



EMPLOYMENT TRIBUNALS

Claimant: Mrs Belinda Yates

Respondent: Herefordshire and Worcestershire Health & Care NHS Trust

Heard at: Midlands West Employment Tribunal
(Hybrid: In person and by Cloud Video Platform)

On: 21st, 22nd, 23rd, 24th, 29th, 30th, 31st May (in Tribunal)
25th, 26th July 2024 (in Tribunal)
19th, 20th August 2024 (in Tribunal)
21st, 22nd, 23rd August 2024 (Deliberations with Members)
26th September 2024 (Deliberations with Members)
15th October 2024 (In Tribunal)

Before: **Employment Judge Gidney**
Mr David Spencer
Mr James Reeves

Appearances

For the Claimant: Mrs Yates (In person)

For the Respondent: Mrs Harty (Counsel)

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal, pursuant to s98 Employment Rights Act 1996 ('ERA') is dismissed.
2. The Claimant's claims of direct age discrimination pursuant to s13 Equality Act 2010 ('EqA') is dismissed.
3. The Claimant's claims of direct and perceived disability discrimination pursuant to s13 EqA is dismissed.
4. The Claimant's claim of a failure to make reasonable adjustments pursuant to s20-21 EqA is dismissed.
5. The Claimant's claim of discrimination arising from disability pursuant to s15 EqA is dismissed.
6. The Claimant's claim of harassment related to her disability pursuant to s26 EqA is dismissed.
7. The Claimant's claim of victimisation pursuant to s27 EqA is dismissed.

REASONS

[1] Introduction

1. The Claimant commenced employed with the 1st Respondent in the role of Band 2 Clerical Support Worker for the Intermediate Care Team at Evesham Community Hospital on 4th July 2011. On 19th March 2012 the Claimant took up the post of Band 3 Administrator for the 1st Respondent's Complex Neurology Team, working with Catherine (Katy) Bingham. Following a difficult meeting on 12th May 2021, on 14th May 2021, the Claimant commenced a

period of sickness absence. She remained off work on sick leave until her dismissal, 15 months later, on 25th August 2022 on capability grounds.

2. All parties accept that from May 2022 the Claimant was disabled, as defined by s6 **Equality Act 2010** ('EqA') by the mental impairment of stress and anxiety with a debilitating tremor (the Condition). The Claimant asserts that she was disabled by the Condition from May 2021, that the 1st Respondent either knew or should have known that from May 2021, or alternatively that the 1st Respondent perceived the Claimant to be so disabled by that date.
3. At the date of her dismissal on 25th August 2022 on the purported grounds of capability the Claimant was 61 years old, having been born on 10th October 1960. The Claimant had 11 years completed service. For the purposes of her age discrimination claim the Claimant asserts that at the material time she was in the age group of 'over 60s'. The Claimant was in that age group from 10th October 2020.
4. 5 days after her dismissal, on 30th August 2022, the Claimant notified ACAS of a dispute with the Herefordshire and Worcestershire Health & Care NHS Trust, the 1st Respondent. She received her Early Conciliation Certificate from ACAS on 7th October 2022 [1]¹.
5. By a Claim Form dated 8th November 2022 [2] with accompanying Particulars of Claim [17] the Claimant presented a number of claims against the 1st Respondent. At trial before us the live Claims were:
 - 5.1. Unfair Dismissal;
 - 5.2. Direct Age Discrimination;
 - 5.3. Direct Perceived Disability Discrimination;
 - 5.4. Direct Disability Discrimination;
 - 5.5. Failure to make reasonable adjustments;

¹ All page numbers referred to in this Judgment are references to the electronic bundle of documents.

- 5.6. Discrimination arising from Disability;
 - 5.7. Harassment related to perceived disability / actual disability;
 - 5.8. Victimisation for making a protected act.
6. The 1st Respondent's ET3 [45] and Grounds of Resistance [53] dated 1st March 2023 denied all of the Claimant's claims. The Claimant responded to that document with additional particulars of her claim on 10th April 2023 [72]. The matter was first case managed by Employment Judge Taylor on 9th May 2023 [144]. On 11th May 2023 the Claimant applied to amend her Claim Form by adding a claim of Breach of Contract [150]. This application was refused by Employment Judge Britton on 26th September 2023 [155]. The Judge clarified and relabelled certain factual allegations, leading to an Amended Grounds of Resistance being filed on 22nd December 2023 [165]. The case was last case managed by Employment Judge Hughes on 2nd February 2024, following which a List of Issues was agreed by the parties [184].

[2] The List of Issues

7. At the outset of the hearing and with the agreement of the parties, we updated the List of Issues by removing matters not in dispute, clarifying others and, where possible, narrowing others. The updated **List of Issues** is attached at **Annex 1** to this Judgment, to which the parties are referred.
8. Due to their volume, the allegations of harassment were collated into a separate **Schedule of Harassment Issues**, which have been attached at **Annex 2** to this Judgment to which the parties are referred. We have determined the Issues set out in those two documents.
9. The Claimant's claim has the following components:
 - 9.1. there are 78 separate factual Issues for determination;

9.2. covering 8 of different types of legal claim.

[3] The Evidence

10. We were provided with the following documents:

- 10.1. an agreed trial bundle (1550 pages);
- 10.2. email exchange with Amanda Oliver and Karen Clifford dated 17th August 2022 (2 pages) physical copies added at **[1551-1552]**;
- 10.3. email exchange with Gill Harrad dated 23rd August 2022 (2 pages) physical copies added at **[1538]**;
- 10.4. email exchange regarding social workers dated 24th July 2024 (3 pages);
- 10.5. email exchange with Simran Deu regarding disclosure on 19th July 2024 (5 pages).
- 10.6. an agreed Cast List (2 pages);
- 10.7. an agreed Chronology of Events (5 pages);
- 10.8. written Closing Submissions prepared by the Claimant (99 pages); and,
- 10.9. written Closing Submissions prepared by the Respondent (44 pages).

