EMPLOYMENT TRIBUNALS

Claimant: Ms C Knightly

Respondent: Chelsea and Westminster Hospital NHS Foundation Trust

Heard at: London Central

On: 20, 23, 24, 25, 26 & 27 September 2019 and 18 October 2019

In chambers: 21 October 2019

Before: Employment Judge Khan
Ms J Tombs
Mr D Clay

Representation
Claimant: Mr A Allen, Counsel
Respondent: Mr B Jones, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

(1) The complaint of a failure to make reasonable adjustments succeeds in part in relation to the appeal and the remainder of this complaint fails and is dismissed.

(2) The other complaints fail and are dismissed.

REASONS

1. By an ET1 presented on 28 March 2018, the claimant brought complaints of disability discrimination i.e. discrimination arising from disability and a failure to make reasonable adjustments, unfair dismissal and breach of contract i.e. notice pay. The respondent resists these complaints.

The issues

2. The issues on liability which we were required to determine were based on a list of issues prepared by the parties in advance of the hearing which was further clarified during the hearing. These issues are set out below:

Disability discrimination: sections 6, 15, 20 & 21 and Schedule 1 of the Equality Act 2010 ("EQA")

2.1 Disability

The respondent concedes that the claimant was disabled at all relevant times, by reference to stress, anxiety and reactive depression.

2.2 Discrimination arising from disability

2.2.1 It is agreed that the respondent subjected the claimant to the following unfavourable treatment:

a) It subjected her to capability proceedings i.e. when it referred the claimant to a long term sickness absence hearing in November 2017
b) It dismissed her

2.2.2 It is agreed that this treatment was because of something arising in consequence of the claimant's disability i.e. her disability-related absence.

2.2.3 Can the respondent show that this treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following aims which it is agreed were legitimate:

a) delivering safe and consistent service to patients
b) appropriate and consistent management of employee sickness absence
c) maintaining certainty in future workforce attendance
d) fairness to others in the workplace

2.3 Failure to make reasonable adjustments

2.3.1 It is agreed that the respondent applied the following PCPs:

a) PCP1: The requirement for employees to demonstrate a sustained and punctual attendance at work according to their agreed hours.

b) PCP2: The requirement for dismissed employees to submit an appeal within 10 working days of the letter confirming the dismissal.

c) PCP3: The requirement for employees suspected to be unable to be unable to return to work from long term sickness absence in the foreseeable future to attend a long-term sickness meeting under the respondent's Sickness Absence Policy.

2.3.2 Did these PCPs put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? The claimant says that each PCP put her a substantial disadvantage in that she was unable to meet these PCPs because of her disability.

2.3.3 If so, did the respondent know or could it reasonably have known the claimant was likely to be placed at such disadvantage?

2.3.4 If so, were there steps that were not taken which could have been taken by the respondent to avoid any such disadvantage?

2.3.5 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time? The claimant relies on the following:

PCP1:

a) Providing the claimant with more support, specifically:

i. Allowing more sickness absence / waiving triggers for a capability / disciplinary hearing in the following specific instances:
   A. When the claimant was referred by Emma Bartlett to a sickness absence hearing after the case conference on 7 March 2016
   B. When Simon Mehigan wrote to the claimant on 8 March 2017 about concerns relating to sickness absence
   C. When the claimant was referred by Angela Cox to a sickness absence hearing after the meeting on 2 October 2018

ii. The respondent's management team adopting a sympathetic and supportive management approach in the following specific instances:
   A. When the claimant was repeatedly told off for arriving late to work between September 2016 and March 2017
   B. The claimant not being given a sympathetic line manager on 12 December 2016 by Mr Mehigan

iii. Ms Bartlett discussing the claimant's personal life in private, not in public in the following specific instances
   A. On 29 September 2016 (PoC paragraph 13)

B. In October 2016 (PoC paragraph 14)
C. On 14 November 2016 (PoC paragraph 16)

iv. Providing the claimant with a private room upon her return to work in the ANC in September 2016.

v. Providing the claimant with a colleague who was supportive upon her return to work in the ANC in September 2016.

b) Allowing the claimant to work from home, specifically:

i. In July 2013

ii. When the claimant returned to work following her sickness absence which commenced in August 2015

c) Allowing the claimant to work flexibly, specifically:

i. Upon her return to work in the ANC in September 2016, allowing the claimant a flexible start and finish time

ii. Upon her return to work in September 2016, not punishing the claimant for arriving a bit late to work i.e. threatening her with disciplinary action

iii. Upon her return to work in September 2016, allowing the claimant to take breaks when needed

iv. Offering her a phased return to work the long term sickness absence hearing in January 2018

v. On 6 & 14 November 2016, allowing the claimant to return to her substantive role as cover for her colleague for three weeks whilst she was on leave

d) Providing the claimant with a support midwife on 4 September 2014.

PCP2:

e) On 8 & 14 February 2018 by granting the claimant a two-week extension to submit an appeal

PCP3:

f) When inviting the claimant to the hearing on 2 January 2018:

i. Reconvening the hearing to a later date

ii. Allowing the claimant to make written representations instead of attending the hearing

g) At the hearing on 11 January 2018

i. Reconvening the hearing to a later date
ii. Allowing the claimant to attend with a representative

iii. Allowing the claimant to make written representations

Unfair dismissal: section 98 of the Employment Rights Act 1996 ("ERA")

2.4 It is agreed that the claimant was dismissed by reason of capability (ill-health) which is a potentially fair reason for dismissal.

2.5 Did the respondent adopt a fair procedure when dismissing the claimant?

2.6 Was dismissal for that reason fair under section 98(4) ERA i.e. was it within the range of reasonable responses?

Notice Pay: sections 86 – 88 ERA

2.7 Was the claimant paid the correct notice pay? The respondent paid the claimant notice pay for the period 23 March 2018 to 4 April 2018.

2.7.1 The claimant claims that she should have been paid notice pay for her contractual 12-week period.

2.7.2 The respondent's position is that the claimant received an overpayment in respect of notice pay. It avers that by virtue of section 87(4) ERA the requirement under section 86(1) ERA to give the claimant eight weeks' notice was redundant as the claimant's contractual right to be given 12 weeks' notice of termination which was at least one week more than the eight week statutory notice required under section 86(1)(b) ERA.

2.7.3 In closing submissions Mr Allen, for the claimant, conceded that this complaint had no prospect of success.

The Evidence and Procedure

3. The claimant gave evidence herself.

4. For the respondent, we heard from: Emma Bartlett, Maternity Outpatients Matron; Geraldine Cochrane, formerly Divisional Head of Nursing; and Natalie Garthford-Porter, formerly Associate Director of Human Resources.

5. There was a hearing bundle which exceeded 600 pages. We read the pages to which we were referred.

6. We also admitted additional Occupational Health-related documents into evidence.

7. We considered written and oral submissions and a bundle of authorities.

8. Owing to a potential conflict one of the non-legal members on the panel was replaced on the second day of the hearing before we heard any evidence.

The Facts

9. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

10. The claimant has stress, anxiety and reactive depression the latter being diagnosed following the traumatic death of her mother in 2007. She has been prescribed anti-depressant medication since this date. The respondent accepts that the claimant is disabled because of the effects of these conditions on her day to day activities which include: a labile mood; debilitating anxiety; poor quality sleep; and poor timekeeping. Across the period over which the events of this claim took place the claimant was involved in two protracted and unrelated sets of legal proceedings: family proceedings which involved the custody of her child; and civil proceedings relating to the disclosure of a genetic condition involving three other NHS trusts. These were significant stressors which impacted on the claimant's mental health.

11. The claimant commenced employment with the respondent on 11 February 2009 as Lead Midwife for Mental Health (band 7 on AfC). This was a new role which was created to set up mental health services in the Maternity Department.

12. The job summary for this role provided:

> "The lead midwife for mental health will have a key organisational role in developing and maintaining high standards of care for women with mental health problems during pregnancy and the immediate postnatal period. They will be an innovative practitioner and an effective change agent promoting evidence based practice.
>
> Main responsibilities include the development of care pathways for women with mild, moderate and severe mental health problems booked at Chelsea and Westminster Hospital; close liaison with relevant hospital and community based professionals; offering advice to maternity service staff; organising mental health training for midwives.
>
> The postholder will be based in both the maternity service and within the hospital based perinatal and parent-infant mental health service. The role encompasses liaison with other agencies as well as teaching, support and empowerment of all clinicians involved in maternity care including: obstetricians, midwives, student midwives, and maternity support workers in relation to mental health issues in pregnancy. Evidence of continued education should be demonstrated."

13. The claimant's role had three elements: 30% was patient-facing i.e. supporting patients directly; 30% was staff-facing i.e. supporting other staff; the remainder was administrative work. The claimant was a point of

leadership, coordination, expertise and clinical support in an acute service and was therefore required to be visible in her department and available when the need arose.

14. The claimant was line managed by Emma Bartlett, Inpatient Matron, until January 2017. Ms Bartlett knew that the claimant had depression, stress and anxiety from the outset, although she did not become aware of the claimant's diagnosis of reactive depression until September 2016.

15. The claimant returned to work from maternity leave in 2011. A support midwife was deployed to assist her for two days a week for around six months.

16. The claimant was recruited to work on a full-time basis i.e. 37.5 hours per week. In 2012 the respondent agreed to the claimant's flexible working request to reduce her working hours to 30 per week i.e. four days a week.

17. In 2013 the claimant requested emergency leave to attend an appointment with her solicitor. Although the exact date was unclear it was agreed that the claimant requested time off on a Thursday which is when she had an afternoon clinic for high-risk patients. As it was difficult to cover this clinic at short notice Ms Bartlett agreed that the claimant could have the morning off but she told the claimant that she would need to be at work by 14.00 when her clinic started. The claimant did not come into work that day. At a meeting shortly after this Ms Bartlett told the claimant that she hoped her commitment to the service would improve.

18. It is notable that the claimant was granted emergency leave 18 times between December 2012 – March 2017. She was also granted carer's leave over this period and when this was exhausted she was allowed to take unpaid leave. As will be seen, the claimant was also permitted to take ad hoc homeworking days which she requested at late notice. She was therefore given a great deal of support and latitude in relation to her attendance.

19. In July 2013 Ms Bartlett agreed to the following adjustments to support the claimant over the next few months:

    19.1 The number of her weekly antenatal clinic sessions would be reduced from two to one from 22 July 2013. If she required extra appointments she could use the "red" team list (a team working with vulnerable women).

