47-54 above).

272. The claimant's factual allegation is not proven. There is no basis on which to find that an appropriate hypothetical comparator would have been treated more favourably. The allegation therefore fails and is dismissed.

9(1)(k) Did HM fail to arrange C's appraisal and supervision?

273. In line with our findings of fact above we are satisfied that Ms Massey did carry out supervision with the claimant. Further, she tried to arrange the appraisal during the period July to August and then the claimant was removed from clinical practice (not by Ms Massey.) At that stage it would not be possible or reasonable to expect an appraisal to take place. As the claimant only started in employment in January 2018, an appraisal would not have taken place before the first six months of employment had been completed. The paper trail shows that Ms Massey tried to arrange the appraisal but was then unavailable to carry it out due to leave during August. This absence and unavailability had nothing to do with the claimant and would have been a problem whatever the name of the appraisee in question. Furthermore, when it became apparent that there would be a delay in Ms Massey being able to do the appraisal, steps were taken to get another appropriate manager to carry out the appraisal. (See paragraphs 79-89). This was not a 'failure' by Ms Massey to arrange the appraisal. Rather, arrangements were being made but the appraisal itself could not take place prior to the claimant's removal from clinical practice, for a variety of reasons. None of those reasons related to the claimant's disability. They related to the availability of appropriate individuals to do the appraisal during the relevant period of time.

274. In light of the foregoing, the claimant has failed to prove the alleged failings on the part of Ms Massey. Furthermore, the Tribunal is satisfied that an appropriate hypothetical comparator would have found themselves in the same situation for the same reasons.

9(1)(l) Did HM fail to sign off C's training?

275. The Tribunal was not taken to any evidence to substantiate this allegation. The allegation is not proven and the corresponding complaint of direct discrimination fails and is dismissed. To the extent that this is a reference to the MSc course,

our findings of fact address this in detail at paragraphs 105-111.

Direct discrimination conclusion

276. Following on from the above, it is apparent that the claimant has failed to prove the necessary facts to show that she was subjected to detrimental treatment as alleged or, if there was detrimental treatment, that there were facts from which we could conclude that a hypothetical comparator (without cancer disability or hearing loss disability) would have been treated more favourably than the claimant. The Tribunal was not, therefore, required to go on to consider the reason for the treatment in relation to any of the allegations. It was not necessary to consider whether the claimant had proved facts from which we could conclude that the treatment was because of the disabilities so as to shift the burden of proof to the respondent. In any event, the respondent presented solid and cogent evidence to explain why the claimant was treated as she was and that it was not disability related.

Section 26: disability related harassment.

277. The factual allegations for the harassment claim were identical to the allegations made in the direct discrimination claim. Our conclusions on the facts were therefore the same as set out in the preceding paragraphs. The factual assertions at paragraphs (a) to (l) were not proven as pleaded. There can be no finding that there was the alleged 'unwanted conduct' in those circumstances. Furthermore, none of the evidence surrounding these alleged events suggested that Ms Massey's behaviour in relation to these issues was 'related to' the claimant's disabilities.

278. The facts relating to these allegations, as found by the Tribunal, would also not have had the necessary purpose or effect as set out in section 26(1)(b) when taking into consideration, not only the claimant's own perception, but the other circumstances of the case and whether it was reasonable for the conduct to have that effect. Given the factual circumstances and the explanation for the events in question, it would not be reasonable for the alleged conduct to have the relevant effect as set out in section 26(1)(b).

279. The claimant's complaints of disability related harassment therefore fail and are dismissed.

Section 27: victimisation

280. It was accepted that the two ET1s presented by the claimant on 5 March 2019 and 20 June 2019 constituted protected acts for the purposes of the section 27 claim. The claimant asserted that there was a third protected act: *"Writing an email on 17 September 2018 making allegations about Ms Vernon."* The Tribunal looked in vain to locate said email in order to assess whether it constituted a protected act. The claimant was unable to show us this email and the respondent's solicitor had not seen it either. In those circumstances, we could not be satisfied that there was a third protected act for the purposes of the victimisation claim.