11. We were provided with the following witness statements:

- 11.1. The Claimant's witness statement (48 pages);
- 11.2. Catherine Bingham's witness statement (7 pages);
- 11.3. Kim Hammond's witness statement (6 pages);
- 11.4. Christina Whittenbury's witness statement (10 pages);
- 11.5. Anna Evans' witness statement (3 pages);
- 11.6. Chloe Bishop's witness statement (3 pages);
- 11.7. Kath Stanbra's witness statement (4 pages); and,
- 11.8. Kerry Wykes' witness statement (4 pages);

12. Each of the witnesses gave evidence under Oath and were subject to cross examination.

[4] Findings of Fact

13. We have not recited every fact in this case, or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts. Findings of fact related to a specific issue that we have been tasked to resolve are set out in our Conclusions section below.
14. The Claimant commenced employment as a Band 3 Administrator with the Respondent on 19th March 2012, pursuant to a Statement of Terms and Conditions issued on 21st March 2012 [199]. The Claimant worked for the Complex Neurology Team providing secretarial and administrative duties for the then Consultant Nurse, Rosie Grove. The Claimant's 2013 appraisal [215] and 2014 appraisal [229] were completed by Ms Grove. Following Ms Grove's retirement in January 2015 Kath Mullins (now Stanbra) the Lead Nurse in Complex Neurology, took over the team. Mrs Stanbra line managed the Claimant and undertook her appraisals on 12th February 2015 [242], 21st January 2016 [258], 26th January 2017 [273] and 22nd February 2018 [289]. In January 2019 Christina Whittenbury joined the team and replaced Mrs Stanbra as the Integrated Community Services Lead. On 22nd January 2019 Ms Whittenbury completed the Claimant's appraisal for that year [296]. Ms Whittenbury was also Katy Bingham's line manager [791].

15. In June 2019 Kim Hammond joined the team as a Sister in Complex Neurology. She was line managed by Katy Bingham [791]. Ms Hammond completed the Claimant's appraisal on 13th November 2019 [306]. On 6th July 2020 Katy Bingham completed the Claimant's appraisal for that year [333]. It was signed by the Claimant on 10th August 2020 [335]. The appraisal contained three additional pages after the Claimant's signature page, headed 'summary of appraisal'. The last of those three pages contained a separate signature box, and had been signed by the Claimant again on 10th August 2020 but, on this page, also bore the manager's signature dated 16th August 2020. There is nothing that we can see from these additional pages to suggest that they are forged and/or that the Claimant's second signature is forged. To our untrained eyes the Claimant's signature is the same on both pages. In so far as the Claimant has invited us to conclude that the second signature is forged, we reject that allegation because the Claimant has failed to establish that the second signature was a forgery and Katy Bingham has denied forging the Claimant's signature.
16. From the end of July 2020, the administrative staff, including the Claimant, began working from home due to the restrictions caused by Covid19. The Claimant provided administrative support to the South of the county and Karen Moogan provided the same service to the North of the county.
17. There was a discussion between Katy Bingham and Kim Hammond about the Claimant which took place in the kitchen. The Claimant invited us to conclude that this occurred before the national lockdowns, ie prior to March 2020, on the grounds that two people could not have safely observed the then social distancing rules in the kitchen, as it was too small. We were not persuaded that this observation was a reliable means of dating this event. We think, on the balance of probabilities, and doing the best that we can, that this occurred prior to the 12th May 2021 meeting, probably by a few months before, in or around March 2021. Both Kim and Katy admit to having a discussion about the Claimant's health, as she had been seen to be shaking. Katy suggested

alcohol was the reason. Kim Hammond suggests that she had valid reasons for being worried about the Claimant's health. Taking paragraphs 14 and 21 of Ms Hammond's statement together, we conclude on the balance of probabilities that Ms Hammond did moot that the explanation was cognitive and due to mental health issues. This could be a reference to any neurodiverse condition or any other mental health concern.

18. During the course of 2021 the Complex Neurology Team, which had operated out of two centres, North and South, were merging into one countywide centre. This process caused difficulties as the two centres had operated different administrative clinical practices. For example in the South Outlook was used for booking appointments, whilst the North used Care Notes, a which was a completely different system. On 23rd March 2021 Kim Hammond completed the Claimant's 2021 appraisal [387].
19. On 23rd March 2021 the Claimant emailed Erica Wiggett and Kim Hammond to express some frustration with the North team [402], stating '*I really don't know what to do, Erica. There is so much going on with the North. They refuse to use Outlook so they rely on Care Notes so when the admin make appointments with the nurses they only look on Care Notes. It is really stupid because not only is annual leave on Outlook but meetings etc are*'.
20. Kim Hammond replied that day [401] stating '*I do not feel anyone is refusing to do anything. This is part of a long process where two teams have worked very differently*'. This exchange illustrates a certain friction developing between the Claimant and Kim Hammond. On the same day Ms Hammond complained to Ms Bingham and Ms Whittenbury that the Claimant's communication had been unhelpful towards countywide working. On 24th March 2021 Christina Whittenbury emailed the Claimant to say it would be good to have a chat '*so that we can all chat about things*' [399].