    19.3 She would take leave every Monday.

20. Ms Bartlett told the claimant that she could not continue to take ad hoc homeworking days. Her evidence was that the claimant worked from home three times a month between February – June 2013. She said that the claimant would regularly text her on the day to say she was working from home as she was not well enough to come into work. The claimant accepted that she worked from home although she denied that she did so with such frequency. In her evidence to the tribunal, she agreed that regular attendance and punctuality were a recurrent issue for her because of her disability. Although these ad hoc homeworking days were not

documented we find that the claimant was intermittently absent from work when Ms Bartlett agreed she could work from home. We find that Ms Bartlett was justifiably concerned as this arrangement was not sustainable. She needed the claimant to be at work and she also wanted to monitor the claimant's health and depression.

21. Ms Bartlett agreed to consider the support of further reducing the claimant's hours and clinics if necessary. The claimant agreed that Ms Bartlett was being supportive.

22. The claimant was on sick leave between November – December 2013. She had a total of 67 days of sickness absence in 2013.

23. In December 2013 Ms Bartlett appointed a junior midwife on a secondment to support the claimant and the service. This was for 22.5 hours i.e. three days per week. This was a temporary measure as there was no budget for a substantive appointment. The junior midwife was in place between 5 February – 3 September 2014 when she went on maternity leave.

24. The claimant saw Dr Graneek, Consultant Occupational Physician, on 14 July 2014. The claimant was concerned that the junior midwife support was coming to an end. Dr Graneek recommended that consideration be given to maintaining this support as well as one day a week of homeworking. This was the only occasion when Occupational Health made these suggestions. Ms Bartlett did not see this report as it was sent by post instead of being emailed to her. The address did not refer to her department, only to her name and job title. However, she knew that the claimant wanted this support to continue.

Flexible working agreement on 16 July 2014

25. The claimant had a return to work meeting with Ms Bartlett on 16 July 2014 when she was put on a 12-week sickness monitoring period. Although she was concerned that this was not sustainable, Ms Bartlett agreed to the claimant's flexible working request to work from 9.00am – 3.00pm with no breaks. The claimant made this request to work shorter days across the week because her child was starting school. Ms Bartlett noted:

> "These hours will be very different to what you currently work and I was concerned that working 5 days a week may be a bigger commitment for you as well as needing to be at work by 9am. You currently work more flexibly with your hours at the start and the end of the day and you often require days off at short notice despite working 4 days a week, which isn't ideal. You were able to reassure me that you will get into a good routine and it may actually be an easier pattern of working for you."

It was agreed that this new working pattern would start on 8 September 2014 and be reviewed after three months.

26. During this meeting Mrs Bartlett refused to agree to the claimant's request to work one day from home "as it does not meet the needs of the service and as lead for mental health you are required to be available on site for

the women and staff". We agree that this was not viable. The claimant was required to be visible in her role and she had continued to take ad hoc homeworking days which were unpredictable. We find that Ms Bartlett was balancing the claimant's needs to work flexibly with the needs of the service.

27. A week later, on 24 July 2014, the claimant requested emergency leave to see her solicitor. Ms Bartlett agreed to this initially as she understood her junior colleague was available to cover the clinic. However, when this colleague told her that she had an antenatal appointment, Ms Bartlett called the claimant and left a message on her phone to say that she was required to attend work for the clinic. The claimant was already with her solicitor and only picked up this message in the afternoon. She did not contact Ms Bartlett. Ms Bartlett marked the claimant as being on unauthorised absence.

28. When the junior midwife went on maternity leave at the start of September 2014 she was not replaced. We accept Ms Bartlett's evidence that the provision of a junior midwife was not a sustainable adjustment. Although the claimant's recorded sickness absences were reduced dramatically over this period when she had four episodes of sick leave totalling ten days, we accept Ms Bartlett's evidence that the number of ad hoc homeworking days increased. This included occasions when the claimant would call her to report that she had slept badly overnight and Ms Bartlett agreed that the claimant could work from home. We find that the claimant's sickness record masked the true picture as she continued to take ad hoc intermittent absences because of her health. This put more strain on the claimant's junior colleagues and on the service itself.

Sickness absence 2015 / 2016

29. The claimant was on sickness absence from 3 August 2015 – 20 June 2016. She complains that during this period Ms Bartlett was less supportive and more punitive.

30. The claimant's sickness absence was managed under the long-term sickness absence management provisions in the respondent's Harmonised Sickness Absence Policy and Procedures ("SAPP") which apply to any continuous sickness absence exceeding three weeks. This policy provides, insofar as material, for the following:

    30.1 An initial informal stage in which the manager and employee are required to remain in contact and the manager must make a referral to Occupational Health (section 11.1).
    30.2 An initial formal review meeting is required where a return to work within six weeks is unlikely with ongoing review meetings to be conducted and referrals made to Occupational Health as appropriate (section 11.2).
    30.3 A case conference to be held if appropriate to assess and monitor an employee and determine what action is required.
    30.4 Consideration given at this formal stage to temporary or permanent redeployment, where the employee is deemed to be unfit to resume their substantive post (section 11.3.3).

30.5 An application for ill-health retirement ("IHR") may be made if this is mutually agreed (11.3.4). The employee will remain on sick leave whilst the application is processed and if it is approved they will be dismissed by reason of IHR (sections 13.5.4 & 13.5.6).

30.6 If Occupational Health does not support IHR the employee may obtain independent medical support for an application but the respondent "will continue to take action in line with this policy" Section 13.5.7).

30.7 A long term sickness absence hearing will be arranged if "there is no prospect of a return to work in the foreseeable future and the employee cannot be retained in their employment for which he/she is contracted" (section 11.3.5).

30.8 The notification of this hearing will "normally" include (section 11.6.4):

a. A management report
b. A copy of the most recent Occupational Health report
c. Any other relevant medical advice
d. Details of any previous support offered or adjustments made following advice from Occupational Health. Including any adjustments in duties, hours or days worked
e. Details of any rehabilitation or redeployment opportunities that have been explored and their outcomes.

30.9 If there is no evidence to indicate a return to work in any capacity in the foreseeable future then the employee will be dismissed on the grounds of capability due to ill-health (section 13.6.6).

30.10 If, however, the hearing manager is not satisfied that the employee has not been fully supported in returning to work or that the provisions of the Equality Act 2010 ("EQA") have not been fully complied with further action may be recommended (section 13.6.7).

31. Ms Bartlett referred the claimant to Occupational Health for advice on 26 October 2015 for advice on any adjustments that could be made to improve her attendance. She noted that the claimant was absent because of stress due to "a personal issue" and the claimant found that work helped her to manage her stress. She therefore wanted to ensure that all possible ways of facilitating the claimant's attendance were explored.

Occupational Health assessment on 2 November 2015

32. The claimant saw Dr Sajid Khan, Occupational Health Physician, on 2 November 2015. In his report of the same date, Dr Khan advised that the claimant's mental health was stable and she was fit to begin a five-week phased return to work in a week's time, i.e. from 9 November 2015. He referred to the claimant's two long-term personal stressors which remained ongoing "but there has been some good news on both fronts and we should be now entering a phase where both are at least manageable". He also noted "none of this has been work-related and she had not had any issues with either the work place or the job itself".

First formal review meeting on 2 November 2015

33. Later that day the claimant attended a formal review meeting with Ms Bartlett. Between these two meetings the claimant received an email from

the family court which referred to a potential breach of an order with the potential consequence of committal to prison. The claimant was very distressed by this and as she later reported to Dr Khan that this caused a rapid deterioration in her mental health.

34. We accept Ms Bartlett's evidence that she gave the claimant an opportunity to rearrange the review meeting but the claimant wanted to proceed with it. This is because the claimant had already come into work to see Dr Khan and did not want to return to have this meeting on another date. Mrs Bartlett agreed to delay the claimant's phased return for a week until 16 November 2015. She also agreed that the claimant would not be required to do any clinical work in these five weeks. It was also agreed that the claimant would work from 9.00am – 3.00pm, as Dr Khan had recommended. Ms Bartlett suggested that the claimant could use annual leave to extend her phased return. She also offered to refer the claimant to a counselling service to support the claimant which she agreed to consider. This was confirmed by Ms Bartlett in writing when she noted "I discussed my concern over your absence and that you are in a standalone post it leaves the service vulnerable. You confirmed that you enjoy your role and are happy to continue in it."

35. The claimant did not return to work on 16 November 2015 as planned because she telephoned Ms Bartlett to say that she would need another two weeks' rest due to lack of sleep. She explained that this was related to her personal stressors. It was agreed that the claimant would make another appointment to see Dr Khan.

36. In the meantime, the respondent continued to rely on the claimant's junior colleagues to cover her work. However, none had the claimant's expertise. This arrangement was also unsatisfactory because it meant that there was no leadership or single point of coordination of the mental health service within the department.

37. The claimant remained signed off work by her GP until 14 February 2016 because of a "stress related problem" which was not specified on the accompanying statement of fitness for work i.e. "fit note". She wrote to Ms Bartlett on 4 January 2016 to explain that this was because of her two ongoing court cases and she had to sell her home to pay her legal costs. She also thanked Ms Bartlett for her ongoing support. The claimant's stressors remained personal and she continued to view Ms Bartlett as supportive.

38. The claimant had now been on sick leave for five months. Ms Bartlett completed an Occupational Health referral in which she noted that a return to work would be beneficial to both the claimant and the service and she requested advice on the likely duration of her sickness absence.

<u>Occupational Health assessment on 11 January 2016</u>

39. The claimant was reviewed by Dr Khan on 11 January 2016. In his report Dr Khan advised

> "From a mental health point of view I am happy to say that she remains stable and if it was purely about her mental health then I believe we could

> have her back to work now. In view of her personal situation I feel it would be difficult for her to return and focus on work given the major distraction [of the family proceedings]".

As the claimant's family proceedings were listed for hearing in late January 2016, Dr Khan recommended that she commenced a phased return to work in February 2016. The advice of Dr Khan, who does not appear to be a mental health specialist, was somewhat contradictory. As will be seen, Dr Khan had an apparent tendency for optimism. He again advised that the claimant's mental health was stable and she was coping, however, he also signalled that the claimant's family proceedings impacted on her ability to return to work. It was evident that these proceedings were a significant stressor for the claimant and were likely to impact on her mental health and stability. Furthermore, as the outcome of these proceedings was uncertain the claimant's prognosis was unpredictable.