281. In terms of detriments in the victimisation claim, the claimant relied upon the same factual allegations as for the section 13 and section 26 claims. We therefore

repeat and rely on our earlier findings in relation to subparagraphs 9(1)(a) to (l).

282. Furthermore, the claimant would have problems establishing the necessary causation in relation to these detriments. All of the alleged detriments, even on the claimant's pleaded case, are said to have taken place during the course of 2018 and therefore predate the two protected acts in March and June 2019. It cannot be said that the claimant was subjected to detriments in 2018 because of protected acts which did not take place until 2019. This part of the victimisation claim would therefore fail in any event even if the claimant had been able to prove the alleged detrimental treatment (which she did not.)

283. The claimant added a further set of alleged detriments for the purposes of the victimisation claim at (i-ix) of paragraph 12 of the list of issues. We deal with each of them in the paragraphs which follow:

(i) Proceed with the disciplinary hearing in C's absence.

284. As set out above, we heard evidence that the disciplinary hearing did go ahead in the claimant's absence and the circumstances in which Ms Walsh made the decision to do so. The salient issue here is causation. Did this happen because the claimant had made claims to the Employment Tribunal? We explored the alleged causative link with the claimant during the course of the hearing. As we understand it, the claimant says that the respondent wanted to have the disciplinary hearing on the scheduled date because there was due to be a Tribunal hearing shortly thereafter and they wanted to use the events of the disciplinary hearing as 'ammunition.' As set out above, the claimant apparently did not understand what was due to happen at the Tribunal preliminary hearing (which had been listed for case management purposes.) Contrary to the claimant's perception, there would be no benefit to the respondent in getting the disciplinary hearing done before the Tribunal hearing. There was therefore no incentive for them to do so. On the other hand, we examined the respondent's reasons for pressing ahead in the claimant's absence. These included the uncertainty as to whether the claimant would attend a rescheduled hearing, the lack of explanation from the claimant to show that she could not attend on the due date and the length of time which had lapsed since the claimant had left employment with the respondent. In short, the claimant had a solicitor during the relevant period and the respondent had corresponded with that solicitor as requested by the claimant. They had no real explanation or justification as to why a postponement was required. The claimant had had ample time to consider the disciplinary documents and decide whether she intended to attend and participate. The process was taking place nearly 12 months after the claimant had left employment. The respondent was entitled to bring the process to a conclusion having given the claimant reasonable opportunities to make representations and attend a hearing.

285. Taking all of the above in the round, we are satisfied that the decision to go ahead with the hearing in the claimant's absence had nothing whatsoever to do with the protected acts and we make a finding to that effect based on the evidence before us. Furthermore, the respondent had sound reasons for going ahead in the claimant's absence and these reasons did not relate to the claimant's protected acts in any way. The necessary causal link between protected act and detriment has not been established and this complaint of victimisation must fail and be dismissed.

(ii) Not dealing with the capability matters under the capability policy and instead proceeding straight to a disciplinary hearing.

286. We considered the available evidence regarding the choice of internal procedure. We found that the allegations against the claimant could legitimately and correctly be categorised as conduct matters rather than capability matters given the circumstances of the case and the claimant's qualifications and experience. This was more a case of 'won't' than 'can't.' It is important to remember that the claimant was a medical professional of many years' experience and was working at a relatively senior level of the pay scale. The allegations included allegations in relation to the reliability and sufficiency of her clinical record keeping. This is a core function of a nurse and it is not reasonable to suppose that this should be viewed as a training issue. The respondent was entitled to conclude that such allegations, if proven, were not instances where the claimant was not aware of what good and safe clinical practice required (e.g. through lack of experience or training.) Rather, the respondent was entitled to consider that it was a conduct matter. In short, viewed objectively and looking at the terms of the respondent's internal procedures, the respondent had good reason to categorise the allegations as conduct rather than capability.