21. On 20th April 2021 there was a team meeting with the Claimant, Karen Moogan (the administrator for the North team) Kim Hammond, Katy Bingham and Christina Whittenbury. Other specialist neurology nurses also attended. The purpose of the meeting was to consider changes to the way nurses were managing their diaries and roles of the administrative staff within that. During this meeting, we find that the Claimant did made negative comments about Katie Bingham, by stating on more than one occasion that Ms Bingham would not be able to manage these changes.

22. Following the teams meeting Kim Hammond had a text exchange with Christina Whittenbury on 20th April 2021 [439] in which the following messages were exchanged:

KH: What I sent to Belinda ... 'I know you're trying to support Katy by saying she can't manage things but please be mindful that it can come across rather negatively. Just a consideration'.

CW: I'll ring her back tomorrow thank you for everything.

KH: Have started a document keep track of Belinda incidences so any issues you observe and then feedback to her, let me know.

CW: They need to get a grip do their job and shut the f up!!! Please don't put that in my document folder.

23. We find that Ms Hammond did indeed create a document of 'Belinda incidences'. On 28th April Ms Hammond told the Claimant that she had many issues with her and would be requesting a meeting with Christina Whittenbury [460]. The Claimant replied the same day [459], stating '*I don't feel at this stage and meeting would be constructive but if you could list your issues then I would be happy to try an address them*'. The Claimant then contacted Ms Whittenbury to complain that Ms Hammond had made her low and isolated. She said she did not want to meet Ms Hammond but would like a list of her issues. Ms Whittenbury decided that a meeting would be best [465] and by email dated 10th May 2021 arranged one for 12th May 2021 [477]. We find that the purpose of the meeting was for Kim Hammond to put her list of concerns to the Claimant that she had previously told Ms Whittenbury she was

compiling. On 11th May the Claimant asked if there was an agenda [474] which we consider was a perfectly reasonable request. Kim Hammond replied to the Claimant's request for an agenda the same day [456] stating, '*tomorrow is just about our little team, just you, me, Katie and Christina. Our issues that we have and how to move on. I'm off now, see you bright and early tomorrow*'. We conclude that this response was disingenuous at best, designed to down play what she intended to do at the meeting and lure the Claimant into a false sense of security about what lay ahead.

24. On 12th May 2021 the meeting was held between Kim Hammond, Katy Bingham, Christina Whittenbury and the Claimant [490]. Ms Hammond prepared for that meeting by writing out a two page list of issues that she had with the Claimant [485]. This was not an agenda. It was a list of complaints about the Claimant which can be illustrated by the last two entries, namely '*It is bullying that has become the norm. Persistent and unjustified criticism*' and '*Attempting to undermine an individual or group of employees. You do it to Katie and I always knocking Erica, Emma, Christina*'.
25. Ms Hammond had forwarded her list of issues with the Claimant to Ms Bingham in advance of the meeting, for printing. Ms Bingham was sent the list in advance. For reasons we shall explain later in this Judgment, we were not satisfied on the evidence that was available to us that the list had been sent to Ms Whittenbury in advance. It definitely had not been sent to the Claimant in advance, despite the fact that the Claimant had asked for it.
26. Ms Hammond, Bingham and Whittenbury were all clinical staff. The Claimant was a member of administrative staff. The Claimant said that she felt that she had attended a disciplinary hearing and that Ms Whittenbury allowed Kim Hammond to lead the meeting [483]. We conclude that there was an element of 'them and us' about this, and that the clinical staff did gang up on their Team's secretary in the way they conducted that meeting. They were sat together on one side of the table, the Claimant, on her own on the other side.

After the meeting Christina Whittenbury sent her notes of the meeting to the other clinical staff for approval, but did not send them to the Claimant [1027].

27. We have seen an updated version of Kim Hammond's list of issues with the Claimant [487]. It contained in red Kim Hammond's notes of the Claimant's responses, and highlighted in yellow topics that she did not raise at the meeting because it had upset the Claimant so much. Christina Whittenbury took notes of the meeting, that the Claimant amended by adding in a lot more detail of what had transpired [490].
28. It is clear that the Claimant became very upset at the meeting. Immediately after it she emailed Christina Whittenbury [503] and said:

'I am extremely upset and feeling quite ill. As you know, I went on annual leave because I was very aware that Kim had issues. I was hoping that things would have calmed down, but clearly they hadn't. I'm not sure whether Kim and Katie felt the meeting help them, but from my point of view, I felt victimised. I'm giving myself time to reflect, but should I still feel like this on Monday I will be visiting the doctor.'

One thing I recall at the beginning of the meeting was Kim mentioning clinical supervision that was discussed about a year ago. I had no idea what she was talking about and this concerned me. Was under the impression admin staff don't have clinical supervision, am I wrong?'

29. The Claimant was quite right to question the expression 'clinical supervision'. As she undertook no clinical work at all the use of the expression was inappropriate. On 14th May 2021 the Claimant commenced a period of sickness absence. Unfortunately the Claimant was never fit enough to return to work prior to her dismissal 15 months later. Her entire absence is covered by Fitness for Work certificates confirming that the Claimant was not fit to work due to stress at work (for example [579]).
30. On 10th June 2021 the Claimant attended an Occupational Health assessment.