40. The respondent's attempts to arrange a second formal review meeting with the claimant were proving difficult. A meeting which had been rearranged for a second time in early February 2016 did not proceed as the claimant was unable to attend. A case conference was also arranged for 22 February 2016 when Dr Khan would be in attendance. The claimant was told that she could bring a companion along to both meetings. Ms Bartlett wrote to the claimant to remind her about this case conference on 12 February 2016 when she noted her concern that the claimant was not complying with the requirement to attend review meetings, under the SAPP. She was told that her failure to attend could "will be viewed seriously and could be considered under the Disciplinary Policy" which was enclosed. This was reasonable. The claimant had been absent for over seven months and this was impacting on the service. She was required to attend review meetings and a case conference as it was necessary for the respondent to understand when the claimant would be able to return to work in order to consider any necessary arrangements to cover her post. There had been only one review meeting in seven months.

41. The case conference was rearranged for 7 March 2016 to enable the claimant's representative to attend.

42. On 25 February 2016 the claimant contacted the respondent to say that she had been signed off work until the end of April 2016.

Case conference on 7 March 2016

43. At the case conference on 7 March 2016 the claimant was not able to say whether she would be well enough to return to work in May 2016. Dr Khan advised that the claimant would not be fit to return within 6 – 8 weeks owing to her personal stressors. The HR note of this meeting recorded that the claimant said "nothing has changed" and there was "nothing we can do".

44. It was explained that the claimant was selling her home and this would remove the stressor of personal debt related to her litigation. Once again Ms Bartlett offered to refer the claimant to the counselling service which was not taken up by her.

45. Ms Bartlett said that there had been complaints about the service during the claimant's absence. These complaints were made by Vivien Bell, Head of Midwifery, and Daniel O'Shea, Principal Psychotherapist and Team Manager who had both written to Ms Bartlett about the impact of the claimant's ongoing absence on the service and well-being of patients. Mr O'Shea had written

> "I am growing increasingly worried about safeguarding the psychological well-being of many of our perinatal patients with this continued absence of a designated Perinatal Mental Health Midwife functioning within the hospital and linking with our service. This is a vital role."

Ms Bell had written:

> "The continued absence of the lead midwife for HR is now causing severe stress on the system & is potentially putting women at risk.
>
> I realise you have not covered this role with an acting position due to the promised imminent return of the post holder. However, I now feel that we need a permanent solution."

46. The claimant accepts that these were legitimate concerns and she says she had encouraged Mr O'Shea to write to Ms Bartlett about them. This situation was not sustainable as it was impacting on the service. A longer-term or permanent solution was needed.

47. The claimant was told that a formal long term sickness absence ("LTSA") hearing would be convened. When the claimant asked what would happen she was told that the worst case scenario was dismissal. Whilst it is likely that the claimant felt threatened by this we find that she was being informed about a potential consequence of this process which was appropriate.

48. The claimant was upset and her representative suggested that the claimant was instead reviewed again in May 2016. However, the claimant was not confident that she would be able to work at the end of this period and the respondent needed greater certainty because of the impact on the service and the need to make arrangements to cover her post.

49. The claimant says that she asked for greater leniency in the way in which her sickness absence was being managed and Ms Bartlett told her that she had to treat her the same way as the other midwives. Even had Ms Bartlett said this, which is denied, we find that she had treated the claimant leniently.

50. Although the claimant complains that adjustments were not discussed at this meeting, including the provision of a permanent support midwife, we find that there were no adjustments which the respondent could have made to facilitate her return to work at this stage. The claimant was signed off work until 30 April 2016. She and Dr Khan agreed that she would not be fit to return for 6 – 8 weeks. She was not confident that she would be able to work at the end of this period.

51. We also find that the decision to refer the claimant to a LTSA hearing was proportionate. The claimant had been on sickness absence for seven months and was unable to say whether she would be able to return to work in another two. Her continued absence was putting the service under stress which the claimant accepted.

52. The claimant emailed Ms Bartlett two days later, on 10 March 2016, to complain that this conference had been very distressing and that she was being referred to a formal hearing after seven months' sickness absence. Ms Bartlett replied when she offered to refer the claimant to the counselling service and to Occupational Health.

53. Ms Bartlett wrote to the claimant on 18 March 2016 to summarise this conference. The claimant's case would be referred to a LTSA hearing, a report would be prepared about the sickness absence management process to date as well as the impact of the claimant's ongoing absence on the service. The claimant was told that "your absence could no longer be sustained in the post you currently hold" and that this hearing could result in her dismissal.

54. By this date the claimant had forwarded a short letter from her GP which advised that her attendance at a disciplinary hearing could be detrimental to her mental health. Although the respondent was not proposing to convene a disciplinary hearing it had constructive notice that a hearing which could result in dismissal was likely to be detrimental to the claimant's health. Ms Bartlett therefore sought advice from Dr Khan who confirmed that the claimant was fit to attend a LTSA hearing.

55. In respect of the sickness absence management process we accept that Ms Bartlett made adjustments: she contacted the claimant less frequently as this was a stressor for her; she suggested that the claimant self-refer to Occupational Health; she also offered to refer the claimant to the counselling service; and, as already noted, there had only been one review meeting and once case conference in over seven months.

56. It is clear that by escalating the sickness absence management process, the claimant now viewed Ms Bartlett as a stressor. She wrote to Ms Bartlett to complain about her "regimented management of my current sick-leave" by referring the claimant to a formal meeting instead of "being given the time, space and support to get back on my feet so that I can return to work". She also complained about Ms Bartlett's actions three years earlier when she had refused to grant her emergency leave told her she hoped her commitment to the service would improve. The claimant failed to acknowledge the ongoing impact of her absence on her role which was crucial to this high risk and complex service.

57. The respondent advertised for a secondment to cover the claimant's role on 18 April 2016. It therefore anticipated that the claimant would not be fit to return to her role for the foreseeable future. This was a sensible contingency because there was no clear prognosis for when the claimant would be able to return to work. Tessa Van der Vord, a senior midwife was recruited in May 2016.

58. Ms Bartlett compiled a LTSA report on 17 May 2016 in which she recommended that the claimant was referred to a LTSA hearing. This report made no references to disability, the EQA, reasonable adjustments, nor did it refer to the specific adjustments of a support midwife, homeworking or flexible start or finish times which had been made to support the claimant.

59. In her evidence to the tribunal, Ms Bartlett says that she considered that the claimant was disabled and she viewed all of the claimant's sickness absences since August 2015 as being disability-related. She did not therefore distinguish disability-related absences as required by the SAPP. As there were no triggers for the management of long-term sickness absence under this policy this did not impact on how her absence was managed.

60. Further to Ms Bartlett's report, Ms Topp wrote to the claimant to invite her to a LTSA. The claimant was told that this hearing could result in her dismissal on the grounds of capability and her right to bring a companion. The claimant replied to request that this hearing was rearranged because of her childcare commitments which was agreed. She also requested a change of line manager.

LTSA hearing on 17 June 2016

61. The rescheduled hearing was held on 17 June 2016. Although Ms Bartlett had prepared the report she did not attend this hearing to present it. The claimant understood that Ms Bartlett was at work on this date.

62. The claimant explained that because of her reactive depression she had a limited ability to foresee how she would react to stressors. Nevertheless, she said that she felt able to return to work when her current fit note expired on 30 June 2016. It is likely that she felt she had to agree to this as she understood that the alternative was dismissal.

63. Ms Topp agreed to support the claimant in returning to work but not to her substantive role which she felt was unsuitable because it was a highly and demanding specialist role, and because of the claimant's protracted sickness absence. Ms Topp proposed that the claimant was instead reoriented back into the service with a six-month redeployment to the Antenatal Clinic ("ANC") as a midwife. The claimant would receive pay protection as this role was on band 6 of the pay scale.

64. Ms Topp agreed to the claimant's request for an extended period of annual leave over the summer because of childcare. She agreed that the claimant could return to work in 5 September 2016 on the following conditions: she was assessed by Occupational Health as being fit to return to work; she was temporarily redeployed to the ANC for six months; and she maintained a sustained period of service over this period. If the claimant met these conditions, she would be supported in returning to her substantive role for an initial period of six months, subject to an Occupational Health assessment that she was able to complete the full remit of her substantive role. She would then be required to demonstrate sustained attendance and the ability to carry out the full remit of role. The

claimant agreed to this although she felt she had no other choice. She also hoped that once back at work she would be able to return to her substantive role sooner.

65. During this hearing the claimant complained about Ms Bartlett's management of her sickness absence and that her stress condition had been exacerbated by formal sickness meetings. She repeated her request to have a different line manager. Ms Topp concluded that Ms Bartlett had been supportive and had not managed the claimant in a punitive way. Ms Bartlett would continue to manage her as she was responsible for the ANC. The claimant was told that if she wanted a different manager she would need to work in Inpatients where she would be managed by the Inpatient Matron. The claimant understood that this would have entailed a permanent change. This was unclear but was not explored.

66. Ms Topp wrote to the claimant to summarise this hearing. She explained that because of the experience, expertise and training required for the claimant's substantive role it was not appropriate to backfill it with inexperienced midwives when there was ongoing uncertainty about the claimant's return to work. The claimant's absence for 10 months had impacted on the service. Ms Topp noted that the claimant could work with Ms Van de Vord to reintegrate into the service and be available to provide any additional support as requested. The claimant therefore understood that she would have some involvement with her substantive role. This did not happen.

Occupational Health assessment on 25 July 2016

67. The claimant was assessed by Dr Khan on 25 July 2016 almost a year since she had last worked. Although it is likely that he was not provided with the job description for the ANC role as he made no reference to it in his report, Dr Khan was supportive of Ms Topp's proposal for the claimant to be temporarily redeployed. He noted that before the claimant was able to resume her substantive role "Clearly you need a demonstration of her stability as well as her mental fortitude". He therefore agreed that the claimant was not fit to resume her substantive post and would need to show sustained attendance before she was able to do so.

68. Dr Khan also reported that the claimant "has been dealing with a lot of stressful situations but I am glad to report that things are looking much better. She feels more robust and in a stronger position to return". In her evidence to the tribunal, the claimant says that this assessment was incorrect. She says that given her medical history she was not robust, she was vulnerable and struggling with ill-health, and multiple stressors. Whilst we have already remarked on Dr Khan's apparent tendency for optimism we also find it likely that the claimant under-reported her symptoms as she remained hopeful of a return to her substantive role.