287. Furthermore, the Tribunal questions whether the use of capability procedures rather than disciplinary procedures would actually amount to subjecting the claimant to a detriment in the circumstances of this case. The choice is not between a 'conduct procedure' and 'no further action.' The respondent was entitled to take the claimant through a relevant internal procedure. Indeed, given the implications for safe clinical practice and patients, it would have been remiss of the respondent *not* to address the issues raised through an internal procedure and to take no action at all. Both a conduct and a capability procedure will have stages where investigation is required and formal hearings with the claimant would need to take place. A nurse could be dismissed or given warnings on capability grounds and not just conduct grounds. In a clinical context, a capability sanction could carry just as much stigma as a conduct one and could have far reaching consequences for future employment.

288. So, the Tribunal is satisfied that the respondent had good reason for choosing the conduct procedure and that the choice of procedure would not amount to subjecting the claimant to a detriment in all the relevant circumstances. Crucially, we are not satisfied that the choice of applicable procedure had anything at all to do with the relevant protected acts. Whether or not the claimant had brought Tribunal claims, the respondent would have had to address the issues raised as conduct and would have had to instigate a procedure to do so. The nature of the allegations dictated the choice of the procedure. There would be no incentive to use a conduct procedure just because the claimant was pursuing claims to the Employment Tribunal. We are satisfied that the respondent has established the reason for its conduct in this regard and that its reasons were completely unrelated to the protected acts.

289. In light of the foregoing, this complaint of victimisation fails and is dismissed.

(iii) The panel proceeding with the hearing in the claimant's absence in the knowledge that she had raised a serious allegation against Ms Vernon, but it chose to ignore that.

290. In line with our findings of fact above, the hearing went ahead in the claimant's absence for the reasons explained by the respondent's witnesses. There is nothing to suggest that Ms Walsh was actually aware of any allegations made against Ms Vernon at the time she made the decision to proceed in the claimant's absence. In any event, as set out above, there is no link between this decision and the protected acts. There was no reason to go ahead with the hearing without the claimant because she had made Tribunal claims. In essence the claimant's correspondence suggested that she did not need to attend a hearing after she had left employment and strongly suggested that she would not be doing so in any event.

291. In light of the above, this complaint of victimisation fails and is dismissed.

(iv) <u>The management side representative and the hearing panel were both aware of the claimant's hearing deficiency and gave no consideration to the actual adjustments required nor that it was up to the respondent to implement them.</u>

292. There was a distinct lack of clarity as to what the claimant was alleging in this regard. If the allegation relates to the disciplinary hearing and whether reasonable adjustments were required, then during the course of the Tribunal hearing this was not put to the relevant witnesses for the respondent. There was no suggestion that adjustments could and should be made for the claimant at the disciplinary hearing. The claimant did not indicate that these were needed in the run up to the hearing.

293. If the allegation relates to the respondent considering the need for reasonable adjustment when assessing the claimant's conduct, then there was nothing in the evidence available to them suggesting that a lack of reasonable adjustments was the reason for the claimant's conduct.

294. In any event, in order to constitute victimisation, the respondent's managers would have to have done this because of the claimant's protected acts. There was no evidence before the Tribunal to substantiate this. We were not satisfied that there was such a link.

295. In light of the foregoing this complaint of victimisation fails and is dismissed.

(v) <u>The hearing panel formed unreasonable and biased conclusions.</u>

296. Based on all the available evidence, the Tribunal is not satisfied that the hearing panel formed unreasonable or biased conclusions. The conclusions were grounded in the available evidence and were reasonably open to the hearing panel in all the circumstances of the case. Furthermore, the respondent actively gave the claimant the benefit of the doubt in concluding that a final warning would have the appropriate sanction rather than dismissal. In arriving at this conclusion the respondent was actively considering that the claimant may have had a different perspective to put forward had she been present to express it. We are not satisfied that the claimant has proven that she was subjected to the alleged detriment.