31. On 8th July 2021, the Claimant attended a long term absence meeting with Christina Whittenbury, supported by Carol Walker, the HR Advisor [552]. The Claimant said she did not feel much better, was still on prescription medication and was continuing with Counselling.
32. On 11th August 2021, an informal investigation into workplace relationships was commenced by Claire Johnson, the Integrated Service Lead for the North. Ms Johnson was appointed to investigate the Claimant's concerns regarding relationships in the Complex Neurology team. Ms Johnson started each interview by reading from a script. On the issues of confidentiality and the purpose of the interview, in each case Ms Johnson read the following, which is captured in every interview (for example at [565]):

'We are holding this interview today as part of an informal process to investigate some relationship issues in the Complex Neurology nursing team. As this meeting is informal, just myself and you are present. The meeting is not being recorded. I will be taking written notes so for some of the interview I might be looking down at my notepad'

33. Ms Johnson was not called as witness, so we could not explore this reassurance that she had given to each of the witnesses that she interviewed. What is clear however, is that despite that reassurance, that Ms Johnson either did record the meetings or was able to produce verbatim transcripts of them, which she then shared with the Claimant. In so doing she with broke the trust that she had invited the witnesses to place in her, by assuring them that the meeting was informal, not being recorded and that it was just them and Ms Johnson attending. The witnesses should have been told that they were either on the record or they were not.
34. Ms Johnson's approach had two consequences, first she led the witnesses to believe it was a safe environment to make unguarded comments, when it wasn't. Secondly she caused the Claimant, quite understandably, to become

deeply upset when she read the transcripts; the comments that she read went on to become standalone legal claims against the Respondent. We consider that Ms Johnson, when she told each witness that they were effectively off the record, mislead them in a way that went on to deeply upset the Claimant, reduce to nil or close to it, any hope of a workplace reconciliation and exposed the Respondent to fresh legal claims.

35. Ms Johnson met with the Claimant on 11th August 2021 [561]. The Claimant said that the meeting on 12th May was like a Court room and that it made her ill. She was told not to interrupt. She was told that she should not leave as then nothing would get resolved. The Claimant told Claire Johnson that Kim does not like her, that the trust had gone, that Kim was taking things out on her and only saw her as Administrator. The Claimant said she was not sure that it [the workplace relationships] could be fixed [563].
36. On 16th August 2021 Claire Johnson interviewed Kim Hammond as part of the informal investigation [565]. Ms Hammond stated:

'There is negativity from Belinda. She is good at her job and knows it inside out. She gets involved with everything which gets her weighed down. She was so angry at the meeting we had. Before COVID I was worried about Belinda's health. She was not herself. She was making small errors. Katie said it might be because she was a drinker. I felt it was cognitive mental health. They've been team issues since day one.'

37. This is an important observation from Ms Hammond as it indicates an awareness of a potential mental health and/or perceived alcoholism issues from as early as March 2020 (the beginning of Covid).
38. Katy Bingham was interviewed by Claire Johnson on 16th August 2021 [568]. She said of the Claimant:

'Belinda struggles to accept change' [568].

'Belinda may not have been well for a long time. She has the shakes. I'm not sure if this has been the result of drinking. She is not good at change. She is good at what she does, but she can't broaden her horizons. I do like her, I feel sorry for her, but she is dangerous and manipulative' [569].

'She is a lady nearing retirement and she has just gone pop for whatever reason' [570]

39. Katy Bingham also queries the Claimant's health, stating that she may not have been well for a long term and that this could be the result of drinking. She states twice that the Claimant is not good at change and references the fact that the Claimant is a lady nearing retirement.
40. On 2nd September 2021 Kath Stanbra wrote to the Claimant summarising the outcome of the informal investigation [571]. She stated *'Claire listened to the testimony of all parties, was able to conclude that the meeting [of 12th May], whilst well intended, did not follow the processes we have in place for such discussions under the Acceptable Standards of Behaviour policy.'*
41. On 7th September 2021 the Claimant wrote back confirming her request to make her grievance formal [573]. As a result, on 20th September 2021 Anna Evans, the Integrated Community Service lead, was appointed to conduct an formal investigation into the Claimant's concerns [586]. The terms of reference were to determine whether (i) Kim Hammond acted in a manner that could constitute bullying and harassment of the Claimant; (ii) Kim Hammond harassed, bullied and victimised the Claimant at the 12th May 2021 meeting; (iii) Catherine Bingham failed to support the Claimant at the 12th May 2021 meeting; and (iv) whether Christina Whittenbury failed to support the Claimant at that time, resulting in the Claimant taking sickness absence.
42. The Claimant stated that she could not return to working with either Ms Hammond, Ms Bingham or Ms Whittenbury, or be redeployed, unless this could be from home [792]. The Claimant said, as early as November 2021, that she could not imagine returning to the team.

43. Ms Evans commenced her investigation on 20th September. Katy Bingham received notification that *'it has been alleged by Belinda Yates that you have acted in a manner that could constitute bullying and/or harassment in behaviour from yourself towards her'* [588]. Kim Hammond and Christina Whittenbury received a similar communications on 20th September 2021 [590 & 592].
44. On 28th September 2021 the Claimant is interviewed by Anna Evans [610]. During the course of that interview that Claimant asked if she could move from 'sick leave' to 'suspension' [668] as the Claimant's absence was using up all of her sick leave entitlement. This indicates that, at that point, the Claimant felt she could work again, just not with any of the individuals who were present at the 12th May meeting.
45. Anna Evans interviewed Christina Whittenbury [680] and Catherine Bingham [712] on 5th October 2021. Kim Hammond was interviewed on 12th October 2021 [736]. It is clear that Kim Hammond considered her relationship with the Claimant was not working. For example she said during that interview *'Belinda has always been very opinionated about everybody and everything behind their back to every member of the team'* and *'then Belinda being her usual negative self, in which she is always being negative'* [738].
46. Claire Johnson was interviewed on 21st October 2021 [768]. She said *'Yes, I was surprised about the fact that there were there was 3 senior people in the room with an administrator. if it was me sitting in a room ... sort of having heard evidence of what I was doing wrong and me not really having any awareness of what the meeting was about when I went in, I would have felt really distressed'* [774] and *'Kim Hammond is the one being accused of being a bully but actually what she was doing was trying to address behaviour which had been neglected by other senior members of the team ... all three of them should never have been together in the room dealing with that situation'* [777].

