



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. David Ford

**Respondent:** Amber Care East Anglia Limited

**Heard at:** Lincoln

**On:** 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> & 21<sup>st</sup> January 2019  
11<sup>th</sup> March 2019 (in Chambers)

**Before:** Employment Judge Heap

**Members:** Mr. A Beveridge  
Mr. M Pavey

## Representation

**Claimant:** In person

**Respondent:** Mr. J Carter - Counsel

# RESERVED JUDGMENT

1. The Claimant's complaint of constructive unfair dismissal fails and is dismissed.
2. The Claimant's complaints of direct discrimination relying on the protected characteristic of disability fail and are all dismissed.
3. The Respondent was not in breach of the duty to make reasonable adjustments and the complaints of a failure to make reasonable adjustments therefore fail and are dismissed.
4. The complaints of discrimination arising from disability also fail and are dismissed.

# REASONS

## BACKGROUND & THE ISSUES

1. This is a claim brought by Mr. David Ford (hereinafter referred to as "The Claimant") against his now former employer, Amber Care East Anglia Limited (hereinafter referred to as "The Respondent") presented by way of a Claim Form received by the Employment Tribunal on 2<sup>nd</sup> May 2017. There was also a duplicate Claim Form issued in the Watford Employment Tribunal. Those claims

were consolidated to be heard together. Originally, the proceedings were also pursued against a second Respondent, J&S Clarkson, as a result of some confusion as to who the Claimant's employer had been. That was resolved and the complaint against J&S Clarkson withdrawn (see pages 31A and 32 of the hearing bundle). As such, the claim proceeded against the current Respondent only.

2. The claim is one of constructive unfair dismissal contrary to Section 95 Employment Rights Act 1996 and of discrimination relying on the protected characteristic of disability. Those discrimination complaints are made up of direct disability discrimination, discrimination arising from disability and a failure to make reasonable adjustments. All claims are resisted by the Respondent, although by the time that the matter came before us it was conceded that at the material time with which the discrimination complaints are concerned, the Claimant was a disabled person within the meaning of Section 6 Equality Act 2010 by reason of depression with underlying symptoms of emotional unstable personality traits.

3. Following submission of the ET3 Response Form, the matter came before Regional Employment Judge Swann for a Preliminary hearing in August 2017. Amongst other things, he Ordered the Claimant to provide further information about the claims that he was bringing (see pages 31C to 31E of the hearing bundle). The Claimant submitted detailed replies in response to those Orders (see pages 44 to 59 of the hearing bundle) and we have considered those carefully as part of our determination of the claim.

4. The matter thereafter came before Employment Judge Britton for a further Preliminary hearing on 2<sup>nd</sup> November 2017 (see pages 59A to 61 of the hearing bundle). He Ordered the Respondent to file an Amended Response in reply to the further information that the Claimant had provided and identified the discrimination complaints being pursued as ones of discrimination arising from disability and a failure to make reasonable adjustments. As we have observed above, however, there is also before us a complaint of direct disability discrimination.

5. There was thereafter a further Preliminary hearing before this Employment Judge on 25<sup>th</sup> May 2018 (see pages 60 to 66 of the hearing bundle). At that stage, the full merits hearing had been due to take place in Nottingham but as a reasonable adjustment to accommodate the fact that the Claimant rarely leaves the house and could not travel to Nottingham, the hearing was moved to Lincoln Magistrates Court for the claim to be heard. Due to a limitation on the availability of hearing rooms for the Tribunal in Lincoln, it was not possible to list the hearing on seven consecutive days of hearing time. The hearing therefore took place over split periods on 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 21<sup>st</sup> January 2019. As it transpired, the breaks in the proceedings were of good use as they gave the Claimant the opportunity of a rest from the hearing process and also afforded him additional time to prepare cross examination questions and to read documentation given that we discovered on the morning of day three of the hearing that the Claimant had not, in fact, read the majority, if indeed any, of the documents in the hearing bundle.

**THE HEARING**

6. As we have already touched upon above, the claim was originally listed for 7 days of hearing time which took place 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 21<sup>st</sup> January 2019.

7. The first morning of the hearing had been intended to be a reading morning with the hearing then commencing at 2.00 p.m. The Tribunal's Orders had been clear as to when the bundles and witness statements that we were to spend time reading into should have been delivered. Regrettably, the Respondent's solicitors failed to comply with that direction with the result that the bundles did not arrive until 1.20 p.m. on the first day of the hearing. The parties were therefore notified that they should not attend on 7<sup>th</sup> January 2019 and we spent the remainder of the day after their arrival reading into the papers. We heard an explanation from Mr. Luke Hutchings, the solicitor acting for the Respondent, on the morning of the second day of the hearing. Although not entirely satisfactory, we accept that the circumstances that led to the late delivery of the hearing bundles were beyond the control of Mr. Hutchins who had chosen to follow rather unfortunate guidance from a recently centralised administration team within his firm.

8. We also observed to the Respondent that the way in which the hearing bundles had been put together was somewhat unhelpful with many pages being duplicated and others having at least two different page numbers in different places and some having as many as three. Depending upon which number had been used, many of the references to page numbers in the witness statements that we had read were not to the document featuring at that particular page. We agreed with the parties that during the hearing we would refer to the typed rather than handwritten numbering system and to be clear upon which document a particular witness was in fact referring to in their evidence. The references in this Reserved Judgment, therefore, are also references to the typed page numbers contained within the hearing bundle.

9. At the outset of the hearing and so as to assist the parties, but particularly the Claimant given that he appeared as a litigant in person, we set out a list of the issues that the Tribunal would need to determine in relation to this claim. We do not rehearse those matters here as a copy of that agreed List of Issues is appended to this Reserved Judgment.

10. That List of Issues was discussed with the parties and the Claimant was content that that recorded accurately the complaints that he was advancing. That included, as we have already touched upon above, complaints of direct discrimination. We had discerned the content of the draft List of Issues from the further information provided by the Claimant following the Orders made by Regional Employment Judge Swann to which we have already referred above.

11. Mr. Carter who appeared on behalf of the Respondent expressed surprise as to the inclusion of the third complaint under the heading of discrimination arising from disability, although he accepted that the essence of that complaint was in fact contained within the Claimant's further and better particulars. However, that gave rise to an issue as to whether the Respondent was advancing any argument that any unfavourable treatment made out was a proportionate means

of achieving a legitimate aim (commonly referred to as a justification defence). Mr. Carter confirmed that to be the case and that the Respondent relied on a legitimate aim of the protection of service users and other members of staff.

12. We also raised with the parties the fact that it was inevitable that there would have to be reference to service users and also members of their family during the course of the evidence and within this Reserved Judgment but to protect the identity of those individuals, we have referred to them at all time by the use of initials only.

13. It was also discussed at the outset of the hearing that with regard to certain of the discrimination complaints, the Respondent contended that the Employment Tribunal had no jurisdiction to entertain them as the Claimant had presented them outside the appropriate statutory time limit provided for by Section 123 Equality Act 2010. That only affected a small part of the claim as we explained to the Claimant during the hearing and we invited evidence and submissions with regard to those particular matters.

14. During the course of the hearing, we made further adjustments in order to assist the Claimant. That included delaying the commencement of the hearing on one of the days of hearing time for personal reasons to the Claimant which it is not necessary to record here; providing the Claimant with the ability to have a quiet area when we were not sitting so that he could read and review documentation; providing breaks for the Claimant so that he could gather his thoughts and prepare and concluding the hearing early on 14<sup>th</sup> January 2019 when the Claimant told us that he was unable to continue that day.

15. We also attempted to assist the Claimant, insofar as it was permissible for us to do so, in order to ensure that he was placed on as equal footing as possible with the Respondent who was represented by Counsel. That was particularly the case in respect of cross-examination, where on occasion it became necessary for us to assist in formulating the questions to be put to the witnesses on the Claimant's behalf.

16. We should also observe that a further issue arose as to the content of a transcript of a covert recording that the Claimant had taken of a meeting with Dawn Whitt of the Respondent on 24<sup>th</sup> August 2016. The Respondent's solicitors had helpfully produced a transcript earlier in the proceedings but the Claimant told us during the course of the hearing that having now looked at it, he did not agree that it was accurate. He therefore produced at our request an amended transcript with highlighted sections denoting changes that needed to be made. Mr. Carter was happy to proceed on that amended document, which features at 834 to 867 of the hearing bundle and it is that document therefore which we have had reference to in respect of that particular meeting. We did not hear the recording itself nor any other of the covert recordings that the Claimant had taken and the Claimant told us that from his point of view it was not necessary that we did so.

17. Unfortunately, there was insufficient time available at the conclusion of the evidence and submissions for the Tribunal to deliberate and make a decision. We therefore identified and notified the parties of a further date when we would conclude our deliberations and reach a decision. Regrettably, as a result of the availability of the Judge and members, the Tribunal could not meet in Chambers

to deal with our decision until 11<sup>th</sup> March 2019. The Judge therefore apologises to the parties for the delay in them receiving this Reserved Judgment.

### **WITNESSES**

18. During the course of hearing, we heard evidence from the Claimant on his own behalf.

19. In addition to hearing evidence from the Claimant, we also heard from a number of individuals on behalf of the Respondent. Those individuals were as follows:

- Dawn Whitt – Area Manager for the Respondent;
- Dawn Goodwin – a Care Assistant for the Respondent;
- Jill Bailey – an office Administrator for the Respondent;
- Emma Palmer – a nurse employed by the Respondent; and
- Jodie Knights – a Care Assistant employed by the Respondent.

20. We make our observations in relation to matters of credibility in respect of each of the witnesses from whom we have heard below.

21. In addition to the witness evidence that we have heard, we have also paid careful reference to the documentation to which we have been taken during the course of the proceedings and also to the helpful submissions made by the Claimant and Mr. Carter on behalf of the Respondent.

### **CREDIBILITY**

22. One issue that has invariably informed (although certainly not solely determined) our findings of fact in respect of the complaints before us is the matter of credibility. Therefore, we say a word about that matter now.

23. We begin with our assessment of the Claimant. Ultimately, we found him to be an unsatisfactory witness. Whilst we did consider the Claimant to be attempting to give us a genuine account, it is clear that he is a very poor historian. For example, in his cross examination of Jill Bailey it was clear that questions asked were designed to obtain an account of what had actually happened on 19<sup>th</sup> January 2017 because the Claimant himself could not recall much if anything about certain events. He had no clear recollection of a number of key events. His account changed in several aspects such as accepting in his closing submissions after hearing evidence from Emma Palmer and Jodie Knights that he had used the term “serial bullshitter” and that despite his prior position being that he contended that there was a plot to remove him from employment, he accepted that that was not the case when cross examined and that, in fact, it was obvious that the Respondent could have taken many earlier opportunities to instigate disciplinary proceedings against him.

24. We have no doubt that the Claimant genuinely perceived that he was treated poorly and unfavourably by the Respondent but that is not rooted in fact. Ultimately, it is clear to us that the Claimant has convinced himself of events and perceived treatment and appears to place a different interpretation on matters to that which is obvious on the face of documents and other evidence. A number of the allegations that he makes – for example of continuous changes being made

to his shifts or being placed on shifts which made it difficult to attend group therapy sessions simply do not stack up when the documentary evidence is scrutinised. Indeed, insofar as shift changes were concerned the Respondent did its level best, as we shall come to, in order to accommodate the Claimant. Of the continuous changes to shifts that the Claimant contended occurred, only two were able to be identified (and then that was largely by Mr. Carter) and the Claimant accepted that on neither of those occasions had he actually worked the shift in question. Equally, the Claimant's contention that Dawn Goodwin had suggested that he was receiving preferential treatment simply was not borne out by a proper and objective consideration of the evidence on that point.

25. Whilst we accept that the Claimant sought therefore to give us a genuine account, he was not a reliable witness and the evidence that he gave was more often than not unsupported by the documentary or other witness evidence to which we were taken.

26. We turn then to consideration of the Respondent's witnesses. We begin with Dawn Whitt who we considered to be both credible and reliable. Her evidence accorded with her witness statement and the documentation before us and we considered her to be candid in her responses to questions asked of her during the course of that evidence. She was also prepared to make concessions that things could perhaps have been done better and it is clear from the documentary evidence before us that she had a history of being extremely supportive of the Claimant.

27. We also considered Emma Palmer, Jill Bailey and Jodie Knights to be credible and reliable witnesses. Again, their evidence accorded with the documentation before us and, insofar as Ms. Bailey and Ms. Knights were concerned, there was very little challenge to their evidence from the Claimant during cross examination.

28. We also took into account in respect of Ms. Palmer's evidence that she gave good explanations for areas of challenge from the Claimant. For example, when it was put to her that she and the Claimant would often have lengthy chats at work at the time of handovers, Ms. Palmer was able to explain to us in detail why that could not have been the case because she would not have had time to have a lengthy conversation with the Claimant as he had suggested at the end of her shift and then still have time to travel the necessary distance to collect her daughter from childcare. Moreover, it is clear that the Claimant and Emma Palmer had a good working relationship given that she supported him by providing a character reference in respect of a criminal case against him which we deal with below.

29. However, we did not find Dawn Goodwin to be an impressive witnesses. Her responses during cross examination were very defensive and although there was a clear history of problems with the Claimant which we shall come to below, we did not glean the impression that her presentation as a witness resulted from any fear or being intimidated in the presence of the Claimant. We considered it more likely that given the events of 18<sup>th</sup> January 2017, there is simply no love lost between the Claimant and Ms. Goodwin. We considered her evidence as to the fear of threat from the Claimant at the time of their 18<sup>th</sup> January altercation to be exaggerated. For example, she said that she had perceived a high level of threat in her evidence but that was not apparent from her statement given at the time of

the incident nor was there any reference within that statement given immediately after 18<sup>th</sup> January that the Claimant had said that he was going to “get her”.

30. Whilst she said in cross examination that she recalled that being said, there were a considerable other number of matters which she could not recall at all. We consider it highly likely that the “get her” comment was something that Ms. Goodwin is attributing to the Claimant having said directly to her, when in fact it was something that he said to others at the time. It may be in this regard that Ms. Goodwin is mis-recalling events but given that discrepancy and the tendency for what we consider to be exaggeration in her account, we considered her neither particularly credible nor reliable.

### **THE LAW**

31. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

#### **Discrimination relying on the protected characteristic of disability**

32. The Claimant’s discrimination complaints all fall to be determined under the Equality Act 2010 (“EqA 2010) and, particularly, with reference to Sections 13, 15, 20, 21 and 39.

33. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

*(1) An employer (A) must not discriminate against a person (B)—*

*(a) in the arrangements A makes for deciding to whom to offer employment;*

*(b) as to the terms on which A offers B employment;*

*(c) by not offering B employment.*

*(2) An employer (A) must not discriminate against an employee of A’s (B)—*

*(a) as to B’s terms of employment;*

*(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*

*(c) by dismissing B;*

*(d) by subjecting B to any other detriment.*

*(3) An employer (A) must not victimise a person (B)—*

*(a) in the arrangements A makes for deciding to whom to offer employment;*

*(b) as to the terms on which A offers B employment;*

*(c) by not offering B employment.*

*(4) An employer (A) must not victimise an employee of A’s (B)—*

*(a) as to B’s terms of employment;*

*(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;*

*(c) by dismissing B;*

*(d) by subjecting B to any other detriment.*

*(5) A duty to make reasonable adjustments applies to an employer.*

*(6) Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—*

*(a) unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or*

*(b) if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.*

*(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—*

*(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);*

*(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.*

*(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.*

34. Section 13 EqA 2010 provides that:

*“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”.*

35. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (see **Wong v Igen Ltd [2005] ICR 931**).

36. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

37. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.



38. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomura International Plc [2007] IRLR 246**:

*“‘Could conclude’ ..... must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of ..... discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory ‘absence of an adequate explanation’ at this stage .... the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like..... and available evidence of the reasons for the differential treatment.*

*The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.”*

39. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**.)

### **Discrimination arising from Disability**

40. Section 15 provides for the circumstances in which discrimination arising from disability will occur and provides as follows:-

“(1) A person (A) discriminates against a disabled person (B) if:-

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

41. There is no requirement in a Section 15 complaint for there to be identification of a comparator. All that is required is that the Claimant is able to show unfavourable treatment, in that regard some detriment, and further that there are facts from which it can again be established that that unfavourable treatment was in consequence of something arising from disability.

### **Failure to make Reasonable Adjustments**

42. Section 20 EqA 2010 provides that:

*“(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.*

*(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*

*(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

*(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.*

*(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—*

*(a) removing the physical feature in question,*

*(b) altering it, or*

*(c) providing a reasonable means of avoiding it.*

*(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—*

*(a) a feature arising from the design or construction of a building,*

*(b) a feature of an approach to, exit from or access to a building,*

*(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*

*(d) any other physical element or quality.*

*(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.*

*(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.*

*(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.”*

43. Section 21 provides that:

*"(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) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise”.*

44. It will therefore amount to discrimination for an employer to fail to comply with a duty to make reasonable adjustments imposed upon them in relation to that disabled person (paragraph 6.4 of The EHRC Code).

45. However, the duty to make reasonable adjustments will only arise where a disabled person is placed at a substantial disadvantage by:

- An employer's provision, criterion or practice ("PCP").
- A physical feature of the employer's premises.
- An employer's failure to provide an auxiliary aid.

46. A PCP "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions" imposed by the employer (paragraph 6.10 of The EHRC Code).

47. Matters resulting from ineptitude or oversight on the part of the employer will not, however, amount to a PCP (see **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley UK EAT 0417/11**).

48. The duty to make reasonable adjustments only arises insofar as an employer is required to take such steps as it is reasonable to take in order to avoid the substantial disadvantage to the disabled person. A Tribunal is required to take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

### **The EHRC Code**

49. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

### **Time limits in discrimination claims**

50. Section 123 provides for the time limit in which proceedings must be presented in "work" cases to an Employment Tribunal and provides as follows:

*"(1) Proceedings on a complaint within section 120 may not be brought after the end of—*

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

*(b) such other period as the employment tribunal thinks just and equitable.*

*(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*

*(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section—*

*(a)conduct extending over a period is to be treated as done at the end of the period;*

*(b)failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a)when P does an act inconsistent with doing it, or*

*(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*

51. Therefore, Section 123 provides that proceedings must be brought “*within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable*”.

52. For the purpose of those provisions, conduct which extends over a period is to be treated as done at the end of that period and the failure to do something is to be treated as occurring when the person in question decided upon it. Therefore, in the event of conduct which extends over a period, time will not begin to run until the last act done in that period. The appropriate test for a “continuing” act” is whether the employer is responsible for an “an ongoing situation or a continuing state of affairs” in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (**Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**).

53. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to consider whether it is “just and equitable” to allow time to be extended and the complaint to proceed out of time.

54. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and should have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**).

55. In considering whether to exercise their discretion, a Tribunal must consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.

- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

56. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. However, the burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 EqA 2010.

### **Constructive Unfair Dismissal**

57. A dismissal for the purposes of Section 95 Employment Rights Act 1995 includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

58. Tribunals take guidance in relation to issues of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA** and, particularly, the following:

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”*

59. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always be repudiatory by its very nature.

60. Where an employer discriminates against an employee, then those acts of discrimination may of themselves represent a breach of the implied term of mutual trust and confidence.

61. However, not all incidents of discrimination will be repudiatory breaches of contract entitling the employee to terminate the contract and treat themselves as dismissed. A finding of unlawful discrimination will not inevitably of itself mean that the employer has breached the implied term of mutual trust and confidence (**Amnesty International v Ahmed 2009 ICR 1450**).

62. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee are only

relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

63. Where an employee relies on an act of the employer as being the “last straw” that act might amount to a relatively minor incident and need not of itself amount to a breach of contract. However, whilst the final straw may be relatively insignificant in respect of the overall conduct of the employer it must not be utterly trivial or innocuous, even if the employee does not view it as such (see **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA** and **London Borough of Waltham Forest v Omilaju 2005 IRLR 35.**)

64. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no extraneous reasons for the resignation, such as them having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon.

65. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703.**)

66. It is possible for an employee to waive (or acquiesce to) an employers breach of contract by their actions. In those circumstances, an employee will affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

### **FINDINGS OF FACT**

67. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before us. The relevant findings of fact that we have therefore made against that background are set out below.

68. The Claimant was, at the material time with which this claim is concerned, a registered nurse of some years standing. We have no doubt that the Claimant was dedicated to his profession and saw it as a vocation or a calling and much more than merely a job. The Claimant was at all times required to abide by the standards contained within the Nursing & Midwifery Council (“NMC”) Code. A copy of the Code appears at page 773 to 790 of the hearing bundle. It is not in dispute that if an employer considers that a relevant member of its staff has breached the Code, then they are required to report that fact to the NMC.

69. The Respondent runs a number of care homes which we understand to be country wide. One of those care homes is Stewton House which is based in Louth in Lincolnshire. It is at Stewton House that the Claimant was employed in his capacity as a nurse between 21<sup>st</sup> August 2007 and 31<sup>st</sup> January 2017. Between January 2008 and August 2010 the Claimant worked on a bank basis whilst he undertook other work with Humberside Police but he returned to working regular hours for the Respondent in August 2010. Many of the Respondent’s residents are vulnerable individuals and some are receiving end of life treatment.

70. The Claimant's evidence before us was that the culture of Stewton House made it, at best, an unpleasant place to work. We do not accept that evidence. The evidence of Jill Bailey when asked about that in cross examination by the Claimant was to the contrary and the suggestion was not put to any other witnesses. That alleged culture is also not supported by the fact that it was clear that Dawn Whitt particularly went out of her way to try and assist and accommodate the Claimant and was often thanked by him for doing so. Furthermore, it is clear that colleagues were supportive of the Claimant, including Emma Palmer who, as we shall come to later, gave a character reference in support of him during a criminal trial.

71. The Claimant was provided with a statement of main terms and conditions of employment (see pages 67 to 69 of the hearing bundle) which was updated from time to time, most notably as to his hours of work.

72. The Respondent operates a basic disciplinary procedure, a copy of which is contained in the hearing bundle at pages 75 to 78. That procedure permits suspension of employees in appropriate cases whilst disciplinary investigations are ongoing.

73. It is common ground that the Claimant suffers from depression with underlying symptoms of emotional unstable personality traits. We are satisfied that the management team at the Respondent had been aware of that position for the vast majority, if indeed not all, of the Claimant's employment (see for example page 122 of the hearing bundle).

74. We accept the evidence of Dawn Whitt that it was the Claimant's practice to note when the effects of his condition began to manifest themselves and to notify the Respondent accordingly. That would involve removing himself from the working environment if he felt that his condition required it. Dawn Whitt, particularly, therefore relied on the Claimant to notify her if he felt that his condition was affecting him at work and that her expectation was that he would then, as he always had, remove himself from work until his condition improved. It was the evidence of Dawn Whitt that when the Claimant experienced problems with his depression he would become quiet and withdrawn and that characterised the start of problems for him. The Claimant agreed with that assessment and it is also evidenced by views of other members of staff, notably BE, within a later disciplinary process.

75. The Claimant had, as a result of his disability, taken several spells of ill health absence. There is no evidence before us that the Respondent at any time considered the Claimant's ill health absences to be an issue. No capability process was ever initiated or even threatened in respect of those absences and Dawn Whitt's view was that those were simply part and parcel of the Claimant's mental health condition and did not pose any problem. There is also evidence before us that other managers had taken a similarly supportive approach in respect of the Claimant's medical condition, time off and accommodations in respect of hours of work and the like that he sought as a result (see for example pages 83 and 85 of the hearing bundle).

76. The Claimant describes one aspect of his personality as being sarcastic. He is also, by our own observation, somewhat forthright or blunt and both at the hearing and in communications with the Respondent that we have seen has a



tendency to swear. None of that has anything to do with his disability. The Claimant himself accepts such traits and that that often has an impact (see for example page 169 of the hearing bundle as to his remarks about his conduct at a Magistrate's Court hearing).

77. The nature of the operations undertaken by the Respondent obviously require that there are sufficient carers and nurses on shift to attend to the needs of the residents. We accept the evidence of Dawn Whitt that issues such as sickness and annual leave sometimes create issues with the rotas which mean that other members of staff have to be asked to step in and cover shifts. We accept that the majority of staff are asked to do so by telephone but the Claimant's preference was for email communication and therefore on the occasions that the Respondent needed to ask the Claimant to cover any additional shifts or to change shift, that would occur by email in line with his preferences (see for example pages 108 and 179 of the hearing bundle).

78. The Claimant made his preferences for shifts known on such occasions (see for example pages 174 and 175 of the hearing bundle) and there is no evidence before us that those preferences were not accommodated by the Respondent (see for example the reply of Karen Archer at page 180 of the hearing bundle).

#### Complaints against the Claimant

79. During the course of his employment, the Claimant was subject to a number of complaints by staff and by residents/their families (see for example page 110 of the hearing bundle). It appears to us that that is something of an occupational hazard and the Claimant himself was aware on occasions of when complaints might be made and made reference to those matters to the Respondent.

80. We come to the main complaints which occurred during the Claimant's employment below.

#### Harassment conviction

81. On 23<sup>rd</sup> April 2015 the Claimant notified the Respondent that he had been arrested for what he referred to as alleged stalking and harassment. That notification was sent to Karen Archer and Dawn Whitt. The Claimant's email, which appears at pages 114 and 115 of the hearing bundle, noted that the complainant was a relative of a former resident of Stewton House.

82. Dawn Whitt replied to the Claimant's email the following day (that being the date when he had said that he would next be checking his emails) in a supportive manner and suggested a meeting to discuss the situation. The Claimant had himself indicated that he had expected the need for a meeting in his original email.

83. During discussions about the Claimant's arrest, he also advised the Respondent that he had become addicted to codeine and that he also used cannabis. The Claimant later corrected the NMC as to use of the latter substance, which he said was incorrect as he no longer used cannabis and had not for some years, but he accepted that the reason for that inaccuracy lay with him as a result of his emotional state at the meeting with Ms. Whitt (see page 133 of the hearing bundle).

84. As a result of those matters, we accept that the Respondent was obliged to make a report to the NMC and that was done by the then Area Manager, Dawn Whitt (see pages 121 to 128 of the hearing bundle). By that stage, Ms. Whitt was the Area Manager but had previously undertaken a spell as the Manager of Stewton House so she had knowledge of, and previous involvement with, the Claimant.

85. The Claimant takes no issue with that course and accepts that the referral needed to be made. The content of that referral is of note. It is in our view supportive of the Claimant. Additional information was provided by Ms. Whitt to say that no complaint had been made by the family of the former resident at the time; that there was no reason to suggest that the Claimant had taken any medication from Stewton House; that his General Practitioner ("GP") had been contacted and felt that there was no risk at that time and the opinion of Ms. Whitt that the Claimant had been open and honest with the Respondent about the allegations and his medical issues. That information, it is clear, was designed to pre-empt concerns that the NMC might have in respect of the Claimant given the content of the report and was designed to be supportive of him.

86. Ms. Whitt's referral also said this:

*"He [the Claimant] has a history of depression which he did declare on application form and apart from a few episodes of sickness has not affected his role as a nurse".*

87. The inclusion of that statement and, in particular, underlining of the word "not" makes it clear that the Respondent certainly had no issue at that stage with the Claimant's disability nor the time that he needed to take off work as a result of it.

88. The referral also made it clear that it was being done for information only and that there were no concerns about the Claimant's fitness to practice (see page 124 of the hearing bundle).

89. The position of Ms. Whitt continued to be supportive of the Claimant, including in respect of him needing time off as a result of the stress that he was under, and the Claimant himself thanked Ms. Whitt for her stance in communications sent at the time (see for example page 132 of the hearing bundle). The then Home Manager, Karen Archer, was similarly supportive of the Claimant as page 138 of the hearing bundle demonstrates.

90. On 23<sup>rd</sup> July 2015 the Claimant informed Karen Archer and Dawn Whitt that he had been charged by the police with harassment (see page 153 of the hearing bundle). The Claimant kept the Respondent informed about those matters, including that there might have been a suggestion that he had been abusive towards the complainant's relative at the time that he was a resident of Stewton House (see page 156 of the hearing bundle). Again, there was nothing other than support for the Claimant from Ms. Whitt particularly (see for example her email to the Claimant of 9<sup>th</sup> September 2015 timed at 16.06 at page 157 and 158 of the hearing bundle).

91. On 14<sup>th</sup> October 2015 the Claimant emailed Dawn Whitt and Karen Archer to tell them that he had been convicted of harassment the previous day but that he intended to appeal that decision. Again, the position of Dawn Whitt was nothing

other than supportive for the Claimant. She made it clear to the NMC that the Respondent felt that his conviction had no bearing on his abilities as a nurse and that they were “100% behind” the Claimant and that they were happy for him to continue to undertake his shifts (see page 168 of the hearing bundle).