297. Furthermore, we are not satisfied that the hearing panel's conclusions were in any way influenced or caused by the claimant's Tribunal claims. The necessary link to the protected act is missing. The conclusions were firmly grounded in the

evidence presented to the respondent's panel. None of the witness evidence suggested that there was an ulterior motive for the panel's conclusions or that they were based on or in any way caused by the claimant's protected acts. We were satisfied that, even if the claimant had not brought Tribunal claims, the panel's conclusions would have been the same.

298. In the above circumstances this complaint of victimisation fails and is dismissed.

(vi) Referring the claimant to the NMC when it should not have done so.

299. For the reasons set out above, the Tribunal is satisfied that the respondent had good reasons for referring the claimant to the NMC and that this decision was based firmly on the evidence against the claimant arising out of the disciplinary process. Indeed the respondent would have left itself open to criticism had it failed to make the referral because the claimant had already left their employment. This would have raised further patient safety/safeguarding issues. The reasons for the referral are clearly evident in the body of the referral document itself. We are not satisfied that the protected acts were the reason for the referral. Rather, the substantive concerns were the reason for the referral, when taken alongside the respondent's duty of care to patients and the public. We do not accept that the respondent 'should not have' referred the claimant to the NMC as alleged in this part of the claimant's case.

300. For the reasons set out above, this complaint of victimisation fails and is dismissed.

(vii) Stating untruths when making the referral to the NMC

301. The Tribunal was unable to conclude that the respondent stated untruths when it made the referral to the NMC (as set out above). Furthermore, the respondent filled out the referral according to its genuinely held concerns about the claimant which necessitated the referral in the first place. We are not satisfied that the NMC referral was linked in any way to the protected acts. Rather, the concerns about the claimant's conduct were the sole reason for the referral.

302. The detriment and the causative link to the protected acts are not proven and so the complaint of victimisation must fail and be dismissed.

(viii) The referral letter to the NMC wrongly stated that the claimant refused to engage in any supervision, any support or mediation to resolve her issues in the workplace.

303. The referral letter did not state what the claimant alleges in this part of her case. The factual allegation of detriment is not proven. There is no link between the content of the referral and the fact that the claimant had brought Tribunal claims. The referral was based on the respondent's assessment of the claimant's actions. Thus the complaint of victimisation must fail and be dismissed.

(ix) Substantially the same false accusations were made by HM in an interview to the NMC investigation, as summarised in a three page report from Shadae Riley of the NMC dated 12 April 2022

304. As set out above, we have seen no evidence of what Ms Massey said in the NMC interview and we have not seen Shadae Riley's report. We are unable to find that this detriment was proved on the facts. Thus the complaint of victimisation must fail and be dismissed. The issue of causation cannot sensibly be addressed in such circumstances.

Victimisation conclusions

305. In light of the foregoing, none of the claimant's complaints of section 27 victimisation succeed.

Constructive dismissal

306. There is no evidence to suggest that the claimant had more than two years' qualifying service. In those circumstances, the claim for constructive unfair dismissal could only succeed if it was an act of disability discrimination (section 108 Employment Rights Act 1996).

307. In seeking to establish a constructive dismissal the claimant relied on the same allegations which made up the allegations of direct discrimination (a) to (l). As set out above, the allegations were not proven as pleaded and no finding of discrimination has been made in relation to any of them. We are not satisfied that any of the matters proven in this case amounted to a breach of the implied term of mutual trust and confidence. In particular, it cannot be said that the respondent acted 'without reasonable and proper cause' in its dealings with the claimant.

308. We were also not satisfied that the respondent breached the duty to provide a safe working environment, given the facts as found.

309. We were not persuaded that there was a fundamental breach of contract in this case which could found a claim of constructive dismissal. The claimant resigned. She was not constructively dismissed.