Temporary redeployment to the ANC from 5 September 2016

69. We accept Ms Bartlett's unchallenged evidence that the ANC was used to rehabilitate midwives who returned to work from long-term absence. The ANC dealt with non-acute and therefore lower-risk patients and it had a

greater capacity to cover any unscheduled absences. The role that the claimant would be covering was more junior than her substantive post and involved less decision-making.

70. The claimant says that the nature of the ANC meant that her difficulties with attendance and punctuality were more problematic than in her substantive role. However, the claimant was supernumerary and she did not have responsibility for running any of the ANC clinics as her hours did not align with clinic hours.

71. The claimant began a four-week phased return to work in the ANC on 5 September 2016.

72. The claimant was 15 minutes late to work on her first day in the ANC. Ms Bartlett says that the claimant was frequently late. Although this was not recorded in 2016 we accept Ms Bartlett's evidence because the respondent recorded that the claimant was at least 20 minutes late arriving to work on 13 out of the 16 occasions she attended between 31 January – 7 March 2017. Ms Bartlett also says that the claimant left work early by 30 minutes on most days. This was not recorded but we again accept her evidence.

73. We also accept Ms Bartlett's unchallenged evidence that during a meeting with the claimant and Ms Topp in the claimant's second week back at work, the claimant said that she was looking into IHR and did not want to be at work but needed the money. This was the first time that the claimant disclosed that she was considering making an application for IHR.

74. At a catch-up meeting with the claimant on 22 September 2016, Ms Bartlett agreed that she could continue to work in a supernumerary capacity from 08.30 – 14.30 for two weeks, from 3 October 2016, when she would return to work 30 hours a week. This was agreed as a temporary measure because a 14.30 finish did not fit with the Outpatient clinics which ran from 09.00 – 13.00 and 14.00 – 17.00. Mrs Bartlett told the claimant that she would need to make a flexible working application if she wanted to continue to work these hours. This would only apply to her ANC deployment and the claimant would be required to make another flexible working application when she returned to her substantive post. This was reasonable as the respondent would need to consider impact of these hours on the service when claimant was able to resume her substantive role. Ms Bartlett also discussed other working patterns with the claimant, including reducing her hours or working longer hours over four days instead of five. This included the suggestion that the claimant could start later at 09.30 but the claimant declined this would have meant in a reduction in her working hours and pay. Ms Bartlett also suggested that the claimant could request unpaid leave or buy leave back as she had almost exhausted her leave entitlement up to March 2017. Ms Bartlett was being supportive whilst remaining mindful of the needs of the service.

75. Although the claimant complains that around this time she also discussed her working arrangements with Ms Bartlett in the atrium i.e. a public space, we accept Ms Bartlett's evidence that it was the claimant who initiated this discussion in a public space and Ms Bartlett moved the

discussion to the phlebotomy room for privacy. The claimant was anxious to secure a working pattern that would fit with her childcare and she had on other occasions made ad hoc approaches to Ms Bartlett about unresolved issues which made her anxious.

76. The claimant says that Ms Bartlett was insistent that she worked from 08.30 – 13.30. We find that whilst it is likely that Ms Bartlett made this suggestion she did not insist on it. These hours fitted with the 09.00 – 13.00 clinic. Ms Bartlett had previously suggested that the claimant reduce her hours for welfare reasons. However, when she followed up these discussions in an email on 12 October 2016 she reminded the claimant to make a flexible working request "as you've informed me several times that you are unable to work antenatal clinic hours or your previously agreed hours 0900hrs – 1500hrs (Mon – Fri)".

77. The claimant was only able to work two days each week over her first four weeks in the ANC as she took a day of emergency leave in her third week and she then was on sick leave at the end of her fourth week, from 29 September – 16 October 2016, owing to stress and anxiety (29 September 2016 only) and a respiratory condition.

78. The claimant submitted a flexible working pattern in which she requested to work from 08.30 – 14.30, Monday to Friday. This was agreed and would take effect from 31 October 2016. In confirming this decision Ms Bartlett emphasised that this was a temporary agreement which applied to the claimant's ANC deployment and would need to be reviewed when she returned to her substantive post.

79. Although it had been envisaged that the claimant would do some work alongside Ms Van der Vord this did not happen. The claimant says that Ms Bartlett told her that she would be able to provide cover when Ms Van der Vord took three weeks' leave in November 2016 but we accept Ms Bartlett's evidence that she did not agree to this. This is because Hannah Rogers, Consultant Midwife – Public Health and Safeguarding, emailed Ms Bartlett on 2 November 2016 to confirm that she would be covering the referrals meeting and two out of the three clinics which Ms Van der Vord ran. By this date the claimant had completed only one week of her full contracted hours and she was still reintegrating back to work. Ms Topp had envisaged the claimant working alongside Ms Van der Vord not undertaking this role on her own in her colleague's absence.

80. However, we find that the claimant did discuss this with Ms Bartlett and came away with the misunderstanding that Ms Bartlett had agreed that she could cover Ms Van der Vord's leave. This is because the claimant discussed this with Dr Khan when she saw him again via a self-referral on 7 November 2016.

<u>Occupational Health assessment on 7 November 2016</u>

81. In his report of the same date i.e. 7 November 2016, Dr Khan noted that the claimant "tells me that she has coped very well and has also felt very well over the last two months". The claimant denies saying this. She says that she may have given Dr Khan the impression that everything was

absolutely fine but it was not. We find that the claimant did say this. We do not find it credible that Dr Khan would have invented this. This is also consistent with the fact that she told Dr Khan that the respondent had agreed that she could cover her substantive role. She was not only reporting that she was well but she was well enough to cover this role. Dr Khan noted:

> "She tells me that she is being allowed to cover her former role temporarily if that is the case then it suggests that she is being deemed fit to return to it. If she is asked to cover this role (unless there are any obvious problems while she does it) then she is essentially being told she can cope and so you could meet with her and consider it as a long term return. The opposite is also true, if you do not wish her to return within six months it would be difficult to ask her to cover that role for any length of time…I am aware that you wanted a longer period of stability before making a decision. She was absent for a long period of time due to her various stresses impacting on her mental health. Given the severity of her the low mood at the time, I would be reluctant to push her back to her former work…"

We do not find that Dr Khan was recommending that the claimant was fit to return to her substantive role. He emphasised the respondent's requirement for a longer period of stability and warned against the claimant returning prematurely to her substantive role. It is notable that Dr Khan discussed the claimant's progress with Ms Bartlett ahead of this appointment and it is likely that this contradicted what the claimant had told him. On her own evidence, she had not been coping well nor had she felt very well since her return to work.

82. A week later, on 14 November 2016, the claimant approached Ms Bartlett in the midwives' office in front of other colleagues. The claimant had left a telephone message for Ms Bartlett earlier that day about covering Ms Van der Vord. She asked to speak to Ms Bartlett in private. Ms Bartlett refused. She had previously told the claimant that they should avoid ad hoc discussions. She noted that they had a one-to-one meeting scheduled the next day. She was waiting to have a meeting with Ms Girton. The claimant told Ms Bartlett that she had agreed she could cover Ms Van der Vord and when Ms Bartlett denied this, the claimant told her she was accusing her of lying. Once again, the claimant had initiated this exchange.

83. The claimant refused to attend her meeting with Ms Bartlett the next day. Ms Bartlett reported this to her line manager, Simon Mehigan, Deputy Director of Midwifery. At around this time, Ms Bartlett disclosed some sensitive information about the claimant to Mr Mehigan as she felt this was necessary for his understanding of the claimant's circumstances. We do not find that it was necessary for Ms Bartlett to have disclosed this specific information.

84. The claimant complains that Ms Bartlett instructed colleagues to monitor her start and finish times. We accept the respondent's evidence that punctuality was monitored for all staff throughout the maternity unit by the band 7 lead, Ms Girton. This was necessary for workforce planning. It is therefore likely that the claimant's punctuality was being monitored. Her attendance and hours were erratic. As has been noted already, the

claimant accepted that punctuality was a recurrent issue for her. Although we find that Ms Bartlett spoke to the claimant frequently about her impunctuality, we accept Ms Bartlett's evidence that this was because she was concerned that the working pattern the claimant had chosen conflicted with her childcare commitments and sleep pattern. It was also reasonable for Ms Bartlett to raise this issue as the claimant's attendance impacted on the service. Ms Bartlett was therefore making reasonable enquires which were related to the claimant's welfare as well as to the needs of the service. As Ms Bartlett wrote in a referral to Occupational Health on 9 December 2016:

> "Returning to work has been difficult for Claudia, she is a single parent and her and her daughter has had to readjust to her return. Initially this resulted in Claudia regularly attending work late; however there has been some improvement in her time keeping over the last couple of weeks".

85. At the end of the week the claimant met with Ms Topp when she requested a new line manager as she felt upset, undermined and humiliated by Ms Bartlett. Ms Topp told her that if she wanted a different manager she would need to move to a different clinical area. She also discussed this with Mr Mehigan on 12 December 2016 when he agreed to consider this if she provided him with written details of how Ms Bartlett had been unsupportive. This was reasonable. He did not therefore refuse to change her line manager. The claimant told Mr Mehigan that she was considering a grievance against Ms Bartlett.

86. Mr Mehigan also reviewed the claimant's return to work when he noted her sickness absences and lateness. He also confirmed that sensitive information about her health had been disclosed to him.

Bullying and harassment complaint

87. The claimant submitted a bullying and harassment complaint against Ms Bartlett on 24 January 2017. Mr Mehigan acknowledged the claimant's grievance "on the grounds of bullying and harassment". He told her that Peter Cook, General Manager for Private Patients had been commissioned to investigate this grievance. He also confirmed that Angela Cox, Intrapartum Matron, would take over as her line manager, whilst this investigation was ongoing who would arrange a meeting to review the claimant's sickness absences and lateness.

88. It had been envisaged that, subject to Occupational Health clearance, the claimant would be able to return to her substantive role if she had demonstrated sustained attendance over six months in the ANC. As she had not demonstrated this because of her sickness absences and persistent lateness, Mr Mehigan told her that she would instead be required to remain in the ANC for another three months, to include some audit and risk analysis work, and if she was able to demonstrate regular attendance and punctuality he would support her in returning to her substantive post for an initial six-month period. If she did not demonstrate this then he would "give serious consideration as to whether it is appropriate for you to return to your substantive post". The claimant felt that she was being told that she would probably never be able to return to her substantive post because of her sickness absences and impunctuality.