92. The Claimant was subsequently the subject of a conditional discharge in relation to the harassment proceedings and after sentencing the NMC again wrote to Dawn Whitt on 6<sup>th</sup> January 2016 seeking an employment reference to assist with their investigations. Ms. Whitt replied on 25<sup>th</sup> January 2016 (see page 201 of the hearing bundle) following her return from annual leave. Again, the response was supportive of the Claimant and made it clear that the Respondent had no concerns around his fitness to practice.

93. It was clear from the evidence before us that the Claimant had anticipated being dismissed by the Respondent and struck off by the NMC as a result of his conviction (see for example pages 145 and 168 of the hearing bundle). The Respondent at that time was already aware of the Claimant’s mental health condition and he had taken at least one period of ill health absence the previous year (see pages 90 to 92 of the hearing bundle). It appears to us that if the Respondent genuinely wanted to dismiss the Claimant because of his mental health condition and/or his absences, his conviction for harassment would have been the perfect opportunity to do so.

94. Indeed, the Claimant anticipated that he would be dismissed and we would observe that the case did generate some negative press attention. It would have been open to the Respondent for example to have dismissed the Claimant at that stage on the basis that his actions could have brought Stewton House into disrepute or caused a damage to the business. That was not least given the complainant’s relative had been a former resident at Stewton House. The Respondent did not dismiss the Claimant, however, and in our view could not have been more supportive. Not only was the communication to the NMC extremely supportive but another nurse, Emma Palmer, also gave a statement in support of the Claimant’s character for use in the criminal proceedings.

#### December 2015 communications

95. On 16<sup>th</sup> December 2015 Dawn Whitt sent an email to the Claimant. It was a perfectly reasonable email making an enquiry about whether he was able to cover a shift. It was no different to any of the previous emails sent to the Claimant on the subject of shifts that we have already referred to above. The relevant part of the email said this:

*“I am happy to do the 24<sup>th</sup> and the 1<sup>st</sup> unless anyone else volunteers, however the 27<sup>th</sup> is my daughters birthday so I am looking to see if anyone can help, ???? any chance you can??? I know it’s a big ask, any of the nights would be welcome, as I said, you would be able to sleep once the meds are complete and you would be paid the full waking night shift.*

*Will leave you to think about it”.*

96. The Claimant replied on 21<sup>st</sup> December 2015. Although as we understand it he sees nothing wrong in his reply we are not surprised that Ms. Whitt was upset and offended by it. It was in hugely inappropriate terms, particularly in view of the

support that Ms. Whitt had offered to the Claimant. It contained profanity, implied that Ms. Whitt was not genuinely ill and just wanted to take time off to coincide with Christmas and made obscure references to the death of his father. Ms. Whitt replied later the same day. Whilst that email made clear that she was not particularly impressed with the Claimant's email (something that she was perfectly entitled not to be) her reply was measured and professional in tone. No action was taken or even proposed in respect of the email when the content of what the Claimant had written could well have led to consideration of a disciplinary sanction.

97. Dawn Whitt also continued to be supportive of the Claimant's position in her communications with the NMC in January 2016 to which we have already referred above.

98. The referral went before Case Examiners at the NMC who concluded that there was no case to answer and that was communicated to the Claimant and to the Respondent on 13<sup>th</sup> May 2016.

#### Complaint to the NMC in February 2016

99. A further complaint was made to the NMC about the Claimant in February 2016. That came directly from the relative of a service user (see pages 202 to 203 of the hearing bundle) who we shall refer to as JH. We understand the nature of that complaint was in the main regarding a Facebook post that the Claimant had made and was accompanied by a press article about his conviction for harassment. No further action was taken by the NMC in respect of that complaint and it was dealt with by the Respondent informally (see page 204 of the hearing bundle).

100. Again, it is plain to see that Ms. Whitt was again extremely supportive of the Claimant's position in respect to the complaint by JH as her emails at pages 207 and 208 amply demonstrate. Again, that approach is not in keeping with the Claimant's contention that it was his mental health condition and/or absences because of the same which led the Respondent, on his case, to seek to remove him from employment. If that had been the case, the JH complaint would no doubt have been another opportunity to seek to discipline the Claimant. However, again no such approach was taken.

#### The Claimant's suspension in March 2016

101. By March 2016, Karen Archer had left employment as the Home Manager at Stewton House and had been replaced by a new manager. We shall refer to her as LH given that criticisms have been made of her in these proceedings which it is necessary for us to refer to but we have not heard from her as to her position on the validity of those matters.

102. The view of Ms. Whitt before us was that LH was not necessarily a good fit for Stewton House.

103. On 11<sup>th</sup> March 2016, LH wrote to the Claimant suspending him from duty. That was followed up by a letter three days later informing the Claimant that an investigation had commenced "into matters which may lead to disciplinary action" and calling him to an investigatory interview. The only details of the allegation set

out was “allegation of abuse to service user”. The letter was poorly and insufficiently worded. It gave the Claimant no details whatsoever of what the alleged abuse was and we have no doubt that it would have come as both a shock and a matter of extreme concern to the Claimant. That part of the process was very poorly handled and the Claimant had only very scant details of what it was that he was being accused of. The Claimant raised that position with LH by email on 14<sup>th</sup> March. Ms. Whitt replied to say that the allegation was based on a complaint of verbal abuse of a service user but again the Claimant was not provided with any further detail even at that stage (see pages 218 and 219 of the hearing bundle).

104. The nature of this complaint transpired to be that a resident, JW, had made a complaint that the Claimant had acted inappropriately towards her. The basis of the allegation was that it was said that the Claimant had called JW “despicable”, had taken one and a half hours to make a cup of tea and told her that she had no friends.

105. The Claimant contends that he should not have been suspended over that allegation as it was common ground that JW was a serial complainant such that it was noted in her care plan and carers had been instructed only to deal with her in two’s because of her propensity to make allegations. There is no evidence of any other member of staff having been suspended or investigated in respect of allegations made by JW previously. However, we accept the evidence of Dawn Whitt, who as Area Manager had an overview of the process, that the allegations made against the Claimant on this occasion were more serious and more specific than the generic complaints that had been made against other staff members previously. We have considered carefully whether to accept that evidence given that there are no documents to support the nature of the earlier complaints made and Ms. Whitt’s evidence was that those issued would have been recorded in the relevant care records. Those records have not been disclosed as part of these proceedings.

106. Similarly, whilst we have a copy of the Claimant’s nursing record relating to the events in question, the record of another member of staff who witnessed the exchange between the JW and the Claimant (and who we shall refer to as “BE”) have also not been disclosed or otherwise made available to us. That is important as it is the Claimant’s position that the records of himself and BE would have matched and shown from the get go that there was no substance to the complaint. Indeed, as we shall come to BE did not support JW’s version of events when later interviewed.

107. Whilst that lack of disclosure is of concern to us, we nevertheless accept the truth of Ms. Whitt’s evidence that the reason for suspension for the Claimant was the more specific and serious nature of the complaint that JW had made and that it was viewed as necessary to protect both the Claimant and residents for the suspension to take place whilst the matter was investigated. Indeed, the Claimant accepted himself that even if JW had made a thousand complaints it would still be necessary to investigate complaint 1001 in case there was something in it. That echoed the position of the Claimant at the time as shown by the footnote to his letter to the Respondent at page 242 of the hearing bundle.

108. LH dealt with the investigation and initially met with BE on 16<sup>th</sup> March 2016. Page 236 of the hearing bundle records that BE during that meeting did express

some concerns about the way in which the Claimant had dealt with JW. BE had been asked to put her account into a written statement but when she had done so she had not included any reference to her concerns about the way in which the Claimant had acted with regard to his interactions with JW.

109. LH therefore met again with BE to ask her to clarify the position on her account of what had occurred between the Claimant and JW. That further meeting took place on 24<sup>th</sup> March 2016. At that meeting it was made clear by BE that she did not support JW's allegation but she did express a view that the Claimant may have acted in a way which was intimidating to JW because of her stature, the way in which he had communicated with her and the fact that she had been close to tears (see page 236 of the hearing bundle). We do not accept the Claimant's contentions that that further meeting was effectively designed to find a damning account against him. It would be natural in our view if what BE had said during the meeting on 16<sup>th</sup> March 2016 was not recorded in her statement, for that to be clarified.

110. We would observe that it is more usual, in our experience, for the notes of investigatory interviews to be prepared by the Respondent and then sent to the interviewee for signature rather than having the witness or complainant prepare their own statements. That approach might well have avoided the need to revisit matters with BE on 24<sup>th</sup> March. However, we accept from the evidence of Emma Plummer that that is the way that the Respondent approaches matters with the emphasis on staff preparing their own statements after concerns have been reported.

111. In addition to meeting with BE, LH also met with the Claimant for an investigatory interview. Following those meetings, the Respondent wrote to the Claimant calling him to a disciplinary hearing scheduled for 5<sup>th</sup> April 2016. That was short notice given the date on which the Claimant was sent the letter and he understandably requested a postponement of that hearing. Dawn Whitt replied the following day to confirm that the hearing would be rescheduled.

112. The letter inviting the Claimant to a disciplinary hearing was clearly a standard letter (see page 331 of the hearing bundle). It provided for the possibility of a range of sanctions, including dismissal, and a reference to whether the Respondent could continue to have any confidence in the Claimant as an employee. The letter also set out that the disciplinary hearing was to be conducted by LH and another member of staff who we shall refer to as LP. Both of those individuals had conducted the investigation against the Claimant and clearly therefore should not have also been undertaking the disciplinary hearing given that they had found after that investigation that there was a case to answer. Whilst we accept the evidence of Dawn Whitt that there was no one else at Stewton House to undertake the hearing given that she needed to be preserved to deal with any appeal, it was a far from satisfactory state of affairs that LH and LP were undertaking both the investigation and the disciplinary hearing. Nevertheless, we accept that that would be the process for all such disciplinary matters, not just that involving the Claimant.

113. The Claimant relied to Dawn Whitt's letter to say that he did not intend to participate in the disciplinary hearing and was seeking advice. He set out his responses to the allegations in writing on 6<sup>th</sup> April 2016 (see pages 255 to 258 of the hearing bundle).

114. The Respondent wrote to the Claimant to rearrange the disciplinary hearing for 12<sup>th</sup> April 2016 (see page 261 of the hearing bundle) and in reply the Claimant again confirmed that he would not be attending. The hearing therefore went ahead in the Claimant's absence and the outcome was communicated to him on 12<sup>th</sup> April 2016 by Dawn Whitt. The decision was that the Claimant was to be issued with a verbal warning for a period of six months and the relevant part of the letter dealing with the reasons for that said this:

*"The allegations substantiated in that case were:*

- *That your non verbal manner towards service user, JW, was considered to be intimidation – this was evidenced by statement from BE however the company has taken into account the stress you have been under in this last year and the added pressure the service user, with a known history of being very demanding and targeting staff".*

115. The Claimant is very critical in these proceedings of the decision of LH to accept BE's word over his. We are satisfied, however, that that was a decision open to the Respondent on the evidence before them at the stage of the disciplinary hearing. Particularly, the Claimant had told another member of staff that he expected to be called into the office after the incident with JW, which supported the view that something was amiss.

116. Moreover, there was never any suggestion that BE had any axe to grind with the Claimant and we note of course that she did not support the allegations made by JW. It was a matter of her perception as to the Claimant's interaction with JW and she provided an account of why she had felt that the Claimant had acted in a way that might have been seen as intimidating. There was in short no reason for the Respondent to disregard what BE had said orally on the first occasion that she was asked about the incident and as is later recorded at page 236.

117. The letter made reference to the Claimant's right of appeal against the outcome and also again to the fact that a GP report would be beneficial. In respect of that latter point, on the same date Dawn Whitt wrote to the Claimant separately enclosing a consent form so as to obtain a medical report on his condition.

118. The Claimant acknowledged receipt of the letters the following day and indicated that he would discuss the consent form with his GP at his next appointment. In fact, he never returned the consent form.

119. In the same email he self certified himself for seven days with anxiety. Thereafter, the Claimant submitted a Statement of Fitness to Work ("Fit Note") for two weeks ending on 3<sup>rd</sup> May 2016 (see page 275 of the hearing bundle) and then further Fit Notes until 17<sup>th</sup> May 2016, 31<sup>st</sup> May 2016 and 27<sup>th</sup> July 2016.

#### Appeal against the decision

120. The Claimant exercised his right of appeal against the imposition of the verbal warning and set out the grounds of that appeal on 8<sup>th</sup> June 2016 (see page 289 of the hearing bundle). Dawn Whitt dealt with that appeal. She did so without a hearing and dismissed the appeal in a letter to the Claimant of 15<sup>th</sup> June 2016.

121. There clearly should have been an appeal hearing in these circumstances. We accept the evidence of Dawn Whitt that she chose not to hold one because the Claimant was still off sick and he had not attended the disciplinary hearing. Whilst that might be so, the Claimant was still entitled to an appeal hearing and he should have been offered the opportunity to attend one. Whilst Ms. Whitt may have acted with the best of intentions, if she had met with the Claimant at this stage it may have obviated the need for his later grievance given that, when Ms. Whitt met with him at that stage she realised that the evidence was such that the warning should be rescinded. If she had met with the Claimant for an appeal hearing, she might well have realised that much sooner and it would have prevented the situation where the Claimant ended up being out of the workplace – either on suspension or sick leave – for a number of months.

### The Claimant's Grievance

122. On 29<sup>th</sup> July 2016 the Claimant submitted a lengthy formal grievance to Dawn Whitt. In essence, the grievance concerned the disciplinary process and outcome which had seen the imposition of the verbal warning. On this occasion, Ms. Whitt sensibly sought to make arrangements to meet with the Claimant to discuss the grievance. That grievance meeting took place with Dawn Whitt on 24<sup>th</sup> August 2016. We would question of course the logic of Ms. Whitt dealing with the grievance given that it concerned on the whole the disciplinary sanction that had been imposed and in respect of which she had dismissed the Claimant's appeal.

123. However, we accept her evidence that there was no more senior manager to refer the matter to because the next level above Area Manager is the owner of the business and he or she does not become involved in matters of this nature. Whilst it appears to us unwise to have such a structure that constrains independent review of earlier decisions in this regard (for example who would the Claimant have been able to appeal the grievance outcome to) it transpired not to be problematic on this occasion as Ms. Whitt decided that the warning should be rescinded and that the Claimant should receive the sum of £600.00 as a good will gesture (see pages 331 and 332 of the hearing bundle). The reason for rescinding the warning was on the basis that having gone through the call bell monitor with the Claimant, Ms. Whitt realised that the time line of events may not have been correct and it would not have been possible for the Claimant to have withdrawn from the interaction with JW as Ms. Whitt had previously believed that he could and should have.

124. By this time, LH had left employment and a new Home Manager, who we shall refer to as FS, had been appointed and part of the grievance outcome referred to the Claimant's request to have regular meetings with FS following his return to work and to discuss any problems that he was encountering.