47. On 20th October 2021 the Claimant attended a Long Term Absence review meeting with Jackie Murphy the Integrated Community Services Lead **[781]**. This was the Claimant's second Long Term Absence review meeting since commencing her sickness absence on 14th May 2021. The Claimant said that she could not return until the investigation into the May 12th meeting was at an end and that she did not feel that she could work with specific complex neurology nurses going forward. The Claimant had completed 6 or 7 counselling sessions. The claimant stated that even working from home would be a challenge and she was fatigued, that her thinking was slower and that she can use the wrong words when speaking. The Claimant was then referred to Occupational Health for an assessment **[784]**.
48. Ms Evans informed the Claimant on 17th November 2021 that she had concluded her investigation **[788]**. The report noted the conclusion of Claire Johnson's informal review which concluded that the team meeting on 12th May had been well intended but did not follow the process is in place for such discussions under the Acceptable Standards of Behaviour policy. Miss Evans dismissed the first allegation, finding that there had been no evidence of harassment, bullying or victimisation in the lead up to the meeting of 12th May **[799]**. The second allegation (relating to Kim Hammond's conduct at the meeting) was deemed to be inconclusive **[800]**. The third and fourth allegations (a lack of support by Catherine Bingham and Christina Whittenbury respectively) were not substantiated **[801 & 803]**.
49. The Anna Evans Investigation report was followed up by a meeting on 26th November 2021 between the Claimant with Kath Stanbra, as detailed in an outcome letter dated 17th December 2021 **[809]**. Having set out the reports conclusions Kath Stanbra concluded, '*rest assured that as soon as you feel able to plan your return to work, we will explore options for you to work in an alternative team if this remains your preference and with support from*

Occupational Health, we very much value your skills and would not want to lose your valuable contribution to the organisation'.

50. On 21st December 2021 the Claimant submitted an appeal against the dismissal of her formal grievance [817]. She concluded by stating that she believed that Kim Hammond attended the meeting to degrade and intimidate her in front of others and that she caused the Claimant a lot of distress. She referred to Kim Hammond's Agenda (her list of issues) that had not been shared in advance. She said '*I feel I have been bullied and harassed, belittled, victimised, intimidated and degraded. I have suffered from much distress and the delays have contributed towards my bad health.*' This appeal made a complaint about conduct that would contravene the **Equality Act**. As such it does, as the Respondent accepts, amount to a protected act as defined by s27(2)(d) **EqA**.
51. On 14th January 2022, the Claimant attended a third long term sickness meeting with Jackie Murphy [844]. The Claimant confirmed that the grievance process had been stressful was now subject to appeal. She said that she could not move forward and was incapable of working anywhere at that moment. The Claimant's GP had signed the Claimant off until March 2022 and the meeting noted that the Claimant was on prescribed medication (sertraline and diazepam) for anxiety and depression. The Claimant said that she was too ill to consider redeployment at that time.
52. On 31st January, she attended an occupational health assessment [865]. The assessment noted that '*Belinda continues to be strongly impacted by the ongoing situation and reports that this is so adversely impacted on her mental health that she is unable to live her life as normal and experiences severe anxiety when leaving the house.*' Amanda Godbold observed that she could not recommend redeployment as the Claimant had not had the full implications of that explained to her (namely that it is time limited with

dismissal if a redeployed role is not found within the relatively short period of 4 to 6 weeks). She recommended:

- 52.1. The Claimant no longer works with or for Kim Hammond;
 - 52.2. Once fit to return she has a four week phased return to work;
 - 52.3. At the current time the Claimant was not fit to return in any capacity;
 - 52.4. That the Equality Act was unlikely to apply at that time; and,
 - 52.5. No return to work date could be provided due to the on-going situation.
53. On the 7th of February 2022, the Claimant's appeal against the dismissal of her grievance took place by a virtual Webex meeting [841]. The meeting was chaired by Rob Cunningham. The Claimant had prepared a Statement of Case in support of her appeal [850]. The Claimant again referred to Kim's Agenda (list of issues) being provided to everyone apart from her. She referred to the grievance investigation notes in which she had been accused as being a drinker, to account for her tremor and had something wrong with her mental capacity [878]. The Claimant relied on this as evidence that there was ill intent on the part of attending nurses.
54. The appeal was adjourned part heard and then reconvened on 29th March 2022, this time in person, at Kings Court 2, Worcester, after some additional emails had been provided for consideration [995]. During the appeal the Claimant said *'I've been ill for a long time and I forgotten what it's like to be normal you know, I'm on antidepressants. I did reduce them but because of this appeal meeting, nobody's fault, I've had to go back up on my temazepam. I just feel that at the moment I am incapable of even thinking about working. So I don't know. I don't know whether I will be able to return to the NHS, to be honest'* [1036].
55. The Claimant's appeal against her grievance dismissal was not upheld. This was confirmed in a letter from the Chair of the Appeal Panel dated the 31st of March 2022 [1109].