89. Mr Mehigan agreed to the claimant's request to work reduced hours of 25 hours per week from 09.30 – 14.30 between 6 – 29 March 2017 to prepare for court hearings and to manage her stress.

90. As has been noted already, the claimant was persistently late between 31 January – 7 March 2017. This included the first two days following the adjustment of her start time. Mr Mehigan wrote to the claimant on 8 March 2017 (his letter being erroneously dated 31 January 2017) to note that of the 21 days she had been rostered to work, the claimant was late 13 times and she had been absent on five occasions. Mr Mehigan asked Ms Cox to investigate the claimant's punctuality under the Disciplinary Policy. The claimant had already discussed her timekeeping with Ms Cox on 7 March 2017 when she assured her that she would not have any further episodes of lateness. The claimant agreed that she was consistently 30 minutes late.

Sickness absence 2017 / 2018

91. The claimant went on sick leave on 10 March 2017 and she remained on sick leave until her dismissal on 5 April 2018.

92. She was signed off work for an initial period of three weeks, from 10 – 31 March 2017, because of stress. As with all subsequent fit notes submitted by the claimant, this did not refer to any amended duties or workplace adaptations which would have enabled her to return to work. She submitted a second fit note covering the period 1 April – 7 May 2017.

Occupational Health assessment on 3 April 2017

93. The claimant was reviewed by Dr Khan on 3 April 2017. In his report of the same date, Dr Khan referred to the claimant's ongoing stressors of her court cases, her grievance and exclusion from her substantive post to which she hoped to be able to return on amended hours. He advised that other than long-standing sleep problems which impacted on the claimant's timekeeping

> "in every other sense she has maintained good mental health and I would have no concerns if you decided to allow her to return to her substantive post…I have to stress that she is not mentally unwell and I am not declaring her unfit rather I am declaring her fit for both posts depending on how you are able to accommodate her…I cannot give you an underlying medical condition that makes her attendance a problem…"

He was supportive of an adjustment of the claimant's hours to 09.30 – 14.30pm to help with her sleep. He noted that the claimant did not feel able to return to the ANC.

94. It is difficult to reconcile Dr Khan's assessment that the claimant was fit to return to her substantive role with her circumstances: she had been unable to maintain sustained attendance between September 2016 and March 2017; she had been certified by her GP as being unfit for work until 7 May 2017; she had an underlying health condition which was exacerbated by her ongoing personal stressors, her grievance as well and by her perception that she had been excluded from her substantive role.

This assessment was also inconsistent with Dr Khan's report of 7 November 2016. In her evidence to the tribunal, the claimant says that Dr Khan's opinion that she had maintained good mental health was obviously inaccurate. We agree. She was not fit to return to work.

95. The claimant remained unfit to return to work. On 13 April 2017 she forwarded a fit note confirming that she had been signed off work until 7 May 2017 because of stress.

96. The claimant attended a grievance investigation meeting with Mr Cook on 7 April 2017. The claimant wanted her complaints to be dealt with under the respondent's Bullying and Harassment Policy instead of the Grievance Policy. This was considered by Mr Cook who concluded that the Grievance Policy was appropriate because the claimant was complaining that Ms Bartlett had failed to comply with her duties under various HR policies. His investigation would proceed under three headings: sickness absence management; breach of confidentiality; and the flexible working process. Although we considered that the claimant's complaint could have been dealt with under the Bullying and Harassment Policy we do not find that the claimant suffered any disadvantage because of this as her complaints were investigated.

First formal review meeting on 28 April 2017

97. The claimant attended a formal review meeting with Ms Cox on 28 April 2017 which Dr Khan had advised she was fit to attend. The claimant said that she did not want to return to the ANC and hoped to return to her substantive role. She felt that she would not be fit to return to work when her fit note expired on 7 May 2017 because of her ongoing personal stressors and grievance, and emphasised that the grievance outcome would impact on her ability to return to work. As Ms Cox wrote in a follow-up letter to the claimant:

> "You informed me that you are hoping to return to work after the completion of the grievance but that if the issues are not resolved and acknowledged that you believe you may never be able to return to Chelsea and Westminster".

Second formal review meeting on 12 June 2017

98. A second review meeting on 12 June 2017 was conducted by telephone. The claimant said that she had been referred for CBT by her GP and was awaiting an appointment in the next few weeks. The claimant had written to Ms Cox before this meeting to say that she had been signed off work until 21 July 2017. At this meeting the claimant stated that she could not return to work until she had received a grievance outcome and she hoped to be able to return before 21 July 2017. The claimant agreed that Dr Khan's previous advice of 3 April 2017 was too optimistic, she remained too unwell to work and she agreed be reviewed by him.

99. The claimant forwarded another fit note to the respondent in which she had been certified as unfit for work from 21 July – 31 August 2017 because of stress.

Third formal review meeting on 17 July 2017

100. A third review meeting took place on 17 July 2017. The claimant said that she did not feel well enough to return to work whilst her grievance and one set of her civil proceedings remained outstanding. She said that she needed both issues to be resolved before she was able to return. In her evidence to the tribunal, the claimant said that her family case was quite straightforward at this stage and was not causing her stress. The repeated that she could not return to work in the ANC and was only prepared to return to her substantive role. In a follow-up letter to the claimant, Ms Cox warned her that unless she was able to return to work in the immediate future her case could be referred to a LTSA hearing which could result in her dismissal.

Grievance outcome

101. Pippa Nightingale, Director of Nursing and Midwifery / Clinical Director who had by this date taken over management of the claimant's grievance, forwarded Mr Cook's grievance investigation report to the claimant on 27 July 2017. Mr Cook dismissed the claimant's complaints about Ms Bartlett's management of her sickness absence and flexible working arrangements and upheld her complaint that Ms Bartlett had breached her right to confidentiality. The claimant was invited to a meeting to discuss this report and her return to work. She replied when she complained about the grievance process.

102. The claimant met with Ms Nightingale on 18 August 2017 to discuss the grievance outcome. Ms Nightingale agreed to reinvestigate the claimant's complaint regarding the breach of confidentiality, to investigate whether Ms Bartlett had been working on 17 June 2016 and to consider why Mr Cook had not interviewed one of the claimant's supporting witnesses. The claimant felt that her relationship with Ms Bartlett had broken down irretrievably although she agreed to consider mediation. She agreed that Ms Cox was a supportive manager. Ms Nightingale discussed the claimant's options for returning to work which included relocating to another site, working in a different clinical area and applying to work on a term-time basis to support her childcare commitments. Ms Nightingale emailed the claimant on 22 August 2017 to summarise their meeting.

103. The claimant's NMC registration lapsed on 31 July 2017 which meant that she was unable to practise as a midwife. She therefore needed to complete the NMC revalidation process in order to practise again.

Fourth formal review meeting on 23 August 2017

104. A fourth formal review meeting took place on 23 August 2018. Ms Cox agreed to delay this meeting until after the claimant's grievance feedback meeting with Ms Nightingale. The claimant told Ms Cox that Ms Nightingale had agreed to review one aspect of her grievance. She noted that there was a four-day trial listed for her civil case in mid-September 2017 and she said that she did not feel well enough to return to work whilst both issues remained ongoing. The claimant said that she wanted to return to her substantive post and if her grievance did not bring about this

outcome she would not come back to work. She noted that because of her reactive depression her response to an unfavourable grievance outcome was unpredictable. As the bulk of the claimant's grievance had already been determined the claimant was placing a great deal of emphasis on the remaining part of her grievance which remained outstanding to bring about her desired outcome. It was agreed that the claimant's Occupational Health appointment would be rescheduled until after her trial. In her follow-up letter to the claimant, Ms Cox again warned the claimant that she would be referred to a LTSA hearing which could result in her dismissal if she was unable to return to work in the immediate future.

105. The claimant submitted a fit note in which she was signed off work for a further two months, from 31 August – 31 October 2017, because of stress.

Occupational Health assessment on 18 September 2017

106. The claimant was reviewed by Dr Khan on 18 September 2017. The claimant told him that she did not believe she could continue working in the NHS because of her civil case and she requested his support with an IHR application. She told him that her GP and specialist supported this. In his report, Dr Khan wrote

> "she tells me she can no longer see herself working in the NHS because of her other non-work experience with the NHS (in relation to one of her court cases). She asked me to support an application for ill-health retirement…I explained my own opinion is that ill-health retirement would not be appropriate…I cannot quote her 'medically' unable to work ever again in the NHS"

Dr Khan was not therefore supportive of IHR because he was unable to conclude that the claimant was permanently incapable of working again. He suggested a case conference to explore whether the claimant could be supported to return to work. However, he also noted "looking at the strength of feeling about returning to work, it does make it practically unlikely to happen". In her evidence to the tribunal, the claimant said that she was obviously unfit to work without support, her sickness and her punctuality were not going to approve, she was at risk of losing her job and her home, and she felt that IHR was her only option.

Fifth formal review meeting on 2 October 2017

107. At a fifth review with Ms Cox on 2 October 2017 the claimant said that she did not feel that she would be able to return to work with the respondent or within the NHS indefinitely. She had lost trust in the wider NHS in large part because of her ongoing civil case. These proceedings had been adjourned until January 2018. She felt that her grievance remained unresolved. She said that she wanted to apply for IHR. She disclosed a diagnosis which impacted on her ability to work. She said that there were no steps which the respondent could take which would enable her to return to work. Ms Cox told the claimant that she would now convene a LTSA hearing.

108. An addendum to the grievance investigation report was completed on 13 October 2017 which addressed the additional issues that Mr Cook had reinvestigated. This did not affect the grievance outcome.

109. The claimant forwarded another fit note to Ms Cox in which she was certified as being unfit for work for a further three months from 31 October 2017 – 31 January 2018. The claimant explained that this was to "get me through both court cases".

110. Geraldine Cochrane, Head of Nursing, wrote to the claimant on 11 November 2017 to invite her to final LTSA hearing on 20 November 2017. A LTSA report which Ms Cox had completed was enclosed. The claimant was told that dismissal was a potential outcome and she had a right to be accompanied to this hearing. She was invited to submit any written representations by 13 November 2017. This hearing was postponed because the claimant failed to confirm her attendance as required.