310. In any event, in the absence of any discriminatory element in the matters alleged to constitute the constructive dismissal, this complaint would have to be dismissed due to the claimant's service with the respondent for less than two years.

Reasonable adjustments

311. We first considered whether the claimant had established the relevant PCPs set out at paragraph 14 of the list of issues.

312. We accepted that, on occasions, the claimant would be expected to work in an open plan office which could be noisy due to the presence of other employees. We were not satisfied that this would be so all the time as it was not clear that 7 or 8 teams of employees worked in the same location and we were satisfied that the claimant's own team were not all present in the office all of the time (they worked at clinics for example.) However, we were satisfied that the PCP at paragraph 14(a) was established.

313. The majority of ADHD duty work came in via email but we accept that some of it would involve taking phone calls which could be from difficult and challenging patients. We were satisfied that the PCP at paragraph 14(b) was established.

314. We accept that the claimant would need to take notes during a patient

assessment. Indeed that would be a core part of her job role. The PCP at paragraph 14(c) was established.

315. Thus, the three PCPs in the claimant's case were established to the Tribunal's satisfaction.

316. We went on to consider whether the claimant was put at the substantial disadvantage alleged at paragraph 15 of the list of issues in relation to the PCPs.

317. The claimant asserts in the list of issues that she suffered pins and needles as a result of cancer treatment and that this made writing difficult. The difficulty with this is an evidential one. We were not directed to any evidence that the claimant did suffer pins and needles or that it made writing difficult. We were not satisfied that this disadvantage was established on the evidence before the Tribunal.

318. The claimant asserts that the noise levels in the office made it difficult for the claimant's hearing aids to work effectively (paragraph 15(b)). We accept that, on occasion a noisier working environment may well impact on the effectiveness of the hearing aids or otherwise make it harder for the claimant to hear those people she was listening to. We were satisfied that the disadvantage referred to at paragraph 15(b) was established in this case.

319. The claimant asserts that when using the duty phone the claimant found that she often had to ask patients to repeat themselves so that she could hear what they were saying effectively and they could become angry start shouting at her. This is to some extent substantiated by the contents of the Occupational Health report [980]. (Some of the claimant's evidence was to the contrary, however.) On balance, we were satisfied that the claimant did suffer the disadvantage at paragraph 15(c) in relation to the PCPs.

320. The claimant asserts that the open plan office was noisy and affected her ability to hear. This much is accepted and is linked to our findings in relation to paragraph 15 (b) of the list of issues. However, she also asserts that she found her appearance arising from cancer treatment caused her anxiety and that during treatment she had a lower white blood cell count and had an increased vulnerability to infection. Evidence to support the issues around her appearance and the blood cell count was not presented by the claimant. The Tribunal is not satisfied that working in the open plan office had the relevant impact on the claimant's anxiety or vulnerability to infection. This element of paragraph 15(d) is not established.

321. We then turn to consider the issue of knowledge as regards the PCP element of the reasonable adjustments claim. We have to consider at what point the respondent knew or ought to have known of the disability *and also* at what point they knew or ought to have known that the established PCPs put the claimant at the relevant substantial disadvantage.

322. The Tribunal has already concluded that the respondent did not know and could not reasonably have been expected to know of the claimant's hearing impairment until July 2018. The actual or constructive knowledge of the disability does not predate July 2018.

323. The claims for reasonable adjustments and auxiliary aids relate to the period January to September 2018, when the claimant was at work as a Band 7 nurse. Whilst the respondent was alerted to the claimant's hearing difficulty in July 2018,

they did not know what aspects of the role or working environment would put her at a substantial disadvantage so as to trigger the duty to make reasonable adjustments and/or provide auxiliary aids. The respondent sought to get Occupational Health advice and guidance as to the impact of the hearing loss and the areas where adjustments should be made. They sought to access the report produced as a result of the claimant's self-referral but the claimant refused them access to it. From July to the beginning of October the respondent was without any guidance as to the likely substantial disadvantage suffered by the claimant and the adjustments and aids which could improve the position for the claimant. This was not the respondent's fault as they tried to get this information and guidance as soon as they were alerted to the issue.