56. In April 2022 the Claimant was informed that Erica Wiggett would be her new Team Lead. On 14th April 2022, the Claimant attended her fourth long term absence meeting with Jackie Murphy [1123]. The Claimant stated that following the appeal process, she would not be able to return to work for the Complex Neurology Team. She questioned whether she could work for the NHS. The Claimant confirmed that she was still taking sertraline. The redeployment process was discussed and confirmation given that a redeployment search is generally limited to 4 to 6 weeks with capability decision meeting following any unsuccessful search at the end of that period. It was confirmed that the Claimant was currently on half pay, but would move to nil pay if her sickness absence continued past 14th May. A new referral to Occupational Health was discussed.
57. On 12th May 2022, the Claimant requested copies of her SADR appraisals from HR for the years 2016, 2017, 2018, 2019 and 2020. The Claimant's Counsellor had suggested that reading these positive appraisals would assist the Claimant's recovery given the negative things that had been said about her since. On 19th May 2022 she emailed Karen Clifford to state that her 2020 SADR appraisal had had a page added which she had no knowledge of and did not sign [1130]. The Claimant's concern was that her 2020 appraisal had been tampered with or falsified by the addition of a new page bearing her forged signature. On 30th May 2022 the Claimant emailed Kath Stanbra regarding her missing appraisals from 2016 onwards [1173].
58. On 15th June Kath Stanbra confirmed that she had attended the Evesham Community Hospital and had not been able to find any of the Claimant's appraisals [1163].
59. On 16th June 2022 the Claimant attended a fifth long term sickness meeting by Webex with Jackie Murphy and Louise Brennan from HR [1191]. Ms Brennan emailed the Claimant setting out the options that were available to

her at that time, namely (i) redeployment for 4 to 6 weeks leading to a Long Term Absence Decision hearing if no redeployed opportunity is found, (ii) a mutually agreed termination, or (iii) ill health retirement [1183]. Mrs Murphy confirmed that the issue over the missing appraisals had exacerbated the Claimant's ill health. A new referral to Occupational Health was agreed.

60. On 18th June 2022 the Claimant asked the Respondent to clarify that her SADR appraisals had gone missing from her lockable draw and were missing from her personal file [1162].
61. On 20th June 2022 Erica Wiggett announced that Karen Moogan would be working as secretarial and admin support for the Integrated Neurology Specialist Nurses (ie the old North and South teams) [1155].
62. On 6th July the Claimant attended a further Occupational Health assessment [1194]. Amanda Godbold reported back that *'Belinda remains unfit to work in her current post and unfit to consider redeployment'*.
63. On 13th July 2022 the Claimant attended her 6th long term sickness meeting with Jackie Murphy [1198]. The Claimant presented another Fitnote extending her sickness absence by another two weeks. She also confirmed that she was not well enough to reconsider redeployment. The Claimant was told that it would be necessary to proceed to a Long Term Absence Decision meeting. The Claimant said that she would just like this to be finished so that she could move on. The Claimant confirmed that she would like to make an application for ill health retirement. Ill health retirement is funded by the Claimant's pension provider and is only available when there is no prospect of the employee returning to any type of work in any capacity.
64. On 14th July 2022 she was assessed by Dr Bashir, the occupational health consultant [1200]. Dr Bashir confirmed that the Claimant's anti-depressant medication prescription had increased and that the Claimant was still

accessing counselling services. The Claimant said she had lost trust with her employ and the NHS as a whole. Unfortunately Dr Bashir informed the Claimant that he could not support her application for ill health retirement. He said:

'There was currently no medical evidence to support the view that [the claimant] has a permanently incapacitating condition with no prospects of improvement in the future. ... work related stress and anxiety, interpersonal conflict, dissatisfaction with the employer, etc, will not be reasons to support IHR. Since there are no prospects of her returning to her employment from the employers perspective, you will need to discuss next strategy or she can opt to retire through the normal channels'

65. On 23rd July the Claimant raised a grievance over her missing SADR appraisals and that her 2020 SADR appraisal had been tampered with [1148]. Kath Stanbra had written to the Claimant accepting that the summary page had at a later date on it, but stating that she did not see how this amounted to falsification.
66. On 10th August 2022 Jackie Murphy produced a report for the Claimant's Long Term Absence Decision Hearing [1208]. The report noted that the Claimant had been continuously signed off as unfit to work from 14th May 2021 and that her current sicknote continued through to September 2022. There was no indication that the Claimant could return at that point. Ms Murphy concluded by stating that she did '*not feel that this is sustainable by the team due to the shortfall of staffing levels, pressure this puts on other staff members and the ongoing cost of cover*' [1215].
67. On 12th August 2022 the Claimant was sent an invitation to the Long Term Absence Decision meeting [1225]. There was then an exchange as to whether the hearing would be held in person or by Webex and about who could attend with the Claimant. On 22nd August 2022 Chloe Bishop wrote to the Claimant [1230] to say '*The panel also notes that you have requested via Karen Clifford*

that the hearing takes place virtually via Webex. However, the panel would like you to attend in person. I'm aware that you have said you would like your partner to be nearby to help you if needed. With that in mind, we can arrange a room for your partner to wait in if they can accompany you to 2 Kings Court.' The Claimant replied on same day to say '*I don't feel comfortable attending a meeting without my colleague Kim Spooner attending and I had felt that attending by Webex would be the best way forward as my partner would have been in the house. However, I do agree that a meeting in Kings Court would be better.'*