125. Whilst the Claimant says that he had expected some formal structure to the meetings, we are satisfied that that was not what was envisaged at the time and that the matter was dealt with by the Claimant having an informal catch up with FS as and when the need arose. There is nothing to suggest that the informal process was detrimental in any way to the Claimant and we note that he did not complain about any failure to hold meetings before the course of these proceedings. Indeed, emails from the Claimant such as that at page 382 of the hearing bundle which he sent to FS evidence that there were catch ups or



opportunities for catch ups where any issues or concerns could be discussed. None of the many emails from the Claimant made reference to meetings having been refused or a lack of access to management for discussion on issues of concern.

126. The Claimant says that there was a refusal at the grievance meeting to obtain a medical report from his GP. We do not accept that there was any refusal in that regard. The Claimant's position at that meeting was that he was fit to resume work. Ms. Whitt trusted his judgment on that as she had previously. The matters that had caused the stress were to be resolved by the grievance outcome and the Claimant had never returned the consent form which Ms. Whitt had sent to him previously to obtain that report. Although the Claimant contended in evidence before us that he had the completed form in his bag at the grievance meeting, we do not accept that.

127. If he had, there is no reason why he would not have handed it to Ms. Whitt and, in all events, his evidence ran contrary to an indication he later gave to the NMC that he had never signed a consent form (see page 543 of the hearing bundle) and a similar comment that he made to the Respondent in a letter sent after the termination of his employment (see page 570 of the hearing bundle). As far as Dawn Whitt was concerned, matters had been resolved and the Claimant was able to return to work. As such, we accept that there was no further need for a medical report.

### Shifts

128. On 13<sup>th</sup> September 2016 the Claimant notified FS that he was well enough to return to work but that he did not wish to be put on any shift with BE. That was as a result of her involvement as a witness in the earlier disciplinary proceedings concerning JW but also as he said that he had heard from other staff that BE often cancelled shifts at short notice because of childcare issues. He referred to BE as a problem that he could do without (see page 359 of the hearing bundle).

129. FS replied the following day to confirm that BE was not on shift. In the same email she also said the following:

*"We have also had a problem covering a late shift on Friday and have had to do some juggling around. I have managed to cover the night shift nurse for Thursday night that was your shift with BNA<sup>1</sup>. Therefore I have swapped your shift to a Friday late, where Emma will be assisting from 6pm. I have spoken to Dawn who has said she will ensure you do not lose out through less hours."*

130. The Claimant replied on 14<sup>th</sup> September 2016 to say that he could not work the Friday late shift. He set out that the late shift would commence only two hours after a psychiatric group therapy appointment which may result in him having to telephone in sick at short notice; the time that it took him to recover from night shifts meant that mixing days and nights in the same week might "lead to problems"; that a late shift and a night shift left him three hours short of his contracted 20 hour working week and that he would like to work in the future two consecutive night shifts per week. He suggested that if that was not possible, there should be a meeting to discuss the matter.

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<sup>1</sup> We understand that BNA is an agency used by the Respondent.

131. The Respondent replied to say that the Claimant should attend on the Thursday night as previously planned and that the agency cover would be cancelled. We accept the evidence of Dawn Whitt that often the agency could supply workers for certain times but not others and in those circumstances it would be necessary to have to look to swap shifts around. That is what we find happened on this occasion.

132. However, the Claimant did not work the shift on Friday and worked instead the original shift on Thursday night that had been previously scheduled.

133. The Claimant took exception to the email from FS and the change of shift. It is true that it is perhaps a different approach from earlier emails regarding shift changes when the Claimant had been more specifically asked to agree the changes, but FS was of course a different manager.

134. He therefore wrote to FS again on 15<sup>th</sup> September 2016 complaining about that state of affairs and the fact that he considered it unreasonable to rearrange his shifts at short notice.

135. FS replied the following day. The relevant parts of that reply said this:

*“You have been deemed fit to return to work without any restrictions by a doctor. Therefore shifts have been allocated according to your contractual hours.*

*As you can appreciate the shifts are allocated to all staff according to the needs of the business. As per your contact you were allocated 20 hours per week.*

*It was only that we were unable to cover the afternoon shift today that we amended the off duty. As stated in my email I spoke to Dawn Whitt who explained that you would not lose any hours because of the change.*

*I would expect any staff working at Stewton House to present for their shifts even after attending an appointment unless as previously stated there are medical conditions/restrictions placed by a clinician.*

*Going forward I expect that all staff understand the needs of the home and work together to ensure shifts are covered.*

*I am concerned regarding your issue working with another member of staff as this cannot be accommodated.*

*As you can appreciate managing an off duty is a difficult task without managing staff members who have issues together.*

*As a team we will all at some point have issues with each other. I expect that we support each other and manage relationships in a professional manner.*

*Therefore your off duty will be completed with the needs of the home in mind unless there is any correspondence from your GP. I will ensure your shifts are together for either days or nights”.*

136. As to concerns about working with BE, the Claimant accepted that rota's were very difficult to plan (and he had first hand experience of having prepared them in the past) and there were added complications for shifts for the Claimant as both his present partner and his ex-wife were also employed at Stewton House.

137. The Claimant replied to FS on 18<sup>th</sup> September 2016. Amongst other things, he made reference to the Respondent having consent to request a written explanation from his GP, although he did not forward any completed consent form which, as above, he said that he had already filled in before the grievance meeting. The Claimant said that he would discuss the issue of day shifts with his GP at his next appointment on 2<sup>nd</sup> November but asked the Respondent to let him know if anything was required in writing before that point.

138. FS replied the following day to indicate that she would await confirmation from the Claimant's GP regarding shift allocation but that it was her position that it was not necessary for the Respondent to request that but for the Claimant to supply such evidence if he wanted to put forward a case for any particular shifts. The Claimant never supplied any evidence from his GP in that regard.

139. However, on the basis of the evidence before us the Claimant was never instructed to attend on a different shift (or indeed even asked to do so) nor did he ever have to attend or was he allocated a shift following a group therapy session. Indeed, as we shall come to below the Respondent continued to accommodate the Claimant with regard to changes to shifts that he wanted to make.

140. Later that same month, there was a meeting between the Claimant and FS at which she offered him the opportunity to undertake an NVQ qualification with a view to taking on management duties. That itself supports the fact that meetings were taking place between FS and the Claimant.

141. The Claimant emailed FS on 4<sup>th</sup> October confirming that he did wish to undertake that qualification. Although that never came to fruition, we accept the evidence of Dawn Whitt that the reason for that was an issue with regard to funding for the qualification and that was not rectified before the Claimant terminated his employment with the Respondent.

142. Within the same email, the Claimant also made reference to wanting to again undertake day shifts, which was in stark contrast to the position that he had set out in his email of 18<sup>th</sup> September 2016.

143. On 26<sup>th</sup> October 2016 the Claimant emailed FS seeking to change his shift which he had been due to undertake the day before a psychiatric appointment. Contrary to the Claimant's suggestion that no one else was ever asked to change their shifts, the Claimant himself suggested that another specific member of staff could be asked to cover or that other staff who were working shifts over the weekend could be asked by the Respondent to swap shifts with him. Within a matter of hours, FS confirmed to the Claimant that another member of staff could swap his shift with him. The Claimant replied to thank FS and to confirm that if that member of staff was, in his words, abducted by aliens then he would come in to work the original shift anyway.

5<sup>th</sup> November 2016 email

144. On 5<sup>th</sup> November 2016 the Claimant emailed FS regarding changes that appear to have been proposed to the start and end times of night shifts. In his email he made reference to whether he might be better returning to day shifts or reducing his hours to one night shift per week and making up the shortfall in his wages with work elsewhere. He asked to meet FS to discuss.

145. There is no reply from FS to that email nor have we seen any evidence of a meeting. We have not heard from FS given that we understand that she has left employment with the Respondent in circumstances where it would be undesirable to have asked her to attend this hearing. We draw our own conclusions from that and the evidence of Ms. Whitt that she would not re-employ her. It appears in that regard that FS left under something of a cloud and we do not draw any adverse inferences from the failure to call her to give evidence in these proceedings, not least where on the whole Ms. Whitt is able to assist us on the vast majority of issues in the claim.

146. It may be that there was a discussion about the matter between FS and the Claimant or it may be that the matter was overlooked (given that around that time FS broke her leg) but it is noteworthy that the issue was not raised again by the Claimant which might well suggest that some resolution was reached and we note that there was a later email exchange between the Claimant and FS on the subject of hours of work on 19<sup>th</sup> December 201 (see page 381 and 382 of the hearing bundle).

147. The issue of shifts and working hours again arose on 10<sup>th</sup> January 2017 when the Claimant emailed FS saying that he was going off sick because of depression and that he wanted to reduce his hours to 14 hours per week over two day shifts and that he no longer wanted to work nights. The Claimant referred to past experiences in the National Health Service that had made him aware that mixing day and night shifts did not suit him and that tallied with his evidence before us that when he had trained as a nurse some 20 years ago he had found a switch from days to nights or vice versa problematic.

148. The Claimant was only once, on the evidence before us, asked to work a mix of day and night shifts in the same week after this point. However, the Claimant never in fact worked that shift.

149. The Claimant also referred to issues with regard to a shift over the weekend of 7<sup>th</sup> January 2017 and we deal with that matter separately below.

Concerns regarding Staff Nurse FA

150. On 7<sup>th</sup> November 2016 the Claimant informed the Respondent that he felt that there was a difficulty with the language skills of a staff nurse, FA, and that this put patients at risk. The Claimant says that it is noteworthy that FA was not suspended or investigated but that he had been suspended for the allegations concerning JW and was later also suspended for other matters to which we shall come in due course.

151. We are satisfied from the evidence of Dawn Whitt that the Claimant's concerns were considered but viewed to be unfounded. In all events, the circumstances of those concerns and the issues for which the Claimant was suspended were entirely different and not therefore remotely comparable.

#### The shift on 7<sup>th</sup> January 2017

152. On 7<sup>th</sup> January 2017 the Claimant completed an early shift and found himself as the only nurse on shift. We accept that that was because of problems with sickness and annual leave. The Claimant had been made aware that the Deputy Manager, Nicola, was available if there were any difficulties at all and the Claimant had her contact details.

153. As it was, there was a need to replace a syringe driver for a resident. The Claimant was not trained in that procedure. However, it is common ground that when the Claimant contacted Nicola she attended Stewton House within five minutes and completed the procedure and then stayed to assist the Claimant with the drugs run. The Claimant noted in his email to FS of 10<sup>th</sup> January 2017 that he would in future require another nurse on all early shifts with him. He had primarily previously undertaken night shifts which were quieter and where he had been the only nurse on duty. As such, prior to this point the Respondent had not been aware that the Claimant objected to being the only nurse on duty.

154. There is no evidence before us to suggest that the Claimant ever had to complete another early shift as the only nurse on duty.

#### Events of 17<sup>th</sup> January 2017

155. On 17<sup>th</sup> January 2017 there was an altercation between the Claimant and the relative of a resident nearing the end of her life. We shall refer to the relative as SR.

156. We accept the evidence of the Claimant that he had encountered SR as she entered a darkened office and had been surprised to see her there. In view of concerns from the Care Quality Commission about visitors accessing Stewton House the Claimant challenged SR about what she was doing there. We are satisfied that SR told the Claimant to fuck off more than once and that he perceived her to be aggressive and perhaps under the influence of drugs or alcohol. It is likely that SR also said something along the lines of that she had heard all about the Claimant.

157. The Claimant remained in the office and was giving consideration to calling the police as a result of the incident and the fact that he did not know at that stage who SR was. Before he could do so, another member of staff, Emily, entered the office and told the Claimant who SR was and that she was a relative of a resident who was in room 12 of Stewton House.

158. The Claimant thereafter went to check the visitors book to see if SR had signed in. We accept the evidence of Dawn Whitt that although visitors are asked to sign in, the Respondent cannot in practice force them to do so. The Claimant then went to room 12 to confront SR about whether she had signed the visitors book. She said that she had done so and the Claimant went to get the visitors book and asked SR to identify her signature which she refused to do. The

Claimant did establish however that she had signed in but matters again became heated with SR again telling the Claimant to fuck off.

159. The Claimant reported those matters to FS the following day. That was by way of an email with a statement at the foot of the same describing the incident. It is fair to say that that description is unfortunately rather florid with, amongst other things, the Claimant referring to SR as a “rancid woman” and a “gone to seed Sandy Toksvig”. We did not accept the Claimant’s evidence before us that the reason that he had done that was so that SR could be easily identified. Quite aside from anything else, the Claimant knew exactly who SR was because Emily had told him moments after the initial exchange. We find it much more likely that the reference was intended as a sarcastic slight towards SR because the Claimant was angry about the way that she had spoken to him.

160. The Claimant ended his statement by indicating that he had been told by another member of staff that SR was a friend of a Care Assistant at Stewton House, Dawn Goodwin, and that he believed that Dawn Goodwin had told SR about him having recently having reduced his hours. The Claimant’s evidence was that that was likely the reason for SR having said that she had heard all about him. It appears likely that Dawn Goodwin did discuss something with SR about the Claimant’s hours of work given the content of a later statement from SR which refers to her having complained to Ms. Goodwin about the Claimant and Ms. Goodwin having commented that she was unlikely to see the Claimant again because he only worked one or two shifts a week (see page 446 of the hearing bundle).

161. It is clear to us that the altercation with SR led to something of a downward spiral with the Claimant’s anger over the incident coming to the fore in respect of further interactions with others over the course of the following days. We deal with those matters further below.

#### Incident with Dawn Goodwin on 18<sup>th</sup> January 2017

162. On 18<sup>th</sup> January 2017 Dawn Goodwin reported to the Respondent that the Claimant had approached her and shouted at her about telling her best friend (a reference to SR) about his personal life and shift patterns and that he would be making a complaint about her.

163. The Claimant denies that that was the case. He says that there was no shouting and that it was in fact Dawn Goodwin who was at fault for smirking at him.

164. Ultimately, although we had reservations over the credibility of the evidence of Dawn Goodwin and consider that her account before us was somewhat exaggerated as to the fear that the Claimant caused her, we find that it is more likely than not that the Claimant did approach Dawn Goodwin and raise his voice at her regarding his interaction with SR. We say that on the basis that he was undoubtedly incensed about what SR had said to him as his description of her as a “rancid woman” clearly evidenced. Moreover, the fact that he felt animosity towards Dawn Goodwin at that time was also clear from a later exchange that the Claimant had with FS the following day where it does not appear to be in dispute that he referred to Ms. Goodwin as a “haggard old bitch”. The fact that the Claimant had his exchange with Ms. Goodwin when they were alone and he was

standing at the top of the stairs shouting down at her would not, we accept, have been a pleasant experience and there is perhaps little wonder that Ms. Goodwin complained to the Respondent about what had occurred.