111. Ms Cox's report covered the claimant's sickness absence since 10 March 2017. In respect of the impact that the claimant's absence had had on the service Ms Cox wrote:

> "CK's substantive post of Lead Midwife for Mental Health is a standalone position and requires a consistent practitioner to care and coordinator [sic] often very complex patients who are high risk…[it is] required to support vulnerable women through a huge life experience and it is imperative that there is someone in this post to ensure high standards of care are adhered to."

Ms Cox noted that the claimant had confirmed that she was too unwell to return to work with the respondent or the NHS in the foreseeable future, and redeployment had not been explored because of this. This report did not refer to disability or to any of the adjustments that had been made to support the claimant in her substantive role. This was because the report dealt with the claimant's absence since March 2018 when no adjustments had been made nor were there any adjustments which could have been made in this period which would have facilitated the claimant's return to work. As she, her GP and Dr Khan agreed, the claimant remained too unwell to return to work throughout this period.

112. The claimant's father attempted suicide in November 2017 when he sustained a cerebral haematoma.

Case conference on 27 November 2017

113. At a rescheduled case conference on 27 November 2017 with Ms Cox and Dr Khan, the claimant repeated that she did not believe she could return to work in the foreseeable future. She cited her two ongoing court cases as well as her father's deteriorating health as stressors. She said that she wanted to apply for IHR. In his report of the same date, Dr Khan noted:

> "I explained that whilst she is off with stress, and I can see that stress lasting a very long time making it difficult for her to return to work; I cannot at the same time, justify that she will be not be back in the longer term. I would have to justify that she is permanently unfit to work now, whereas I

would be more than happy to support her return to work, if she felt that she was able to cope better and deal with her stresses."

Dr Khan did not therefore recommend IHR. He advised the claimant that her specialist or GP could complete the IHR application but if not he agreed to do this. Dr Khan also advised that it was unlikely that the claimant would be fit to return to work when her fit note expired in January 2018, as her stress was unlikely to resolve by this date. In her evidence to the tribunal, the claimant said that Dr Khan was finally realising that she was struggling.

114. The claimant agreed that her two ongoing court cases were stressors. She had by now also received the addendum to her grievance. In her evidence to the tribunal, the claimant said that by this date it was too late for any resolution.

115. IHR forms were sent to the claimant in early December 2017 and she was invited to contact HR for help with completing them.

116. Ms Cochrane invited the claimant to a rearranged LTSA hearing on 11 January 2018. The claimant was told that this hearing would proceed in her absence if she failed to attend without good reason. She was also told that this hearing could result in her dismissal and reminded of her right to bring a companion. She was invited to submit any written representations by 5 January 2018.

117. The claimant began 12 sessions of counselling on 8 January 2018.

LTSA hearing on 11 January 2018

118. The LTSA was chaired by Ms Cochrane, who was supported by Viktoria Burley, Head of Employee Relations. Ms Cox was also in attendance to present her report. The respondent had agreed to bring this meeting forward by an hour to 14.30 at the claimant's request to fit in with her childcare.

119. The claimant attended without a companion. She referred to her two legal cases and her father's suicide attempt. She said that she was stressed and could not cope. We accept Ms Cochrane's evidence that she asked the claimant whether she wanted to proceed and the claimant told her she did as she wanted to get the hearing over with. The claimant was unable to recall what she said and we do not believe that Ms Cochrane would have invented this.

120. Although the claimant was unable to recall whether she said that she was unfit to work indefinitely, we find that it is likely that she did say this. This was recorded in the respondent's contemporaneous note of the hearing. This was also what the claimant had said at her Occupational Health appointment on 18 September 2017, the review meeting on 2 October 2017 and the case conference on 23 November 2017. She no longer felt able to return to work and wanted to apply for IHR. She referred to IHR several times and noted that her GP and specialist supported this.

121. The claimant requested that Ms Cochrane delayed her decision until after she had applied for IHR. She had not at this stage submitted an application. She also asked that this decision was delayed until after she had completed her 12-week course of counselling, although she explained this could be longer if needed. She also said that she had a disability.

122. The claimant also referred to her grievance and noted that she was waiting for an update which was causing her stress. It was not clear to us which part of this grievance remained outstanding, however, as we have noted, the bulk of the claimant's grievance had already been concluded.

123. The hearing was adjourned because the claimant needed to collect her child and it was agreed that Ms Cochrane would telephone her later to confirm her decision.

124. Having reviewed the respondent's record of this hearing we find that the claimant took an active part in this hearing. We also note that the claimant did not submit any documents or written representations prior to this meeting. She had had in effect over two months to do this because Ms Cochrane had initially written to her on 11 November 2017 when she had been invited to submit any written representations.

125. In her evidence to the tribunal, Ms Cochrane said that when she discussed the IHR process with Ms Burley during the adjournment she was told that it was not the respondent's practice to wait for an IHR application to be completed as these were separate processes. Ms Cochrane said that she was also aware that the IHR outcome was uncertain and the process protracted and she felt that delaying the outcome was not in the claimant's best interests. It is notable that the SAPP provided that where Occupational Health supported IHR, the employee would remain on sick leave whilst the application was processed and if approved, the contract would be terminated on the grounds of IHR. The SAPP noted that an application for IHR took three months on average. However, we have found that Dr Khan did not support the claimant's IHR application. He had only agreed to complete the IHR application if the claimant was unable to obtain the support of her specialist or GP. The SAPP provided that in these circumstances whilst an employee could seek independent medical support to progress an IHR application, the respondent would continue to take action including dismissal.

126. Ms Cochrane telephoned the claimant later that day when she told her that she had been dismissed by reason of capability due to ill health. The claimant was told that she would receive 12 weeks' notice.

127. In her evidence to the tribunal, Ms Cochrane said that her focus was on the claimant's sickness record since March 2017, as outlined in Ms Cox's report. She understood that the claimant's stressors were external and did not consider the impact that the grievance had had on the claimant. However, she felt that she had sufficient information, including from Occupational Health to make her decision. She said that the evidence she had, which the claimant confirmed, was that the claimant could not return to work in the foreseeable future and there were no adjustments which

would have changed this. She also took account of the claimant's intention to apply for IHR.

128. Ms Cochrane wrote to the claimant on 25 January 2018 to confirm this outcome in which she noted that the claimant had been on sickness absence for over 10 months and she had confirmed that she was unable to return to work now or in the foreseeable future and wanted to apply for IHR. Ms Cochrane also noted that the claimant's role was a standalone post which had been covered by a secondment and this arrangement could not continue indefinitely. She concluded that this post "involves supporting vulnerable women through a huge life experience and it is imperative that there is substantive cover to ensure high standard of care." She was told that she would receive 12 weeks' notice of dismissal which would be paid subject to her submitting evidence that she had been reinstated on the NMC register. Ms Cochrane noted that Dr Khan would assist the claimant with her IHR application if neither her specialist nor GP were able to support her with it. She was told that she had 10 days in which to lodge an appeal.

Appeal

129. The claimant was signed off work because of stress for six months from 30 January – 31 July 2018.

130. She emailed HR on 7 February 2018 to request a two-week extension on the grounds that her father was unwell when she also noted that she was seeking legal representation. It is notable that within three minutes of receiving this email, Ms Burley emailed her HR colleagues to note "My view is that we shouldn't extend – as this has been the pattern of behaviour since the start". This decision was referred to Natalie Porter-Garthford, Associate Director of HR, who was the respondent's most senior HR officer at the time. She discussed this with Mr Burley the next day when she decided to refuse the claimant's request. This decision was conveyed to the claimant later that day at 12.28 when the claimant was told "It has been confirmed that the Trust would expect you submit your appeal within the required timeframes". She was told that any supporting documents could be submitted at a later date. The claimant therefore had until 17.00 that day in which to submit an appeal. In her evidence to the tribunal, Ms Porter-Garthford stated that it was the respondent's usual practice to apply its policies stringently. She felt that the claimant had adequate time to submit an appeal.

131. The claimant submitted a three-line summary appeal on 14 February 2018. Although the claimant complained that policies and procedures had not been followed and she had not been supported in accordance with the Equality Act 2010 she did not provide any further detail. We find that this was a half-hearted attempt to appeal her dismissal which the claimant had little confidence would be accepted because it was late. HR replied on 22 February 2018 to confirm that her appeal would not be progressed as it had been lodged out of time. In her evidence to the tribunal, Ms Porter-Garthford confirmed that this was the sole basis on which the appeal was rejected.

132. The claimant was dismissed on 5 April 2018. She did not send her IHR application to the respondent before this date.

133. She completed a course of counselling on 21 May 2018. Her counsellor wrote to her GP on this date with a short report in which she noted that the claimant's outcome scores had not changed since May 2017 "which is probably indicative of the stress associated with the ongoing court cases".

134. The claimant did not apply for IHR until after her employment with the respondent ended. She was granted tier 1 IHR benefits on 23 November 2018 which meant that the NHS Pension Scheme's medical adviser had concluded that the claimant was unable to undertake her substantive role with the respondent owing to permanent ill-health.

The Law

Disability discrimination

Failure to make adjustments

135. The duty to make reasonable adjustments is set out in sections 20 – 21 EQA and in Schedule 8. Where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

136. Under Schedule 8, paragraph 20(1), an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled *and* is likely to be placed at a substantial disadvantage by the PCP, physical feature or, as the case may be, lack of auxiliary aid. A tribunal can find that the employer had constructive (as opposed to actual) knowledge both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage. In this case, the question is what objectively the employer could reasonably have known following reasonable enquiry.

137. In Environment Agency v Rowan [2008] IRLR 20 the EAT said that in considering a claim for a failure to make adjustments the tribunal must identify the following matters without which it cannot go on to assess whether any proposed adjustments are reasonable:

    (1) the PCP applied by / on behalf of the employer, or
    (2) the physical feature of the premises occupied by the employer, or
    (3) the identity of non-disabled comparators where appropriate, and
    (4) the nature and extent of the substantial disadvantage suffered by the claimant

138. The onus is on the claimant to show that the duty arises i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not disabled. The burden then shifts to the employer to show that the disadvantage would not have been eliminated

or alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made this adjustment.

139. The test for whether the employer has complied with its duty to make adjustments is an objective one, see Tarbuck v Sainsbury's Supermarkets [2006] IRLR 664. Ultimately, the tribunal must consider what is reasonable, see Smith v Churchills Stairlifts Plc [2006] ICR 524. The focus is the reasonableness of the adjustment not the process by which the employer reached its decision about the proposed adjustment.