68. The issue of meeting location and attendees was agreed during a telephone conversation between Chloe Bishop and the Claimant on 24th August 2022 [1233]. Ms Bishop's telephone attendance note records that the Claimant said she could be dropped off at 2 Kings Court and that she would be willing to attend without Kim Spooner. If the meeting was at home then the panel would be happy for the Claimant's partner to be in the house. Chloe then confirmed the agreement that the hearing would proceed the next day, as a virtual hearing, with the Claimant's partner at home.
69. The Claimant prepared her own statement of case for the Long Term Absence decision meeting [1236]. The Claimant's desired outcome was a settlement package negotiated with her solicitor. She made the following points in the conclusion of that document:

'My health is not good. I have massive unpredictable anxiety attacks which cause bad tremors in my arms and hands which are hugely debilitating and embarrassing and episodes of fatigue afterwards. I do have pernicious anaemia, which makes me a little weak and fatigue sometimes I have dreadful nightmares, mainly about people who I worked with. Now my life is completely different. I have to plan each day and if some part of it changes I become very anxious and upset. If I go out, I can only go to one place at a time. I have to return home immediately. I cannot drive due to the fatigue and anxiety and I'm too anxious to use public transport. I've lost all confidence in my administrative abilities. I find it very difficult to socialise. I am on

diazepam to assist with my anxiety attacks and sertraline 100mgs a day. I now have to rely on my partner to take me places. I believe I've lost my independence though I've been trying out different strategies to deal with this.'

70. On 25th August 2022 the Claimant attended a Long Term Sickness Panel meeting via Webex **[1260]**. The meeting was chaired by Kerry Wykes. The notes of that meeting record the following extracts:

- KW: Do you want to ask any questions with the management side following their presentation?*
- BY: No, Jackie has summed it up perfectly clearly, as ever. ... I can't think of anything else.*
- KW: Stress risk assessment was mentioned at one point. Can I ask if that was completed at all?*
- JM: Not to my knowledge ... because Belinda was then not ready to return to work, I believe that was the reason it wasn't completed at that time.*
- BY: I've seen documentation which has been extremely upsetting and has made it impossible for me to return to my team.... So it's over now and I just feel I can't be redeployed. I think the occupational health people are right. Returning to the NHS would just be a trigger to all the upset.*
- BY: I've made the resolution now that I have to leave. ... I know I can never work for the NHS again.*
- CB: If we consider redeployment, you do not feel you're fit and well enough at this stage to consider redeployment into any role within the organisation, is that correct?*
- BY: Yes, unfortunately.*
- BY: I mean I know that once a decision is made and you know, I know, I have to go. I know I have to go and there will be people I need to say goodbye to. ... the last year has been so traumatic and upsetting, I have just got to put that behind me you know, and just get on with it now. You know, move on to the next chapter, as I said to Chloe yesterday. You know life's life, isn't it? You have just got to move on with things and you just think enough is enough.*
- KW: Belinda again, thank you for attending today and for being so open and willing to share your experience. The Panel has considered all the information today that has been presented and also the packs that have been given to us prior to today. We have decided that with regret, we*

terminate your contract for employment with the Trust on the grounds of capability due to health reasons.

BY: OK.

71. The outcome was confirmed in writing on 1st September 2022 [1288]. The Claimant was paid 11 weeks pay in lieu of notice and her accrued but untaken holiday pay [1283].
72. On 11th November 2022 Jan Austin wrote to the Claimant with the outcome of her grievance on the issue of the Claimant's missing / tampered SADR appraisals [1304]. Jan Austin confirmed the following conclusions:
 - 72.1. The January 2013 and January 2020 SADRs were located in the Claimant's personal file;
 - 72.2. The 2014, 2015, 2016, 2017 and 2018 SADRs cannot be found;
 - 72.3. The 2019 SADR is stored electronically on Christina Whittenbury's hard drive.
 - 72.4. The Claimant's cabinet was in use by another member of staff during her sickness absence, but when searched did not contain any of the Claimant's SADRs.
 - 72.5. An apology was issued in respect of the missing appraisals.
 - 72.6. Catherine Bingham strongly denied changing the contents of the 2020 SADR and, looking at the handwriting, there was nothing to suggest fraudulent activity had occurred.
73. Those are the facts in this case. We now turn to the relevant law

[5] The Relevant Law

Time

74. In considering whether to extend time on the just and equitable basis, a Tribunal must consider the balance of prejudice as between the Claimant and Respondent. These include:
- 74.1. The length of and reasons for the delay;
 - 74.2. The extent to which the cogency of the evidence is likely to be affected by the delay;
 - 74.3. The promptness with which the Claimant acted once she knew of the facts giving rise to the claim;
 - 74.4. The steps taken by the Claimant to obtain appropriate professional advice once she knew that a claim could be brought; and,
 - 74.5. The promptness with which the Claimant acted once she know of the facts giving rise to the claim.
75. The relative hardship prejudice to the parties in allowing or disallowing the extension is a relevant factor in determining a just and equitable extension.

Disability

76. Section 6 **EqA** provides that:

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

77. The effect of an impairment will be long term only if:
- 77.1. It has lasted at least 12 months;
 - 77.2. The period for which it lasts is likely to be 12 months; or
 - 77.3. It is likely to last for the rest of the life of the person affected.

78. The date of determination of disability status is at the date of the alleged act (***Cruickshank v VAW Motorcast Ltd*** [2002] I.C.R. 7291). The Tribunal must consider whether the impairment had a substantial adverse effect on day-to-day activities at that point, and whether that effect was likely to be long term at that point.
79. In ***In J v DLA Piper UK LLP*** UKEAT/0263/09, the EAT drew a distinction between symptoms of low mood and anxiety caused by clinical depression and those that derived from a "medicalisation of work problems" or "adverse life events". While the former was likely to be a disability, the latter was not without more.
80. An employer cannot be liable for direct disability discrimination, discrimination arising from disability or failure to make reasonable adjustments unless it knew, or should have known, about the employee's disability.