324. The information and guidance to allow them to evaluate adjustments etc only came to light on or about 5 October when the Occupational Health report was forwarded to management as a result of the management referral. By the time the managers saw this medical evidence and guidance, the claimant had already been removed from clinical practice such that the need for adjustments/aids was suspended. Only if and when the claimant returned to her substantive role would the adjustments and aids become relevant or meaningful.

325. The actual impact of that hearing loss on the claimant's work was not revealed until the second Occupational Health report was disclosed. Prior to that point the respondent could only go off what the claimant herself had said about the impact of the PCPs and the disability on her ability to work. At the supervision meeting in July 2018 the claimant specifically said that she was not having problems on the phone and that her hearing aids made Winscribing easier. The respondent was entitled to rely on what the claimant herself said to them about this subject.

326. In those circumstances the Tribunal is not satisfied that the respondent had either actual or constructive knowledge that the PCPs in question put her at the relevant substantial disadvantage until October 2018, after the claimant had left the workplace. The respondent had asked for the claimant's input and had tried to get specialist advice but that specialist advice was not released to the respondent because the claimant had not provided the necessary consent. In those circumstances we cannot conclude that the respondent had constructive knowledge when the claimant herself had prevented the respondent from getting the information and guidance it was asking for.

327. In such circumstances, the duty to make reasonable adjustments in relation to the PCPs was not triggered during the period when the claimant was actually in the workplace. The earliest date that the respondent came under the duty to make reasonable adjustments was after the claimant had already left the workplace where the adjustments were to be made. This part of the reasonable adjustments claim must therefore fail at this stage.

328. In any event, the claimant contends that the respondent should have provided an office/less noisy workspace to make it easier to hear and hold conversations over the phone. However, we are not satisfied that the respondent would reasonably have to take the steps requested to alleviate the disadvantage in any event. The claimant had access to a more private, quieter work space in the form of Dr Mason's office. She was able to use this in order to alleviate her hearing difficulties, as required. She had a mobile phone which could be taken out of the open plan office into a quieter environment. She was not restricted to using a landline phone at a desk in the open plan office. Furthermore, she spent a good part of her working time out at clinics where this particular issue was not,

apparently, a problem. Effectively the respondent had already provided this adjustment as part of the claimant's normal working arrangements.

329. Furthermore, the claimant did have a personal laptop and phone with dictation software. There was nothing to indicate to the respondent that any further adaptations to the software were necessary during this time as the claimant said that she was able to Winscribe. The earliest that the respondent could have known to implement further measures to assist with dictation was upon receipt of the Occupational Health report in October 2018.

330. We then proceeded to address the reasonable adjustments claim pursued in relation to 'auxiliary aids (section 20(5).)

331. At paragraph 16 of the list of issues we were required to consider whether the lack of auxiliary aids put the claimant at a substantial disadvantage as compared to those persons who are not disabled.

332. The Tribunal was satisfied that the claimant was provided with a personal laptop from March onwards. Up to that point she had access to the spare unassigned laptops. We did not consider that the absence of a personal laptop would put the claimant at any particular or substantial disadvantage as compared to the non-disabled employee.

333. Likewise, the claimant was provided with a phone. To that extent she had the auxiliary aid. The only difficulty that the use of the phone presented was some difficulties with background noise. In any event, the claimant was able to use the phone in Dr Mason's quieter office if required. Alternatively she would be working remotely from the shared office in any event (e.g. in clinics.)