140. The tribunal must also have regard to the guidance contained in the EHRC Code of Practice on Employment 2011 and in particular the following six factors it enumerates when considering the reasonableness of an adjustment:

    (1) Whether taking any particular steps would be effective in preventing the substantial disadvantage
    (2) The practicability of the step
    (3) The financial and other costs of making the adjustment and the extent of any disruption caused
    (4) The extent of the employer's financial or other resources
    (5) The availability to the employer of financial or other assistance to help make an adjustment (such as through Access to Work)
    (6) The type and size of the employer

Discrimination arising from disability

141. Under section 15(1) EQA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

142. The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of his [or her] disability". The tribunal must ask what the reason for this alleged treatment was. If this is not obvious then the tribunal must enquire about mental processes – conscious or subconscious – of the alleged discriminator (see R (on the application of E) v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors 2010 IRLR, 136, SC).

143. In Pnaiser v NHS England [2016] IRLR 170 the EAT set out the following guidance:

    (1) A tribunal must first identify whether there was unfavourable treatment and by whom.
    (2) The tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and amount to an effective reason for or cause of it. Motive is irrelevant. The focus of

this part of the enquiry is on the reason for or cause of the impugned treatment.

(3) The tribunal must determine whether the reason or cause is something arising in consequence of B's disability. The causal link between the something that causes the unfavourable treatment and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(4) The "because of" enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

144. The employer will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and must represent a real, and objective consideration. As to proportionality, the EHRC Code on Employment notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

Jurisdiction – time limits

145. Section 123 EQA provides that:

> (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.
>
> …
>
> (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 not inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

146. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and amounted to an act of discrimination extending over a period.

147. In considering whether an act of discrimination is to be treated as extending over a period the focus of inquiry must not be on whether this is something which can be characterised as a policy, rule, scheme, regime or practice but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably (see Hendricks v Metropolitan Police Commissioner [2003] IRLR 96, CA).

148. It is for the claimant to satisfy that it is just and equitable to extend the time limit. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule (see Robertson v Bexley Community Centre [2003] IRLR 434).

149. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT said that in considering this discretion a court should consider the prejudice which each party would suffer as the result of refusing or granting an extension and have regard to all the circumstances of the case, including:

(1) the length of and reasons for the delay
(2) the extent to which the cogency of the evidence is likely to be affected by the delay
(3) the extent to which the party sued has cooperated with any requests for information
(4) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action
(5) the steps taken by the plaintiff to obtain appropriate professional advice once he or he knew of the possibility of taking action.

150. In the applying the just and equitable formula, the Court of Appeal held in Southwark London Borough v Alfolabi [2003] IRLR 220 that while these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, "provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion". This was approved by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 when it noted that:

> "factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

151. Even where a claimant fails to advance a reason, the tribunal must consider the balance of prejudice.

Unfair dismissal

152. Under section 98(1) ERA, it is for the employer to show:

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and

> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

153. If the employer fails to discharge this burden the dismissal will be unfair.

154. If the employer does establish a potentially fair reason for dismissal then the tribunal must go on to decide whether this dismissal was fair or unfair, applying section 98(4) ERA and at this stage the burden of proof is neutral.

155. Section 98(4) ERA provides that:

> [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

Capability (ill-health)

156. Capability (ill-health) is one of the potentially fair reasons for dismissal under section 98(2) ERA.

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

158. Where an employee has had a long-term absence because of illness or injury, a tribunal must consider whether the employer could have been expected to wait longer for the employee to return. This will involve balancing the "unsatisfactory situation of having an employee on very lengthy sick leave" against other factors which may include: the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employer (see Spencer v Paragon Wallpapers Ltd [1977] ICR 301, EAT; S v Dundee City Council [2014] IRLR 131, Ct Sess (Inner House)).

159. A tribunal must also consider whether there has been a fair procedure. This requires, in particular:

    (1) consultation with the employee
    (2) medical investigation i.e. such steps as are sensible to the circumstances (see East Lindsey District Council v Daubney [1977] ICR 566, EAT; S v Dundee City Council)
    (3) consideration of other options, including redeployment.

160. A dismissal may be rendered unfair if an employer has failed to consider eligibility under an ill health early retirement scheme before dismissing an employee (see First West Yorkshire Ltd t/a First Leeds v Haigh [2008] IRLR 182).

Notice pay

161. The provisions governing the statutory right to notice on termination are set out in sections 86 – 91 ERA. The right of an employee to paid notice under these provisions is ousted by section 87(4) ERA which applies where the notice that the employer or employee are required to provide is at least one week more than the notice required by section 86(1) ERA.

Conclusions

Disability discrimination

Failure to make adjustments

Did the PCPs place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? If so, did the respondent know or could it reasonably have known the claimant was likely to be placed at such disadvantage?

162. In each case, the claimant claims that the PCP placed her at a substantial disadvantage in that she was unable to meet the PCP because of her disability.

163. We remind ourselves of the guidance in Environment Agency v Rowan which is that we must be able to identify the nature and extent of the disadvantage in order to establish whether the duty applies and what adjustments would have been reasonable, not least because these adjustments must have some likelihood of alleviating this disadvantage.

PCP1

164. We have accepted the claimant's evidence that regular attendance and punctuality were difficult for her because of her disability and we therefore find that this PCP placed her at a disadvantage. However, we find that the substantial disadvantage contended for i.e. that she was unable to meet this PCP because of her disability has been pleaded in a way that fails to elucidate how the PCP interacted with the claimant's disability to her substantial disadvantage, nor does it enable us to understand and identify the nature and extent of this disadvantage. As Mr Allen, for the claimant, conceded, the disadvantage contended for is somewhat generic. We agree. We are therefore unable to find that this PCP placed the claimant at a substantial disadvantage nor that the respondent had actual or constructive knowledge that it did. For completeness, however, we will go on to consider the steps the claimant contends the respondent should have made to avoid or alleviate this disadvantage.

PCP2

165. We find that this PCP placed the claimant at a substantial disadvantage compared to non-disabled employees. We accept that the impact of her father's deteriorating health as well as her dismissal exacerbated the claimant's disability. We find that because of this the PCP placed her at the substantial disadvantage that she was unable to meet this PCP i.e. she was unable to submit an appeal within the two-week deadline which the respondent enforced rigidly. We also find that it was or should have been patent to the respondent that the claimant was likely to be placed at this substantial disadvantage by this PCP.

PCP3

166. We do not find that the claimant has established that this PCP placed her at a substantial disadvantage. This is because the claimant was able to attend the LTSA hearing on 11 January 2017. We have also found that she took an active part in this hearing. She was therefore able to meet this PCP. This part of the claim fails.

If so, were there steps that were not taken which could have been taken by the respondent to have avoided any such disadvantage? If so, would it have been reasonable for the respondent to have taken those steps at any relevant time?

PCP1

167. Had we found that the failure to meet this PCP amounted to a substantial disadvantage we would not have concluded that there were any reasonable steps which the respondent could have taken to have alleviated or avoided this disadvantage (with reference to the list of issues above):

167.1 (a)(i)(A), (B) & (C): to the extent that it amounted to a capability trigger, we agree that section 11.3.5 of the SAPP was applied to the claimant on 7 March 2016 and 2 October 2018 but we do not find that waiving this trigger would have avoided or alleviated the disadvantage i.e. it would not have meant that the claimant was any more likely to be able to meet this PCP because she was on long-term sickness absence and she agreed that she was unable to return within several months / the foreseeable future; we do not find that Mr Mehigan applied any triggers under either the SAP or the Disciplinary Policy to the claimant.

167.2 (a)(ii)(A): we have not found that the claimant was repeatedly told off for arriving late to work between September 2016 and March 2017.

167.3 (a)(ii)(B): we have not found that Mr Mehigan refused to change the claimant's line manager on 12 December 2017, he instead asked the claimant to provide him with more information in order to consider this which was reasonable; in addition, it is not clear to us how this adjustment would have avoided or alleviated the disadvantage.

167.4 (a)(iii)(A), (B) & (C): we have not found that Ms Bartlett discussed the claimant's private life in public on 29 September 2016 nor in

October 2016; whilst we have found that there was an exchange between them on 14 November 2016 in the midwives' office we have found that this was initiated by the claimant despite Ms Bartlett's instruction to the claimant to avoid ad hoc discussions of this nature; in addition, it is not clear to us how this adjustment would have avoided or alleviated the disadvantage.

167.5 (a)(iv): in the absence of any evidence, we do not find that this would have avoided or alleviated the disadvantage; in any event, it is accepted that this step was not practicable in the ANC role.

167.6 (a)(v): in the absence of any evidence, we do not find that this would have avoided or alleviated the disadvantage.

167.7 (b)(i) & (ii): we have found that this was not a reasonable step because of the nature of the claimant's role.

167.8 (c)(i): we have found that the claimant was supported with working flexibly: she was initially supernumerary; the respondent agreed to her request to work from 08.30 – 14.30 even though this did not align with clinic times in the ANC; she was given the option of reducing her working hours but did not wish to do this as it would impact on her pay; we have found that the claimant was frequently late and routinely left work early in respect of which the respondent took no action nor did it propose to take any action for six months; we also find that this would not have been a reasonable step as it was necessary for the claimant to attend the ANC at agreed times in order for the respondent to meet the needs of the service.

167.9 (c)(ii): we have not found that the claimant was punished as alleged for being late nor was she threatened by Ms Bartlett with disciplinary action; although we have found that the claimant's punctuality was monitored by Ms Girton we agreed that this was necessary for workforce planning and it would not therefore have been reasonable for the respondent to made this adjustment.

167.10 (c)(iii): we do not find that this was practicable and it was not therefore a reasonable step.

167.11 (c)(iv): we do not find that this would have been a reasonable step because the claimant agreed that she was not able to return to work for the foreseeable future and her evidence was that there were no steps which the respondent could have taken to support her return to work from 2 October 2017

167.12 (c)(v): we do not find that this would have been a reasonable step as the claimant was still struggling to reintegrate back into work, it had never been envisaged that she would resume her role in her colleague's absence within her first six months back at work and we have found that Dr Khan did not support this.