165. We have no doubt that the Claimant perceived that Dawn Goodwin had been smirking at him and also that he believed that she had been talking to SR about him behind his back. We did not accept Dawn Goodwin's evidence that she had not made any mention of the Claimant to SR given a statement which SR later gave to FS which made reference to Dawn Goodwin having told her that the Claimant only undertook one or two shifts per week and also Ms. Goodwin's own evidence that she knew that SR had had clashes with him in the past. Given that we accept that SR told the Claimant that she had heard all about him, it is possible that more was said between the pair but we have no way of knowing what, if anything, else was said.

166. Whilst Dawn Goodwin accepted that she knew that the Claimant suffered from depression, we accept that she did not know anything more than that and there is no evidence that there was any discussion between SR and Dawn Goodwin about the Claimant's mental health.

#### Incident on 19<sup>th</sup> January 2017

167. On 19<sup>th</sup> January 2017 the Claimant attended the office to discuss his complaint about SR with FS. The Claimant candidly accepts that his behaviour during that time was appalling. Particularly, as we have already touched upon above the Claimant referred to Dawn Goodwin as a "haggard old bitch". We accept that a statement given by FS about the incident and which appears at pages 392 and 393 of the hearing bundle records the gist of what the Claimant had said and that as well as the "haggard old bitch" comment the Claimant said words to the effect of "That fucking haggard old bitch, if she walks past me and smirks again I will have her". That accords with the Claimant's own evidence that he believed that Dawn Goodwin had smirked at him on 18<sup>th</sup> January. That could well be perceived as a threat and we are not surprised that FS formed the view as set out in her statement that the Claimant had been aggressive and threatening in what he had said.

168. It is clear that the Claimant does not have a full recollection of precisely what occurred on 19<sup>th</sup> January. That was clear from his cross examination of Jill Bailey which was largely based on asking her for her recollection of events given that he himself did not recall much of what had happened. He did, however, describe what he could recall of his actions on that day as "grotesque" and we accept the evidence of Jill Bailey that she had been close to tears because of what had happened.

169. It is clear to us that the Claimant had stewed over the events of 17<sup>th</sup> January and that he continued to be angry over how he had been spoken to by SR. That had manifested itself in the inappropriate language that he used in the statement of the incident with SR; his interaction with Dawn Goodwin the following day and then his outburst in the office with FS.

170. At the Preliminary hearing on 25<sup>th</sup> May 2018 this Judge raised with the Claimant the need for some medical evidence as to a link between his actions on 19<sup>th</sup> January 2017 and his disability. The Claimant said at that stage that he had

sufficient evidence but we have not been taken to anything to support that. Indeed, the evidence of Dawn Whitt and the Claimant was that when his condition caused him to experience difficulties at work then that was evident from the fact that he became quiet and withdrew into himself. That was the polar opposite of what occurred on 19<sup>th</sup> January 2017 and there is no evidence that that outburst had anything to do with the Claimant's disability. We find that his reaction was simply as a result of the anger that he felt as a result of his altercation with SR on 17<sup>th</sup> January.

171. Unsurprisingly, FS contacted Dawn Whitt as Area Manager to discuss what had occurred with regard to the Claimant over the course of 17<sup>th</sup> to 19<sup>th</sup> January. The decision was taken to suspend the Claimant on full pay pending an investigation and that was communicated to the Claimant by FS the same day. We find that decision unsurprising given the circumstances. The Claimant had acted inappropriately in his comments regarding SR, had been the subject of a complaint by Dawn Goodwin and had displayed aggressive behaviour in his interactions with FS and had made what could be perceived as threats towards Ms. Goodwin. In those circumstances, it was understandable that the Respondent would have determined that it was necessary to suspend the Claimant pending an investigation to ensure the safety of staff, residents and for the Claimant's own well being. That was recorded in the statement of FS to which we have referred above and we accept from that and the evidence of Dawn Whitt that it was for those reasons lone that the Claimant was suspended.

172. That suspension was communicated to the Claimant in writing on 20<sup>th</sup> January 2017 (see pages 429 and 430 of the hearing bundle). In contrast to the Claimant's earlier period of suspension, at this stage full details of the allegations against him were set out.

### Investigation

173. An investigation thereafter commenced which was undertaken by FS. Again, that was perhaps not wise given that she was also a witness to the events of 19<sup>th</sup> January 2017. However, we accept that the reason for that was on the basis that again it was felt necessary to retain Dawn Whitt for any later appeal process and there was no one else available to deal with the matter.

174. On the basis of the evidence before us, statements were obtained from Dawn Goodwin, Emma Palmer and Jill Bailey in addition to the record that FS had herself made after the events of 19<sup>th</sup> January 2017.

175. Emma Palmer had been asked to make a statement as she had reported to FS an incident that had occurred during a handover on 19<sup>th</sup> January 2017. That handover had occurred prior to the Claimant's outburst in the office. That report was to the effect that the Claimant had referred to FS as "just a serial bullshitter".

176. The Claimant's evidence in respect of that comment has changed during the course of the proceedings. He originally denied having made any such comment – only that he might have said the word bullshit - but by the close of the hearing before us his position was that he probably had said words to the effect of "serial bullshitter" but that he would not have said "just" because that would have been to denigrate good things that FS had done. That unfortunately rather misses the point given that the part of the comment of concern was referring to the Home



Manager as a serial bullshitter. Whether the word just was or was not said is not to the point. It was obviously clear insubordination on the Claimant's part. The Claimant's evidence was also that he had not specifically mentioned FS but had waved generally towards FS's office door. Whilst we prefer the evidence of Emma Palmer on this issue and that the Claimant made specific reference to FS, it makes little difference in reality given that it would have been obvious who the Claimant was referring to by gesturing towards FS's office door.

177. Emma Palmer also reported that during the handover he had also said words to the effect of "I'm going to get them before they get me. I am. I'm going to get them" and that when he was asked by Emma Palmer who he was talking about he had replied SR and Dawn Goodwin.

178. Again, that is demonstrative of the anger that the Claimant felt towards SR and to Dawn Goodwin, who he perceived as a close friend of SR and who he believed to have been discussing him behind his back.

179. We accept the evidence of Emma Palmer that the Claimant did make those comments. There was no reason for her to have made an untrue statement in that regard. She had no axe to grind with the Claimant, nor has he been able to suggest a reason that she may have had cause to make a false report. Indeed, as we have already observed Ms. Palmer had been supportive of the Claimant in the past including giving a statement or character reference in support of him during the harassment trial.

180. On 23<sup>rd</sup> January 2017, FS wrote to the Claimant inviting him to attend an investigatory meeting on 25<sup>th</sup> January. The Claimant was invited to submit a statement for the meeting. The Claimant replied the same day to say that what he had said about Dawn Goodwin was a profound embarrassment to him and that he had been under a lot of pressure. He apologised directly to Jill Bailey, an administrator who had been present on 19<sup>th</sup> January, and he indicated that he was seeking legal advice the following day and thereafter would be in touch with regard to the date of the investigatory meeting. The Claimant thereafter provided a statement dated 24<sup>th</sup> January 2017 setting out his responses to the allegations against him (see pages 460 and 461 of the hearing bundle).

181. The Claimant accepted that he had had an interaction with Dawn Goodwin regarding SR but denied that he had been intimidating. He accepted that he regretted what had been said about Dawn Goodwin in the office but noted that his "annoyance and even anger" was perfectly understandable in the certain respects. Insofar as the serial bullshitter allegation was concerned, the Claimant said that he recalled saying bullshitter in what he described as a jokey manner but that he had not used FS's name directly but had gestured to the office door when asked who he was referring to by Emma Palmer. He described the interaction as office banter.

182. With regard to the comments that SR and Dawn Goodwin were out to get him, he accepted that that had been said but indicated that it was said tongue in cheek and that his manner and tone of voice would have made that obvious.

183. As to the comments regarding SR, the Claimant indicated that a number of the comments had been made in a covering letter rather than an actual statement to FS but that those that were – such as the “gone to seed Sandy Toksvig” had been intended for identification purposes.

184. On the same day FS received a complaint about the Claimant from SR. A copy of the complaint email appears at page 446 of the hearing bundle.

#### NMC referral

185. FS also spoke to the NMC and was advised to make a referral regarding the Claimant’s conduct. That telephone call is evidenced from the covering email accompanying the later referral which appears at page 406 of the hearing bundle.

186. The referral raised the concerns that the Respondent had in respect of the Claimant’s conduct at that time and made reference to the following matters:

- (i) Intimidating Dawn Goodwin on 18<sup>th</sup> January 2017;
- (ii) Using inappropriate language in the office on 19<sup>th</sup> January 2017 including referring to Dawn Goodwin as a “haggard old bitch”;
- (iii) Referring to FS as “just a serial bullshitter”;
- (iv) Making threatening and aggressive comments regarding Dawn Goodwin in the terms reported by Emma Palmer;
- (v) The comments that the Claimant had made regarding SR in his statement relating to the events of 17<sup>th</sup> January 2017;
- (vi) Concerns about paranoid behaviour which was referred to as issues such as believing that there was a plot against him and keeping his belongings in an empty resident’s room;
- (vii) Issues which had been identified by FS with regard to potting up medications; and
- (viii) That a complaint had been received from relatives of a resident on 19<sup>th</sup> January 2017 that the Claimant had replied when concerns were raised about nutritional issues that the resident was “going to die anyway”.

187. Those concerns were identical to the allegations which had been set out against the Claimant in his suspension letter of 20<sup>th</sup> January 2017.

188. Although the referral was completed by FS, it was seen and approved by Dawn Whitt before it was submitted to the NMC. However, we accept her evidence that she did not read every section of the referral form in detail but focused on the key sections, such as the reasons for the referral. She did not therefore pick up that FS had included an incorrect reference regarding the Claimant’s diagnosis and had referred at page 8 of the referral form to the Claimant having been diagnosed with “depression, paranoid personality disorder”. The correct diagnosis, as recorded later in the referral form at page 422 of the hearing bundle, was recurrent depressive disorder and emotionally unstable personality traits.

189. The inclusion of a reference to paranoia may well have been either an error or perhaps as a result of FS’s own observations of some of the Claimant’s conduct which had been highlighted in her statement and as part of the referral at point (vi) above. That had included the Claimant saying that he believed that Dawn Goodwin and others were out to get him and the Claimant storing belongings in a

wardrobe in an empty resident's room rather than in the staff room. We accept the Claimant's evidence that he had chosen to store his belongings there, however, because he was concerned that there had been some theft of property within Stewton House previously. In all events, it does not appear from the evidence before us that the inclusion of erroneous information within NMC referrals was an isolated incident by FS given the content of page 615 of the hearing bundle.

190. The Claimant was not told before the NMC referral was made but given that he had been suspended and his knowledge of the referral process, it cannot have come as any surprise to him.

191. The Claimant later corrected the error as to his diagnosis within the referral documentation from FS by way of an email sent to the NMC on 30<sup>th</sup> January 2017 (see page 507 of the hearing bundle).

#### The investigatory meeting

192. The investigatory meeting took place with the Claimant and FS on 25<sup>th</sup> January 2017. The Respondent prepared minutes of the meeting which appear in the hearing bundle at pages 492 to 495. The minutes were prepared by FS using handwritten notes which were taken at the meeting by Jill Bailey. Jill Bailey's evidence was that her notes had not been verbatim and that she had struggled to capture as much of what was said at the meeting as was possible. We have some sympathy with that position having sought to capture the Claimant's evidence before us at this hearing. She handed the notes to FS after the meeting and did not see them again. She does not know what happened to her notes and they were not before us at this hearing. However, we take nothing from that given that the evidence of Jill Bailey was that she believed the minutes would not have differed materially from her handwritten notes as far as she could recall.

193. The Claimant takes issue with the content of the minutes of that meeting which were later sent to him. The Claimant refers to those minutes as being the last straw which caused him to resign in the circumstances that we shall come to below. During the hearing we therefore asked the Claimant to identify what the issues were with those minutes. The Claimant objected to doing so as he considered it appeared that they should be obvious. However, the Claimant's witness statement did not deal with that and so we remained of the view that he needed to identify the issues of concern clearly. The Claimant did so after an adjournment to consider the document. The Claimant identified the matters set out below as being the issues that he had with the minutes.

194. The minutes provided by the Respondent recorded the following with regard to the incident with Dawn Goodwin on 18<sup>th</sup> January 2017:

*"DF said that this statement was perfectly correct. DF said that he did not shout he was only calling. DF said he was not angry when he spoke to the staff member. DF denied that he was angry and had bottled anything up. DF stated that the staff member sneered at him on two occasions following this conversation. The next day DF said that he came to the office to see if FS had received his statement regarding an incident with a relative. In view of this issue and that the staff member sneered at him he felt angry and "lost the plot". DF said this was the only way he could describe how he felt. DF said he felt deeply embarrassed at having an adolescent outburst. DF said he felt angry and annoyed."*

195. The transcript of a covert recording taken by the Claimant, however, said this:

*DF: The facts... the events as described...the chronology of it is perfectly correct, yeah. There were a few things that don't tally with my Statement which I've already written down and wrote."*

196. The next is inclusion in the minutes from the Respondent that the Claimant had commented:

*"FS had improved things a lot".*

197. The relevant part of the transcript in this regard said this:

*"I know for a fact – or my recollection is that – I didn't use the words, "Just a serial bullshitter" for a very good reason, the reason being that to have said that would have implied that everything you've done just that – that's all you are, just a bullshitter...*

*That to have said that would have implied that everything you've done since you started in this place erm... you know... wasn't good or it was rubbish or it was just bullshit and that just is not the case. I mean I've, well myself and other colleagues have often pointed out how good some of the changes you've made are in terms of patient care. And really a lot of the changes that staff have been critical, anxious or whatever including myself... once you've rephrased them in terms of direct patient care they're almost invariably good ones.*

*So I know if I'd said 'Just a serial bullshitter' – and I don't for a second believe that I did – but if I said that then that's certainly not any sentiment that reflects my beliefs".*

198. The next part of the minutes with which the Claimant takes issue is the following:

*"...this would be explained later in a statement and during a tribunal. DF also stated that Ambercare paid him £600 following a previous disciplinary and this is why this issue has occurred.*

.....