334. If the relevant aspect of the auxiliary aid in this part of the claim was the provision of hearing assistance software/applications, the Tribunal can accept that the claimant would find it easier to operate speaking and listening devices which had been adapted to deal with hearing loss. The absence of this aspect of the auxiliary aid would put her at a substantial disadvantage. However, the evidence we heard suggested that the claimant had told the respondent that she was able to use Winscribe (and was doing so) even without special adaptations. It may be that what the claimant was telling the respondent was not true. However, if this *was* true it undermines the suggestion that the absence of adaptive software caused the claimant to be put at a substantial disadvantage as compared to the non-disabled person. The Tribunal was not wholly convinced that the claimant, based on her own evidence, was at a substantial disadvantage in the absence of hearing assistance software on the phone.

335. It was not entirely clear to the Tribunal exactly how a Roger pen/nova pen worked but we understand that it could assist in dictation or hearing in noisy environments. We can see that this would make life easier for someone with a hearing impairment although, for the reasons already stated, we are not altogether clear that she was at a substantial disadvantage without one.

336. However, even assuming that the absence of auxiliary aids *did* put the claimant at the relevant substantial disadvantage, the issue of knowledge is, once again, important. In order for the duty to provide the auxiliary aid to be triggered, the respondent has to have actual or constructive knowledge of the disability *and* actual or constructive knowledge of the substantial disadvantage. The respondent did not know of the hearing impairment until July 2018. Given the non-release of the earlier Occupational Health report and the substance of the

claimant's own communications with the respondent, the respondent did not have actual or constructive knowledge of the substantial disadvantage related to the lack of the auxiliary aid until October 2018, after the claimant had left the workplace. Any duty to provide the auxiliary aid was therefore not triggered until October and so the respondent cannot be liable for a failure to provide this at an earlier stage.

337. Indeed, even when the Occupational Health report was disclosed it did not mention all of the disadvantages that the claimant now relies on (e.g. anxiety due to her appearance.). The claimant did not make up for the absence of the Occupational Health guidance by suggesting to the respondent that she was disadvantaged in the manner alleged. Indeed, at the meeting on 2 July 2018 the claimant reassured Ms Massey and Dr Mason that no adjustments were needed pending provision of the Occupational Health report. The claimant then refused to disclose the first Occupational Health report.

338. In any event, we have considered the reasonable adjustments that the claimant argues for and make the following observations. She suggests that a less noisy and busy workspace should have been provided to help her hear and hold conversations on the phone. However, the evidence from the respondent was that the claimant had access to Dr Mason's individual office (as required) when she needed somewhere quieter to work. We also note that she was often working in clinics away from the main office. There was no evidence that these locations were particularly noisy or that the claimant struggled to hear in those environments. It appears, therefore, that in substance, the respondent had already made the adjustments contended for by the claimant even though they had no occupational health evidence to assist them. The claimant did have a personal laptop and mobile phone and she did have Winscribe for dictation. She did not have any adaptation to Winscribe but had suggested that she was using Winscribe and that there were no barriers to her using Winscribe. It does not appear that the claimant actually needed any further adaptations to Winscribe or phone than had already been provided. The claimant had access to landline telephones too. There was no suggestion that adaptive technology could or should be added to landline telephones or that this was needed. A mobile phone can, of course, be moved into a quieter environment, if required.

339. The Roger pen/Nova pen was not mentioned until the October Occupational Health report. It is not something that one would necessarily expect the respondent to be aware of in the absence of expert guidance.

340. In light of the foregoing (particularly the absence of the relevant knowledge during the relevant period of time) we conclude that the claimant's claim for reasonable adjustments/auxiliary aids must also fail and be dismissed.

CONCLUSION

341. None of the claimant's complaints of discrimination have succeeded. In those circumstances we are not called upon to determine the jurisdictional issues concerning time limits. We do not need to address whether any of the claims were presented outside the applicable time limit or whether it would be just and equitable to extend time to allow the claims to be heard.

Employment Judge Eeley
Date 11 April 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
27 April 2024

FOR THE TRIBUNAL OFFICE

Notes

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/