167.13 (d): we do not find that this would have alleviated or avoided the disadvantage as we have found that when this support was provided in 2014 the claimant continued to take some sick leave, although it was markedly reduced, and she continued to require ad hoc homeworking days which she requested at late notice and which we have also found was not sustainable because of the requirements of her substantive role.

PCP 2

168. The claimant requested a two-week extension to the appeal deadline on 7 February 2018. When this was refused she submitted an appeal on 14 February 2018 which we have already found was a half-hearted attempt which the claimant made with little hope that it would be accepted. However, the respondent rejected this appeal because it was out of time not because it lacked detail. We find that had the claimant been given a two-week extension then it is likely she would have submitted a more detailed appeal. We therefore find that it would have been a reasonable step for the respondent to have agreed to extend the appeal deadline by two weeks on 8 February 2018. We also find that it would have been a reasonable step for the respondent to have accepted her appeal late on 14 February 2018 and to have invited the claimant to provide further particulars by a later date. These steps were practicable, neither costly nor disruptive for the respondent and they would have enabled the claimant to appeal her dismissal. The substantial disadvantage contended for and which we have found is that the claimant was unable to meet this PCP i.e. to bring an appeal. For completeness, we would emphasise that had we been so required we would not have found that there was any likelihood that the respondent would have upheld the claimant's appeal had it been accepted late because the same factors which were relied on to dismiss her remained applicable and in fact, the claimant had been signed off work by her GP for an extended period until the end of June 2018.

Discrimination arising from disability

169. It is accepted that the respondent treated the claimant unfavourably when it subjected her to capability proceedings by referring her to a LTSA in November 2017 and when it dismissed her. It is also accepted that this was because of something arising in consequence of her disability i.e. her disability-related absence.

Can the respondent show that this unfavourable treatment was a proportionate means of achieving a legitimate aim?

170. It is accepted that the aims relied on by the respondent were legitimate. The issue we are required to determine is whether the unfavourable treatment was a proportionate means of achieving one or more of these aims.

The second LTSA hearing

171. We find that it was proportionate for the respondent to have applied capability proceedings to the claimant when it referred the claimant to a second LTSA in November 2018.

171.1 There were five formal review meetings between 28 April – 2 October 2017 when the respondent reviewed the claimant's health, obtained Occupational Health advice and considered how to support the claimant to return to work. By September 2017 it was clear that the claimant was focused on IHR as she no longer felt able to return to work with the respondent or within the NHS.

171.2 At the fifth review meeting on 2 October 2017 the claimant said that she wanted to apply for IHR. She had been absent for almost seven months by this date and there was no prospect that she would be fit to return to work in the foreseeable future. The claimant said that she did not feel able to return to work indefinitely with the respondent or within the NHS. There were no other options available to facilitate her return to work. In these circumstances, we find that it was proportionate for Ms Cox to recommend that the claimant was referred to a LTSA hearing. This was a proportionate means of meeting the respondent's legitimate aims of delivering safe and consistent service to patients, appropriate and consistent management of employee sickness absence and maintaining certainty in future workforce attendance.

Dismissal

172. We also find that it was proportionate for the respondent to have dismissed the claimant at the LTSA on 11 January 2018.

172.1 The claimant had been on sick leave for almost 10 months and she was signed-off work until the end of the month. She said that she would not be able to return to work again. In her evidence she accepted that there were no adjustments which the respondent could have made after October 2017 to support her in returning to work. She was focussed on making an application for IHR.

172.2 In his report dated 27 November 2017, Dr Khan advised that the claimant's stress was unlikely to resolve by January 2018 and it was likely to last a very long time. Notably, in his previous report dated 18 September 2017 Dr Khan advised that "looking at the strength of feeling about returning to work, it does make it practically unlikely to happen".

172.3 The claimant had previously acknowledged and agreed that there were legitimate concerns about the impact of her ongoing absence from her substantive role on the service. We find that in these circumstances in which the nature of the claimant's contracted role was such that substantive cover was required to ensure a high standard of care to vulnerable service users and there was no reasonable likelihood of the claimant being fit to return to work in any capacity in the foreseeable future, the decision to dismiss her was proportionate. It was a proportionate means of meeting the legitimate aims of delivering safe and consistent service to patients, and maintaining certainty in future workforce attendance. There were no less detrimental steps short of dismissal which the respondent could have taken to achieve the same aims.

Jurisdiction

173. It is not necessary to make any findings on jurisdiction because of our findings above.

Unfair dismissal

Did the respondent adopt a fair procedure when dismissing the claimant by reason of capability?

174. We find that the procedure adopted by the respondent to dismiss the claimant was fair and within the range of reasonable responses.

175. We find that there was adequate and reasonable consultation with the claimant.

175.1 As we have noted, the respondent held five formal review meetings with the claimant between 28 April – 2 October 2017 when it reviewed her health, obtained Occupational Health advice and considered how to support her to return to work.

175.2 By the final review meeting on 2 October 2017 the claimant was clear that she could not return to work with the respondent or to the NHS. In these circumstances in was reasonable for the claimant to proceed to a LTSA hearing.

175.3 A LTSA hearing was convened initially in November 2017 and when the claimant did not confirm her attendance, it was rescheduled on 11 January 2018. The claimant was warned that she faced potential dismissal and was reminded of her right to bring a companion to this hearing.

175.4 We have found that at this LTSA the claimant agreed that she wanted to proceed without a companion and took an active part in this hearing. The claimant had also been given effectively two months to submit written representations.

175.5 The respondent wrote to the claimant on 25 January 2018 to confirm that she had been dismissed and the reasons for this decision. She was given the opportunity to submit an appeal against her dismissal within 10 days.

175.6 Whilst we have found that it would have been a reasonable adjustment under the EQA for the respondent to have extended the appeal deadline we do not find that the respondent acted outwith the range of reasonable responses as required by the ERA when it failed to extend this deadline.

176. We also find that the respondent's medical investigation was reasonable in the circumstances. Dr Khan had advised on 27 November 2018 that it was likely that the claimant's stress would continue for a very long time. The claimant's position was clear. The claimant stated repeatedly that she was unable to return to work with the respondent or within the NHS again: on 18 September 2017, 2 October 2017, 27 November 2017 and 11 January 2018. She also wanted to make an IHR application and she told the respondent that her specialist and GP supported this. We do not find in these circumstances that further medical advice was necessary.

177. The respondent did not consider alternative employment because the claimant was not fit to return to work with or without any adjustments and there was no prospect that she would be able to return to work in the foreseeable future. This was reasonable.

Was dismissal for that reason fair under section 98(4) ERA i.e. was it within the range of reasonable responses?

178. We find that the decision to dismiss the claimant was within the range of reasonable responses:

178.1 The claimant had a long-term illness. She had been absent for over ten months. She agreed that she was unable to return to work in the foreseeable future. Since October 2017, she had repeatedly told the respondent that she could not return to work with it or within the NHS. The respondent was entitled to place significant weight on this.

178.2 There were no adjustments which could be made to facilitate the claimant's return to work. Nor was she well enough for redeployment to be considered.

178.3 The nature of the claimant's substantive role was a significant factor. This was an autonomous role providing leadership and coordination of a mental health service to vulnerable patients. The claimant's sickness absence had impacted on the service and the respondent needed to provide substantive cover for this role.

178.4 We do not therefore find that the respondent acted outwith the range of reasonable responses in failing to wait any longer than it did.

178.5 The respondent considered IHR prior to dismissal. Dr Khan twice advised that he was not supportive of IHR as he was unable to conclude that the claimant was permanently unable to return to her role. This meant that section 11.3.4 of the SAPP did not apply but section 11.5.7 did under which the respondent proceeded with the capability process and the claimant was able to obtain independent medical support for an IHR application. Although the claimant told the respondent that her GP and specialist were supportive of IHR she did not disclose any medical evidence which contradicted Dr Khan's assessment.

178.6 Nor did the respondent hamper or obstruct an IHR application. Dr Khan agreed to complete the IHR application if the claimant was unable to obtain the support of her specialist or GP. The claimant did not send her application form to the respondent for completion. She submitted this application after her dismissal when she was awarded tier 1 IHR benefits.

178.7 Finally, we do not find that the failure of Ms Cochrane to consider the impact of the grievance on the claimant nor that she took account of the claimant's intention to apply for IHR render her decision unfair. Ms Cochrane acted reasonably in accepting the evidence which was that there was no reasonable prospect of the claimant being able to return to work in any capacity in the foreseeable future and her health, and therefore her ability to return to work continued to be affected by several personal stressors i.e. her ongoing legal proceedings, in addition to her father's health.

Notice pay

179. The claimant conceded that there was no prospect of this complaint succeeding. This complaint fails.

Remedy

Injury to feelings

180. Although this hearing dealt with liability issues only, we consider that it is within the overriding objective to make a provisional assessment of the injury to feelings award consequent on our findings.

181. Having considered the guidance in Vento v Chief Constable of West Yorkshire Police (no. 2) [2002] IRLR 102 and the Presidential Guidance: Vento Bands (2017), our provisional assessment is that the discrimination we have found falls within the bottom half of the lower Vento band and that it would be just and equitable to make an award to the claimant for injury to feelings of £3,000.

    181.1 The claimant has claimed injury to feelings in the middle Vento band. However, her discrimination complaints consisted of over 20 specific acts / omissions going back to 2013. The discriminatory conduct we have found was discrete and of limited duration i.e. a failure to make adjustments on 7 and 14 February 2018.
    181.2 Although we have found that because the respondent refused to adjust the appeal deadline the claimant was deprived of the opportunity to appeal her dismissal we have also found that had an appeal proceeded it would not have been upheld.
    181.3 We note that the claimant was signed-off work by her GP for six months from the end of January 2018 which preceded this discriminatory conduct. At the LTSA on 11 January 2018 the claimant referred to the stressors of her two legal cases as well as her father's suicide attempt and it is likely that the decision to dismiss her compounded the impact of these personal stressors. The respondent's refusal to adjust the appeal deadline is likely to have been an additional although secondary stressor.

182. If either party disagrees with our provisional assessment and wishes instead to proceed with a remedy hearing then they should write to the tribunal within 28 days of the date of this judgment. In this event, a remedy hearing will be listed and further case management directions made. If, however, neither party writes to us within this 28-day period we shall promulgate a short judgment on remedy in which we shall make an order for compensation of £3,000 and interest.

Employment Judge Khan

Date 10 March 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11/03/2020

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FOR EMPLOYMENT TRIBUNALS