*DF also said that this would be addressed in a tribunal".*

199. The corresponding parts of the transcript said this:

*"DF: the fact is The Company did give me six hundred quid because of my treatment during The [LH] Experience and [DF: laughs] ...Well the CAB guy I spoke to yesterday asked mw what that was given for and event with the paperwork in front of me I wasn't really clear. Well I wasn't clear. They said they explained it in the letter but it was in 'solicitor-speak' covering the company...as they're entitled to do. I mean I'm not naïve in that respect.*

.....

*DF: Well, that will obviously be part and parcel of any grievance that I submit after the investigation is completed into these complaints. It's not something I'm prepared...'prepared' in the sense that I'm ready...to discuss now"*

200. The next issue is that the Respondent's minutes record the following with regard to the Claimant being read SR's statement:

*"DF laughed at this statement and requested a copy of it".*

201. The corresponding parts of the transcript say this:

*"DF: [Disbelieving laughter] Oh dear, hang on a minute let me just write that down...there were other people in the room with the family as well.*

*FS: You will get copies of these....*

*DF: Oh, that's – yeah, I'd like those as soon as possible, preferably before I leave if I can. Is that going to be possible".*

202. The next issue is that the Respondent's minutes record the following in respect of the 17<sup>th</sup> January altercation with SR:

*"DF said that he did take the visitors book up to bedroom 12 to confront the daughter.*

.....

*FS explained that this could be interpreted as harassment".*

203. The corresponding parts of the transcript say this:

*"DF: Ok, Well my statement speaks for itself. I came...I mean immediately after I came downstairs having identified the lady...but she didn't actually identify herself to me ever, she just kept referring to the Visitors Book. She never told me her name at any point. Which is why I'm relying on an 'aka' when I refer to her but...*

*'Harassment', well I mean. Aren't you allowed to express and any opinion about why she said that? What is the relatedness of that given the circumstances?*

*FS: Well, we looked at the policy and we have got a policy about the Visitors Book. We can advise but we can't make people sign it.*

*DF: Oh of course not, no.*

*FS: What we are concerned at is that yeah, there was a little bit of confrontation ere and yet again later on it happened again. And that's what we can't understand?*

.....

*DF:.....*

*The point is here you – The Company – is concerned at confronting her but the duty... given the circumstances. She did repeatedly tell me to ‘Fuck off’, that was witnessed by Jodi at least once and she confirmed the fact later, Jodi did.”*

204. On our reading of the differences in the minutes provided by the Respondent and the transcript from the Claimant, it is clear that one is simply a summary taken from the handwritten notes. Those notes were never intended to be a verbatim record and it is rare that any are unless they are recorded. Indeed, it is obvious that the minutes were a summary of what was said given that they are only just over three pages of text when compared to the 20 page transcript. There was nothing misleading within the minutes provided by the Respondent or anything included that had not been said. That is perhaps with the exception of the reference to a Tribunal but that was perhaps the impression that FS had gleaned from what the Claimant was saying given his reference to submitting grievances and seeing the Citizen’s Advice Bureau and also the fact that his parting shot when he had been suspended by FS had been reference to going to an Employment Tribunal.

205. However, even if there was a problem with the minutes, as we have identified above, the Claimant took a covert recording of the meeting. The minutes were sent to him to consider and to sign if he agreed with the content. Indeed, the letter sent by the Respondent on 26<sup>th</sup> January 2017 could not have been clearer in that regard and it said this:

*“The minutes of the meeting have now been completed and I enclose two copies. One copy you need to return and the other copy are for your reference. If you could please check the minutes and if you are satisfied these are a true reflection of the discussion please sign, date and return one copy to me”.* (See page 497 of the hearing bundle)

206. It appears to us that nothing would have been easier than for the Claimant to say that he did not agree with the minutes (which he would have been aware were being produced from Jill Bailey’s handwritten notes rather than a recording) and to identify the amendments that needed to be made. He would have had his recording to hand to enable him to do that and also to rely upon if the Respondent took issues with any of those amendments. We have found it difficult to understand why the Claimant did not take that step. Moreover, we would observe that if it was the case that the Respondent was seeking in some way to produce deliberately misleading minutes as the Claimant appears to suggest, it is unlikely that a copy would have been voluntarily provided to him with an invitation to check them for accuracy.

#### Disciplinary hearing and the Claimant’s resignation

207. On 27<sup>th</sup> January 2017, FS wrote to the Claimant calling him to attend a disciplinary hearing on 1<sup>st</sup> February 2017. The letter again set out the allegations against the Claimant and made it clear that if he did not attend, the hearing may be held in his absence.

208. On 30<sup>th</sup> January 2017, the Claimant emailed Dawn Whitt resigning from employment with immediate effect. His letter of resignation, which appears at page 511 of the hearing bundle) said this:

*"I resign with immediate affect [sic] and am pursuing claims for constructive dismissal/unlawful discrimination through the appropriate channels.*

*The Nursing & Midwifery Council referral statement signed by [FS] (RGN) and dated 20/01/2017 appears to constitute evidence of that discrimination, as do various documents and other evidence obtained during my employment at Amber Care.*

*Since aspects of that referral and statement(s) obtained in relation to it appear potentially malicious I have cc'd the NMC into this email."*

209. We should observe that the Claimant's position as to the trigger for his resignation has somewhat altered from the resignation letter to the present proceedings. The resignation letter appeared to suggest that the trigger for the resignation was the content of the NMC referral but the Claimant's position before us (and which is consistent with his later statement to the NMC at page 545 of the hearing bundle) was that the "last straw" was a comparison of the minutes of the investigatory meeting with his covert recording.

210. We do need to make a finding as to the reason for resignation. Whilst the Claimant denies that his resignation was prompted by the fact that he was concerned that he was going to be dismissed for gross misconduct, we did not accept his evidence in that regard. It was clear by this stage that there were a catalogue of allegations against the Claimant and the nature of these allegations were not such that the Respondent was able to take the stance that they had done previously of unconditional support for the Claimant and his continuing employment. They were serious matters. We find it more likely than not that the Claimant realised the seriousness of his actions and that it was entirely likely that he was going to be dismissed as a result. His evidence before us was that he was concerned to keep his NMC registration – that is understandable – and a resignation in the normal course of events would have the result of ending a disciplinary process or otherwise somewhat derailing it. We are satisfied that it was for that reason that the Claimant chose to resign just two days before the scheduled disciplinary hearing because he knew that he was likely to be dismissed.

211. Dawn Whitt replied the following day acknowledging the Claimant's resignation but confirming that the disciplinary proceedings would continue nevertheless and, as we shall come to, the disciplinary hearing proceeded in the Claimant's absence.

212. We initially considered that to have been a rather odd decision given that the Claimant had resigned with immediate effect. However, we accept the evidence of Dawn Whitt that that was the Respondent's policy when it came to employees resigning during the course of a disciplinary process, given that it was necessary for evidence to be gathered and a conclusion reached so as to assist in any NMC investigations. Dawn Whitt was able to tell us of the circumstances of one earlier employee who had had disciplinary action continued after her resignation and the Claimant was therefore treated no differently in that regard.

213. The disciplinary process therefore continued and the hearing took place on 1<sup>st</sup> February 2017. The Claimant did not attend.

214. The decision reached by FS at the disciplinary hearing was to dismiss the Claimant for gross misconduct with immediate effect. We accept the evidence of Dawn Whitt that that decision was discussed with her in her capacity as Area Manager – although as Dawn Whitt was supposed to deal with any appeal that was perhaps unwise at best - and that she reached the same conclusion as FS.

215. We would observe that it was, practically speaking, impossible to impose the sanction of dismissal given that the Claimant was no longer an employee of the Respondent. Whilst the decision to dismiss in that regard was therefore something of an oddity, we accept that the reason that the matter continued was, as highlighted above, to bring the process to an end so as to assist in any future NMC investigation.

216. FS wrote to the Claimant on 2<sup>nd</sup> February 2017 notifying him of his “dismissal” with immediate effect by reason of gross misconduct (see pages 536 to 538 of the hearing bundle). The letter set out that all allegations against the Claimant were made out. The allegation in respect of the 18<sup>th</sup> January 2017 altercation was said to be made out on the basis that the Claimant had stated at the investigatory meeting that this was “perfectly correct”. The Claimant disputes that area of the minutes as we have highlighted above. However, that is in fact a reasonable reading of what was said even from the Claimant’s own verbatim transcript and, as we have already, observed, the Claimant took no steps to seek to amend the minutes despite having the clear opportunity to do so.

217. The allegation of inappropriate language in the office on 19<sup>th</sup> January 2017 was upheld on the basis of the witness evidence and, in all events, we would observe that that allegation was not materially contested by the Claimant at any stage.

128. The allegation that the Claimant had referred to FS as “just a serial bullshitter” was upheld on the basis of the witness statements obtained. There was in that regard we remind ourselves the evidence of Emma Palmer who had no axe to grind with the Claimant.

219. Similarly, the allegation that the Claimant had said that he was going to “get” Dawn Goodwin and SR was upheld on the basis of witness evidence and, particularly, the witness statement of Emma Palmer also covered that issue of course. The Claimant had not materially disputed that allegation at the investigatory meeting but claimed that he had made comment in something of a jocular way that they were “doomed” and that it was obvious that the comment was not threatening (see pages 476 and 477 of the hearing bundle). However, given the background as to how the Claimant had reacted in his statement concerning SR and the events of 19<sup>th</sup> January 2017 in respect of Dawn Goodwin, it was open to the Respondent not to accept that account.

220. The allegation that the Claimant had used inappropriate comments regarding SR was upheld on the basis of the Claimant’s own email which recorded reference to his opinion that SR was, amongst other things, a “rancid woman” and a “gone to seed Sandy Toksvig”. Whilst the Claimant may consider those comments to have been sarcastically humorous or descriptive, they were insulting, unnecessary and plain inappropriate and the Respondent was entitled to conclude to that effect. Had it come to light more publicly that such comments had been made by a nurse



regarding the relatives of a resident, that would no doubt have caused the Respondent significant embarrassment.

221. The outcome also considered the fact that there had been a complaint from SR about the way in which the Claimant had acted on 17<sup>th</sup> January 2017. The basis of the Respondent's conclusion in regards to this allegation was that the Claimant had escalated the situation by further pursuing SR with the visitors book despite the fact that he was aware of her identity and therefore provoked a further situation which could have been avoided. Given that the Claimant knew who SR was before that point, that was a not unreasonable conclusion for the Respondent to have reached.

222. The Respondent also concluded that the Claimant had "potted up" medications rather than handing those out individually as was the required practice. The position of the Respondent was that FS had opened the medicine trolley and found potted up medications when she relieved the Claimant of his duties at the time of his suspension. Whilst the Claimant denies any potting up and effectively suggests that FS was setting him up in this regard, there is no evidence to that effect and we would observe that the Claimant of course does not have a great deal of clear recollection of 19<sup>th</sup> January 2017 when this issue arose.

223. The letter also made reference to the Claimant's behaviour causing concern and that he had said that he had not "been right" for months and his behaviour was because of his depression. Whilst no express finding was made as to whether that was accepted or not, the position of FS was that the Claimant had at no point advised the Respondent that he was not coping. That, of course, was the expectation that Dawn Whitt had as that was what the Claimant had always done on previous occasions.

224. The allegation regarding a complaint received from relatives of a resident on 19<sup>th</sup> January 2017 that the Claimant had replied when concerns were raised about nutritional issues that the resident was "going to die anyway" did not feature in the disciplinary outcome and therefore we need say no more about it.

225. Cumulatively, the Respondent determined that the Claimant's conduct which was found to be made out amounted to gross misconduct. The Claimant raises the issue of a difference in treatment between himself and another member of staff who we will refer to as FA. The Claimant says that FA had wrongly potted up medications but he was not dismissed. We heard evidence from Dawn Whitt on that issue as she had dealt with it herself whilst she was the Home Manager at Stewton House. She had imposed a written warning on FA. However, FA was not alleged to have done anything other than wrongly potted up medications and as such was not subject to the same raft of complaints that the Claimant was dismissed for. The evidence of Dawn Whitt, which we accept, was that equally had that been the only complaint against the Claimant then he would not have been dismissed either.

226. The Claimant was advised of his right of appeal and the way in which that could be exercised. The Claimant did not submit an appeal although he did write a detailed letter in reply to the outcome on 8<sup>th</sup> February 2017 (see pages 569 to 572 of the hearing bundle).

227. We should observe that the Respondent's investigations did not take in any issue as to what SR had been doing in the office on 17<sup>th</sup> January 2017. However, we are satisfied from the evidence of Dawn Whitt that that was because SR was not their employee and as such could not be the subject of any disciplinary investigation but, in all events, her relative was terminally ill and an investigation would have been insensitive and in all events that resident died two weeks later and as such there would be no need for SR to be at Stewton House again thereafter.

#### The NMC outcome

228. The outcome of the consideration of the Claimant's fitness to practice by the case examiners was communicated to the Claimant on 8<sup>th</sup> January 2019. It concluded that there was no case to answer in respect of the matters which had formed the basis of the referral from FS. A copy of the NMC outcome appears at pages 684 to 688 of the hearing bundle.

229. Whilst the Claimant relies upon that document in connection with the allegations which led to his "dismissal", we would of course observe that the NMC were considering a different and more stringent test of whether the Claimant's ability to practice as a nurse was impaired that that which would have been applied in any unfair dismissal claim. Moreover, we would observe in this regard that none of the allegations which led to the Claimant's dismissal concerned his actions towards residents but instead towards colleagues.

#### **CONCLUSIONS**

230. Insofar as we have not already done so within our findings of fact above, we deal here with our conclusions in respect of each of the complaints made by the Claimant.

#### Direct discrimination

231. We deal with each allegation of direct discrimination in turn.

232. The first of those is the Respondent conducting an investigation of the Claimant's practice in March to April 2016 relating to allegations from a service user. This of course related to complaints made by JW in respect of the Claimant. It was common ground that JW was something of a prolific complainer such that, as we have already observed above, staff were advised to attend on her in twos. We have no evidence before us of any other member of staff being investigated following allegations being made by JW. However, as we have set out above we accept the evidence of Dawn Whitt that there was an investigation on this occasion because the allegations made against the Claimant on this occasion were more serious and more specific than those usually levelled at staff by JW. The Claimant himself accepted that even if a thousand allegations were made, this would not mean that allegation 1001 should not be investigated. We are satisfied that the circumstances of the allegations of the Claimant were therefore different to those of earlier complaints and that was the reason that the Respondent chose to investigate.

233. However, even if we had concluded that the Claimant had in some way been singled out by the Respondent in respect of the investigation relating to JW, there is absolutely nothing before us to suggest that that had anything to do with his

disability. The Respondent had been aware of the Claimant's mental health condition from the outset of his employment. It had been nothing but supportive for him. The Claimant has taken us to nothing at all, other than his general contention that this was the case, to begin to suggest that his disability had anything whatsoever with the decision to conduct an investigation into the complaints made by JW. The reason for that was not disability but because the complaints were more serious and more specific than those usually levelled at staff by JW. This aspect of the claim therefore fails and is dismissed.

234. The second allegation relates to the Respondent choosing to accept or prefer the evidence of BE over that of the Claimant during the investigation into the allegations by JW. As we have already set out in our findings of fact above, we are satisfied that that was a decision open to the Respondent on the evidence before them at the stage of the disciplinary hearing. Particularly, the Claimant had told another member of staff that he expected to be called into the office after the incident with JW, which supported the view that something was amiss, and there was no suggestion that BE had any axe to grind with the Claimant and it was a matter of her perception as to the Claimant's interaction with JW and BE had provided an account of why she had felt that the Claimant had acted in a way that might have been seen as intimidating. There was no reason for the Respondent to disregard what BE had said about the incident and to prefer her account over that of the Claimant that there had been nothing at all amiss with regard to his conduct.

235. However, again there is absolutely nothing before us to begin to suggest that the reason why BE's account was preferred over that of the Claimant was because of his disability. It follows from all that we have said in respect of this allegation that it fails as a complaint of direct discrimination and it is dismissed.

236. The third allegation Respondent choosing to accept the evidence of Dawn Goodwin over that of the Claimant in an investigation into alleged misconduct in January 2017. This, of course, relates to the events of an incident between the Claimant and Dawn Goodwin on 18<sup>th</sup> January 2017. Again, for the reasons that we have already set out in our findings of fact above that was not an unreasonable or unusual conclusion. Particularly, it was abundantly clear from events before and after the 18<sup>th</sup> January 2017 incident that the Claimant harboured a significant degree of animosity towards Dawn Goodwin which would be in keeping with the report that she had made about his conduct. Furthermore, the impression that the Respondent had from what the Claimant had said at the investigatory meeting (and which he did not correct at that time despite having the recording to hand) was that the allegation was "perfectly correct". Moreover, once again there is absolutely nothing before us to begin to suggest that the reason why Dawn Goodwin's account was preferred over that of the Claimant was because of his disability. It follows from all that we have said in respect of this allegation that it fails as a complaint of direct discrimination and it is dismissed.

237. The fourth allegation relates to what the Claimant terms as inaccurate recording of notes of an investigatory meeting held between himself and FS on 25<sup>th</sup> January 2017. As we have already set out in detail in our findings of fact above, we do not consider there to have been considerable differences between the minutes and the transcript. The minutes were taken from handwritten notes in an attempt to capture the gist of what the Claimant and FS had said at the meeting. That, as we have observed, is obvious given the differences in length between the minutes and the Claimant's transcript. It was inevitable in those circumstances that the minutes would

be a summary and not a verbatim note as the transcript was. There is nothing at all to suggest that the way in which the minutes were prepared was for any ulterior purpose and, as we have observed already above, if they were it would be unusual to have sent them voluntarily to the Claimant and invited him to check their accuracy.

238. Moreover, again the Claimant has taken us to nothing whatsoever to begin to suggest that his disability had anything to do with the way in which the minutes were prepared. Whilst we do not have the benefit of the handwritten notes, there is nothing from the evidence of Jill Bailey to suggest any differences between her recollection of what she recorded and the minutes later produced by FS. There is, quite simply, nothing at all before us other than the Claimant's contention to that effect that the preparation of the minutes was anything at all to do with his disability. This part of the claim therefore also fails and is dismissed.

239. The fifth allegation is that the Claimant contends that the Respondent made sudden and repeated changes to shift patterns without consultation with him. We are able to dispose of this complaint quite swiftly on the facts. As set out above, there were only two occasions when the Claimant was asked to alter his shifts. That does not amount to sudden and repeated changes. In fact, the Claimant worked neither of the altered shifts in all events after complaining about the matter. There is no evidence that others were not asked to change their shifts although other staff would receive telephone calls about that rather than emails because the latter was the Claimant's preference for communication and Dawn Whitt knew that, unlike some other staff, the Claimant would reply in that medium. The Claimant has no way of knowing what was said to other staff members in those telephone calls about shift changes. Indeed, it is obvious that changes were made to shifts by the Respondent given that, as we have set out in our findings of fact above, the Claimant himself had suggested others being asked to cover a shift that he said that he would prefer not to work.

240. Again, there is nothing at all before us to suggest that the Claimant's disability had anything to do with the two occasions when he was asked to alter his shifts. The Claimant has not been able to take us to anything in support of his contention that that was the case and we note of course that the Respondent had been aware of the Claimant's disability from the commencement of this employment and had bent over backwards to accommodate the shift pattern and changes that he wanted to work. In all events, we are satisfied that the reason why that occurred was as a result of operational difficulties caused by sickness and other absences and the need for Stewton House to have certain levels of staff cover to ensure the safety and well being of the residents. That was a critical issue and one that affected not only the Claimant but other staff members.

241. For those reasons, there is nothing to suggest that the Claimant either received less favourable treatment nor that any shift changes had anything to do with his disability and for that reason this aspect of the claim also fails and is dismissed.

242. The sixth allegation is that the Claimant contends that the Respondent refused to alter demands that he attend work to undertake shifts following psychiatric therapy sessions that he was undertaking. Again, this allegation is not made out on the facts and we are therefore able to dispose of it in short order. It fails on the facts and it is dismissed accordingly.

243. The seventh allegation is the allocation of the Claimant to work alone as the only nurse on shift on 7<sup>th</sup> January 2017. This did occur. However, again other than a general assertion that that was the case, the Claimant has not shown anything to even begin to suggest that his disability played a part in that decision. Indeed, we are satisfied from the evidence of Dawn Whitt as set out in our findings of fact above that the reason why the Claimant was on shift alone was because of staff shortages.

244. The Respondent put in place support from the Deputy Manager who was at all times on call and when the Claimant called her for assistance with the syringe driver, she attended in less than five minutes and also proceeded to assist the Claimant in dispensing medications. In those circumstances, there can be no reasonable suggestion that the Claimant was subjected to any detriment, less still that this was an act of less favourable treatment because of his disability. When the Claimant later complained about the need for two nurses to be on shift in the future, he was not allocated to work as the sole nurse again on an early shift. The reason for the shift allocation on 7<sup>th</sup> January was therefore operational constraints and there is nothing at all to begin to suggest that it was anything to do with the Claimant's disability.

245. The eighth allegation is that it is said that the Respondent failed to accept the Claimant's consent to obtain his medical history and/or take account of the information that he had already provided in respect of the same. It was difficult to pin down with the Claimant what occasion this allegation in fact related to. However, as we understand it, this is said to relate to Dawn Whitt not seeking a report from the Claimant's GP following the grievance meeting which he attended with her on 24<sup>th</sup> August 2016. We remind ourselves here that Dawn Whitt had asked the Claimant to provide consent forms to obtain a GP report but the Claimant, even on his own account, never returned them. By the time of the grievance meeting, the Claimant was saying that he was fit to return to work without the need for any adjustments. As such, Dawn Whitt not unreasonably took the view that there was no need for a GP report at that stage and the matter was not raised further with the Claimant. There was no failure to accept the Claimant's consent to obtain his medical history because he never provided it when requested and, by the time of the grievance meeting, the need to obtain a report had passed. That was the reason for Dawn Whitt's actions at the grievance meeting and there is nothing whatsoever to suggest that the Claimant's disability played any part at all in that decision. She had, of course, always been extremely supportive of the Claimant and at all material times she had been aware of the Claimant's disability.

246. Insofar as the allegation might relate further to the actions of FS in not seeking a report from the Claimant's GP about his need for certain working patterns, as her communications with the Claimant at the time make clear it was the Respondent's position that if the Claimant was saying that he needed further adjustments in terms of working or shift patterns then it was a matter for him to obtain that evidence and supply it to the Respondent. The Claimant in fact never did so.

247. We therefore do not find the substance of the allegation made out on the facts but it is clear in all events that there is no evidence whatsoever to begin to suggest that the actions of Dawn Whitt and of FS relating to medical consent had anything to do with the Claimant's disability. This part of the claim therefore fails and is dismissed.

248. The ninth allegation of direct discrimination is that the Claimant contends that his requests for meeting were ignored between 14<sup>th</sup> September 2016 and 20<sup>th</sup> January 2017. We have only been able to identify two occasions when the Claimant requested a meeting that does not appear to have received a response from the Respondent. We have identified those occasions in our findings of fact above. However, it is clear that the intention as to meetings that the Claimant had referred to in the grievance hearing with Dawn Whitt were not for formal structured meetings and as our findings of fact above demonstrate, the Claimant was able to catch up with FS during working hours. If it is the case that the two occasions that we have identified where a meeting was requested or suggested were not actioned (and given that the issues was not raised again by the Claimant that is far from certain) there is, however, nothing at all to suggest that that was because of the Claimant's disability. Again, other than his general contention that that is the case, the Claimant has taken us to nothing to support that position. This part of the claim also therefore fails and is dismissed.

249. The final allegation of direct discrimination is that the Claimant contends that the Respondent was seeking to bring about the end of the employment relationship. We do not accept as a fact that that is what happened. As the Claimant candidly admitted in cross examination, if that had genuinely been the case then the Respondent had had ample opportunity previously to achieve that end. That was not least at the time of his conviction for harassment but the Respondent, and Dawn Whitt particularly, had been nothing other than supportive of the Claimant at that and other times. The Respondent had always been aware of the Claimant's mental health condition and it was of course Dawn Whitt who had been consulted by FS and agreed with the eventual decision to "dismiss" the Claimant on 2<sup>nd</sup> February 2017.

250. The Respondent was entitled to instigate an investigation and disciplinary action against the Claimant arising from the events of 17<sup>th</sup> to 19<sup>th</sup> January 2017, not least in respect of his outburst in the office relating to Dawn Goodwin.

251. On the facts of this allegation, it is simply not made out on the basis of the evidence before us and the instigation of disciplinary action against the Claimant in January 2017 related not to any issue as to his disability but as a direct consequence of his conduct.

#### Failure to make reasonable adjustments

252. There are five complaints of a failure to make reasonable adjustments and we deal with each of those separately.

253. The first issue relates to shift changes and the first question for us is whether the Respondent implemented a policy, criterion or practice of implementing sudden and repeated shift changes. We are satisfied that it did not. The Claimant has identified two occasions when he was asked to change shifts. Even if that amounted to sudden and repeated shift changes (which it did not) then the Claimant was not placed at any substantial disadvantage in that regard because he was never required to work the altered shifts in question. This part of the claim therefore fails on the facts.

254. The second complaint of a failure to make reasonable adjustments is whether the Respondent implemented a policy, criterion or practice of requiring staff to undertake a mixture of day and night shifts. We are not convinced on the evidence

before us that there was such a practice on the basis that shift allocation was simply an issue which arose as and when there were operational constraints. However, even assuming that there was that did not place the Claimant at a substantial disadvantage when compared to non-disabled persons. Firstly, there is no medical evidence at all that the Claimant's disability was affected by such shift patterns given his evidence that he had experienced difficulties with that rotation 20 years previously when training in the NHS and secondly the Claimant never in fact worked on the mixed day and night shift which had been proposed and which is the only occasion we have seen that he was asked to do so.

255. The third complaint of a failure to make reasonable adjustments relates to the Claimant's group therapy sessions and again it is necessary for us to consider whether the Respondent implemented a policy, criterion or practice of requiring the Claimant to attend work after he had attended psychiatric therapy sessions. Again, this is a complaint which fails on its facts given that the Claimant at no time was required to work at shift which clashed with his group therapy sessions and, indeed, when the Claimant requested annual leave or a change of shift to enable him not to have to work in proximity to a therapy session, that was resolved to his satisfaction by the Respondent within a matter of hours. Again, this part of the claim therefore fails on the facts.

256. The fourth complaint of a failure to make reasonable adjustments is whether the Respondent implemented a policy, criterion or practice of requiring the Claimant to attend work as the only nurse on shift on 7<sup>th</sup> January 2017. We are satisfied that there was no PCP in that regard. The position in which the Claimant came to be allocated as the only nurse on that particular shift was because of operational constraints given periods of sickness and annual leave of other nursing staff.

257. However, even if we had found that there was such a policy, criterion or practice, we would still have found no breach of the duty to make reasonable adjustments. Firstly, the Claimant has not properly identified what the substantial disadvantage to him was. That appears only to relate to the fact that he was unable to operate the syringe driver. Assuming that the Claimant had made out that the knowledge that he might have to attend to the syringe driver caused him stress and anxiety because change of the syringe driver was more likely to occur on an early shift, then it is clear that the Respondent had put in place all necessary adjustments to deal with that situation. Particularly, Nicola was on hand to deal with that issue and attended Stewton House within five minutes of receiving a telephone call from the Claimant. He was aware at all times that that support was in place to assist him. As such, we are satisfied that there was no breach of the duty to make reasonable adjustments in respect of the events of 7<sup>th</sup> January 2017.

258. The fifth complaint of a failure to make reasonable adjustments concerns the issue of meetings. The first question in that regard is whether the Respondent implemented a policy, criterion or practice of failing to hold regular meetings with the Claimant between 14<sup>th</sup> September 2016 and 20<sup>th</sup> January 2017. As we have found above, they did not. There was no intention for the meetings to be formal meetings and we are satisfied that the Claimant had both email and face to face communications with FS in order to discuss and resolve any concerns or issues that he had at the time. That included the meeting where he was offered the NVQ Level 5 qualification. The Claimant was not placed at any disadvantage, substantial or otherwise, and at no time did he raise in the considerable number of emails that he exchanged with the Respondent the fact that a request for a meeting had been

ignored or that he was concerned about being unable to speak with FS about an issue. This complaint therefore fails on the facts as we have found them to be.

259. The final complaint of a failure to make reasonable adjustments concerns whether the Respondent implemented a policy, criterion or practice of failing to accept his consent to access his medical history. As we have set out in our findings of fact above, this simply did not occur. Dawn Whitt asked the Claimant on a number of occasions to return the consent forms for a report to be obtained from his GP. The Claimant failed at any stage to do so. By the time that they discussed matters at the grievance meeting, the Claimant's position was that he was fit to return to work without the need for any further adjustments being made. As such, it is difficult to see what the need for a report would have been at that juncture and it certainly would not have identified any additional adjustments that needed to be made on the basis of the Claimant's own position at the time of that meeting.

260. Insofar as this complaint might relate to the later actions of FS in not contacting the Claimant's GP when he raised the issue of shift patterns, she quite clearly advised the Claimant that if he wanted to support a particular shift pattern then it was open to him to supply medical evidence from his GP. The Claimant never did so. Accordingly, it is clear that there was no PCP implemented by the Respondent in respect of medical consent on the facts as we have found them to be and accordingly this aspect of the claim also fails and is dismissed.

261. It follows from all that we have said above that all complaints of a failure to make reasonable adjustments fail and are dismissed.

#### Discrimination arising from disability

262. We turn then to the complaints of discrimination arising from disability.

263. The first of those allegations is that it is said that the Respondent made changes to the Claimant's shift patterns without consultation. That would have to be the unfavourable treatment for the purposes of this aspect of the claim. We are satisfied on the facts that the Respondent did not treat the Claimant unfavourably in this regard. There were two occasions when the Respondent sought to alter the shifts that the Claimant was working. On both occasions the Claimant raised objection and the proposed shifts were not worked. There was no unfavourable treatment on the facts. However, even had we found that there was unfavourable treatment, the Claimant has not been able to explain how that was something arising in consequence of his disability. It is clear that the reason for the proposed shift changes was as a result of staff absences which required the existing rota's to be revisited to ensure that there was sufficient cover. The proposed changes were no more to do with the Claimant's disability than his suggestions that others be asked to cover one of his shifts were. This aspect of the claim for those reasons also fails and is dismissed.

264. The second complaint of discrimination arising from disability relates to the requirement to attend work for a shift following psychiatric therapy sessions. Again, we are able to deal with this aspect of the claim in relatively short order given that we are satisfied from our findings of fact above that this did not in fact ever occur. However, even had we found there to have been unfavourable treatment (and we have not) then it remains unclear how the Claimant says that that was something arising in consequence of his disability. Therefore, this aspect of the claim falls on the facts as we have found them to be.



265. The final complaint of discrimination arising from disability is the instigation of disciplinary proceedings in January 2017. Contrary to the suggestion of the Claimant, we are satisfied that those matters were investigated transparently and honestly and the Claimant has not been able to assist us with what aspects of the process he took issue with save as for the minutes of the meeting. We have made our findings on that matter above.

266. However, the Claimant contends that the instigation of the process was nevertheless an act of discrimination arising from disability. There are two parts to this particular complaint. The first of those parts is that the Claimant firstly contends that the real reason for the instigation of those disciplinary proceedings was because he had taken periods of disability related sickness absence (that absence being the “something arising from disability”) and that the Respondent wanted to remove him from employment because of that. Again, that is a complaint that is easy to reject on the facts. There is no evidence at all that the Respondent had any issue in respect of the Claimant’s absences. We accepted the evidence of Dawn Whitt as we have set out above that it was recognised that the Claimant would need time off and there was no problem with him taking the time that he needed. That is supported by the fact that at no stage had the Respondent ever sought to commence any form of capability process with the Claimant nor made any adverse comment at all regarding his sickness absence record.

267. We turn then to the Claimant’s alternative position that the disciplinary proceedings commenced as a result of, in part at least, the allegation of inappropriate conduct relating to language used in the office on the day of the Claimant’s suspension and that that language was a manifestation of his disability. Again, this is a matter which we are able to deal with in relatively short terms given the evidence of both Dawn Whitt and the Claimant himself that when his disability began to affect him at work the result was that he became quiet and withdrew into himself. That was the polar opposite of what occurred on 19<sup>th</sup> January 2017 and we are satisfied that that outburst was not a manifestation of the Claimant’s disability but was in fact reflective of the anger that he felt and continued to feel relating to the incident with SR a few days previously and his perception that Dawn Goodwin and SR had been talking about him behind his back. Despite reference having been made to the need for medical evidence to support any link between the Claimant’s disability and the conduct in question, we have not been taken to anything in that regard and, as we have already observed, we are satisfied that that conduct was not a manifestation of the Claimant’s disability on the evidence before us, including his own account both at this hearing and also his reference to his anger when discussing the incident at the investigatory meeting.

286. It follows therefore that the final complaint of discrimination arising from disability also fails and is dismissed on the basis that the instigation of disciplinary proceedings was entirely unconnected to anything arising from the Claimant’s disability.

269. However, we would observe that had we found there to have been a link between the Claimant’s conduct on 19<sup>th</sup> January 2017 and his disability, we would nevertheless have accepted that the dismissal of the Claimant in those circumstances was a proportionate means of achieving the legitimate aim of protecting residents and staff.

Jurisdiction

270. As a result of the findings that we have made in regard to the discrimination complaints, it is not necessary for us to determine the issue of jurisdiction and therefore we say no more about it.

Constructive unfair dismissal

271. We turn finally to the complaint of constructive unfair dismissal. The Claimant relies, as we understand matters, upon the above acts of which he complains as being acts of discrimination along with the content of the minutes of the investigatory meeting as, either singularly or cumulatively, being such to fundamentally breach his contract and that his resignation in response rendered him constructively dismissed.

272. As we have already concluded above, the acts which the Claimant has complained of either did not occur as he contends on the basis of the evidence before us or otherwise were understandable actions taken by the Respondent given the circumstances. They were not acts of direct discrimination, a failure to make reasonable adjustments nor discrimination arising from disability when viewed in the context of how the incidents actually occurred.

273. It cannot be said that those matters amounted to anything approaching a breach of the implied term of mutual trust and confidence or, indeed, any other implied or express term of the Claimant's contract of employment. We should say that we have no doubt that the Claimant was aggrieved at what he perceived and still perceives to be ill treatment by the Respondent, but such ill treatment is simply, for the reasons that we have given in our findings of fact above, not borne out on the basis of the evidence before us.

274. Moreover, although the last straw upon which the Claimant relies need not be a breach of itself, it must nevertheless be something other than entirely innocuous or trivial. The last straw relied on by the Claimant is the content of the minutes of the investigation meeting. Whilst we see that the Claimant might well perceive matters to the contrary, when considered objectively and in view of the surrounding circumstances, we are satisfied that that is a matter which could properly be described as entirely innocuous or trivial.

275. In this regard, it bears repeating that the Claimant knew that a verbatim note was not being taken and that Ms. Bailey was taking handwritten notes rather than preparing them from a recording. Furthermore, he was sent a copy of the minutes for consideration and given the opportunity to make any amendments or comment. He had the covert recording and the entire matter of the content of the notes could have been resolved very easily by providing a copy of that recording from which a transcript could have been produced. Finally, it is clear from looking at the content of the minutes in totality that they captured the general points made by the Claimant and Respondent at the meeting and as recorded in the transcript which we have seen.

276. Finally, we are satisfied that the catalyst for the Claimant's resignation was not the minutes or any earlier conduct of which he complains but, it is clear to us, that was the fact that he had come to understand the seriousness of the situation that he faced in respect of the disciplinary allegations against him and the realisation that that was likely to end in dismissal for gross misconduct. We are satisfied that that

state of affairs was the actual reason for resignation.

277. It follows, therefore, that we are not satisfied that the Claimant has demonstrated any breach of the implied term of mutual trust and confidence; that the act relied upon as the last straw did not amount to such and that in all events his resignation was not in response to the Respondent's alleged conduct but to the realisation that he was likely to be dismissed. For all of those reasons, the complaint of constructive dismissal therefore also fails and is dismissed.

278. As a result of the conclusion that we have reached in that regard, it is not necessary for us to go on and consider in detail if the Claimant would have been fairly dismissed in all events had he not resigned from employment prior to the conclusion of the disciplinary process. However, what we would say briefly on that matter had we needed to consider the question is that we accept that the Claimant's conduct in the office with FS on 19<sup>th</sup> January 2017 would have been sufficient to entitle the Respondent to dismiss him for gross misconduct. In the Claimant's own words, his actions were "grotesque". Whilst acknowledging that the Claimant felt aggrieved at that time, it would clearly fall within the band of reasonable responses to dismiss for his behaviour at that time. The Respondent had to consider in this context the position of vulnerable residents and the need to protect other staff from the sort of outburst to which FS was subjected.

279. In view of that and the other allegations against the Claimant which formed the reasons to dismiss him, it is clear that had the Claimant not resigned he would have been fairly dismissed a few days later.

280. It follows therefore for all of the reasons that we have given, that the claim is therefore dismissed in its entirety.

Employment Judge Heap

Date: 13<sup>th</sup> May 2019

Note:

Public access to employment tribunal decisions

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

**MR. D FORD**

**- and -**

**AMBER CARE EAST ANGLIA LIMITED**

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**LIST OF COMPLAINTS AND ISSUES**

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**Constructive unfair dismissal**

- (i) Did the Respondent breach the implied term of mutual trust and confidence (with the last straw relied upon being the production of inaccurate minutes of an investigation meeting on 25<sup>th</sup> January 2017)?
- (ii) If so, was that breach a fundamental breach?
- (iii) If so, did the Claimant resign in response?
- (iv) If so, would the Claimant have been dismissed in all events for alleged gross misconduct shortly after he terminated his employment?

**Direct disability discrimination - Section 13 Equality Act 2010**

- (i) Has the Respondent subjected the Claimant to treatment falling within Section 39 Equality Act 2010 in respect of any or all of the following matters:
  - (a) The Respondent conducting an investigation of the Claimant's practice in March to April 2016 relating to allegations from a service user;
  - (b) The Respondent choosing to accept or prefer the evidence of BE over that of the Claimant during the investigation referred to above;
  - (c) The Respondent choosing to accept the evidence of Dawn Goodwin over that of the Claimant in an investigation into alleged misconduct in January 2017;
  - (d) The inaccurate recording of notes of an investigatory meeting held between the Claimant and FS of the Respondent in January 2017;
  - (e) The making by the Respondent of sudden and repeated changes to shift patterns without consultation with the Claimant;
  - (f) The refusal of the Respondent to alter demands that he attend work to undertake shifts following psychiatric therapy sessions that he was undertaking;
  - (g) The allocation of the Claimant to work alone as the only nurse on shift on 7<sup>th</sup> January 2017;
  - (h) Failing to accept the Claimant's consent to obtain his medical history and/or take account of the information that he had already provided in respect of the same;
  - (i) Ignoring the Claimant's requests for meetings between 14<sup>th</sup> September 2016 and 20<sup>th</sup> January 2017; and
  - (j) Seeking to bring about the end of the employment relationship with the Claimant.
- (ii) Has the conduct complained of above been made out by the Claimant on the facts?

- (iii) If so, has the Respondent treated the Claimant as alleged above less favourably than it treated or would have treated an appropriate comparator or comparators? The Claimant relies on a hypothetical comparator.
- (iv) If there has been less favourable treatment, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of disability?
- (v) If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**Failure to make reasonable adjustments - Sections 20 and 21 Equality Act 2010**

- (i) Did the Respondent implement a policy, criterion or practice ("PCP") of implementing sudden and repeated shift changes? If so, did that place the Claimant at a substantial disadvantage when compared to non-disabled persons in that the working of mixed day and night shift rotations worsened his disability? If so, did the Respondent take such steps as were reasonable to avoid the disadvantage, for example by way of placing the Claimant on a fixed shift pattern or adopting a dialogue with him prior to shift changes.
- (ii) Did the Respondent implement a policy, criterion or practice ("PCP") of requiring the Claimant to attend work after he had attended psychiatric therapy sessions? If so, did that place the Claimant at a substantial disadvantage when compared to non-disabled persons in that the requirement did not allow him time to recover from the emotional upset of such sessions? If so, did the Respondent take such steps as were reasonable to avoid the disadvantage, for example by way of not allocating the Claimant a shift for at least one and a half hours after such a session.
- (iii) Did the Respondent implement a policy, criterion or practice ("PCP") of requiring the Claimant to attend work as the only nurse on shift on 7<sup>th</sup> January 2017? If so, did that place the Claimant at a substantial disadvantage when compared to non-disabled persons and what was that substantial disadvantage?
- (iv) Did the Respondent implement a policy, criterion or practice ("PCP") of failing to hold regular meetings with the Claimant between 14<sup>th</sup> September 2016 and 20<sup>th</sup> January 2017? If so, did that place the Claimant at a substantial disadvantage when compared to non-disabled persons and what was that substantial disadvantage?
- (v) Did the Respondent implement a policy, criterion or practice ("PCP") of failing to accept his consent to access his medical history? If so, did that place the Claimant at a substantial disadvantage when compared to non-disabled persons and what was that substantial disadvantage?

- (vi) If so, did the Respondent know, or could the Respondent be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage(s) set out above? *[In view of the documentation and witness evidence, the Respondent confirmed at the outset of the hearing that they are no longer pursuing the suggestion of a lack of knowledge of disability].*
- (vii) If so, did the Respondent take such steps as were reasonable to avoid the disadvantage(s)?

### **Discrimination arising from disability – Section 15 Equality Act 2010**

- (i) The first allegation of unfavourable treatment as “something arising in consequence of the Claimant’s disability” is the changing of the Claimant’s shift pattern without consultation. Did the Respondent treat the Claimant in that way and, if so, was that because of “something arising” in consequence of the disability? If so, what is the “something arising”?
- (ii) The second allegation of unfavourable treatment as “something arising in consequence of the Claimant’s disability” is the requirement to attend work for a shift following psychiatric therapy sessions. Did the Respondent treat the Claimant in that way and, if so, was that because of “something arising” in consequence of the disability? If so, what is the “something arising”?
- (iii) The third allegation of unfavourable treatment as “something arising in consequence of the Claimant’s disability” is the instigation of disciplinary proceedings in January 2017. It is common ground that disciplinary proceedings were so commenced. Was the reason for the disciplinary proceedings the Claimant’s disability related sickness absence (the “something arising from disability”) and the desire of the Respondent to remove him from employment on account of the same? Alternatively, was the allegation of inappropriate conduct relating to language used in the office on the day of the Claimant’s suspension a manifestation of his disability (the “something arising from disability”).
- (iv) If there has been unfavourable treatment as a result of something arising from the Claimant’s disability, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability? *[In view of the documentation and witness evidence, the Respondent confirmed at the outset of the hearing that they are no longer pursuing the suggestion of a lack of knowledge of disability].*

**Jurisdictional issues**

- (i) Was the Claim Form presented within 3 months of the date of the acts and omissions complained of (taking into account an extension of time for ACAS Early Conciliation)? If not and any act or omission is potentially out of time, the Tribunal may not have jurisdiction to entertain that complaint unless the earlier conduct forms part of a course of conduct extending over a period or the Claimant persuades the Tribunal that it is just and equitable to consider the complaint out of time.
- (ii) If any complaint has been presented “out of time” does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
- (iii) If not, was any complaint presented within such other period as the Employment Tribunal considers just and equitable? In determining that question, the Tribunal will have regard to the factors set out in **British Coal v Keeble & Ors 1997 IRLR 336, EAT.**