Perceived Disability

81. The wording of the Act indicates that s20/21 (reasonable adjustments) and s15 **EqA** (discrimination arising) are not available in the case of perceived (as opposed to actual) discrimination. S13 and s26 **EqA** (direct discrimination and harassment) refer more broadly to discrimination in relation to "*a protected characteristic*" whereas s15(1) and s20 **EqA** refer to discrimination specifically "*against a disabled person*" [emphasis added]. Furthermore, s15(1)(a) refers to unfavourable treatment "*in consequence of B's disability*" [emphasis added].
82. In ***Chief Constable of Norfolk v Coffey*** [2019] EWCA Civ 1061 LJ Underhill states that "If the disability is perceived rather than actual, s15 may not be available, because, unlike s13, it applies to discrimination "*against a disabled person*". The natural meaning of that phrase is that the person should in fact

be disabled, and it is not apt to cover the case where they are only perceived to be.”

Direct discrimination (s13 EqA)

83. Section 13 **EqA** provides that:

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

84. Age and disability are protected characteristics. An employee claiming direct discrimination will need to show that they have been treated less favourably than a real or hypothetical comparator who is the same circumstances as the Claimant in all material respects but does not share that protected characteristic.

85. Unfavourable treatment can take many forms. The EAT has, however, held that *“an unjustified sense of grievance cannot amount to detriment or less favourable treatment”* (cited in **Barclays Bank plc (respondents) v Kapur and others (appellants)(No.2)** [1995] IRLR 87 at §43).

86. The test for direct discrimination is in two stages:

86.1. **Stage 1:** The burden of proof is on the Claimant to show that there are facts from which tribunal could conclude discrimination in the absence of any other explanation (s.136(2) **EqA**); and,

86.2. **Stage 2:** If this is established, the burden of proof then shifts onto the Respondent to provide an explanation sufficient to show that it did not discriminate ((s.136(3) **EqA**).

87. The fact that a Claimant has been treated less favourably than an actual or hypothetical comparator is not sufficient to establish that direct discrimination has occurred. There must be "something more" from which the court or tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic (*Madarassy v Nomura International plc* [2007] IRLR 246 (CA) at §56).

Harassment (s26 EqA)

88. Section 26(1) of the **EqA** provides that:
- (1) *A person (A) harasses another (B) if—*
 - (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
 - (b) *the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

 - (4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
 - (a) *the perception of B;*
 - (b) *the other circumstances of the case;*
 - (c) *whether it is reasonable for the conduct to have that effect.*
89. The test for conduct "related to" a protected characteristic is wider than the test for direct discrimination, which requires treatment "because of" a protected characteristic. Where the words used are not inherently discriminatory, context will be important.
90. To succeed in a harassment claim a claimant either needs to prove that the conduct had the purpose of violating his dignity/creating a hostile environment and/or that it reasonably had that effect on her.

91. It is not enough for the victim simply to claim that the unwanted conduct violated their dignity or created an environment that was intimidating, hostile, degrading, humiliating or offensive to them. The Tribunal must also decide that it is reasonable for that to be the effect. In reaching their view on this, the Tribunal must take the victim's perception into account (s.26(4)(c)).
92. Case law indicates that an individual's dignity is not necessarily violated "*by things said or done which are trivial or transitory, particularly where it should have been clear that any offence was unintended*" (**Richmond Pharmacology Ltd v Dhaliwal**, [2009] I.C.R. 724 (2009) at §22).
93. Harassment claims require 3 elements (**Dhaliwal**), namely (i) unwanted conduct; (ii) having the purpose or effect of either (a) violating the claimant's dignity; or (b) creating an adverse environment; (iii) which are related to the Claimant's protected characteristic.
94. In order to decide whether the conduct has either of the proscribed effects under sub-paragraph (1)(b) a Tribunal must consider *both* whether the putative victim perceives themselves to have suffered the effect in question *and* whether it was reasonable for the conduct to be regarded as having that effect **Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham** [2018] IRLR 542, CA.
95. The statutory words 'intimidating, hostile, degrading, humiliating or offensive' are important. Elias J stated in **Land Registry v Grant** [2011] IRLR, 748, CA '*Tribunals must not cheapen the significance these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*'.

Victimisation (s27 EqA)

96. Section 27(1) Equality Act 2020 (“**EA**”) provides that victimisation occurs when a person (A) subjects another person (B) to a detriment because either:
- 96.1. B has done a protected act; or,
96.2. A believes that B had done, or may do, a protected act.
97. The term “detriment” is not defined in the **EqA**. The test for detriment has been held to be treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment (***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337).
98. Victimisation need not be consciously motivated. If A's reason for subjecting B to a detriment was unconscious, it can still constitute victimisation (***Nagarajan v London Regional Transport and others*** [1999] IRLR 572). Further, the protected act need not be the main or only reason for the treatment. Victimisation will occur where it is one of the reasons (paragraph 9.10, EHRC Services Code).
99. However, a victimisation claim will fail if the employee's protected acts are found to be “separable” from the treatment complained of. This means that where an employer takes action against an employee in response to a complaint of discrimination, they are not to be treated as acting “because of” that complaint if the true reason for the action is not the fact that the employee has complained but some other genuinely separable feature of the complaint (such as the manner in which it is made) (***Martin v Devonshires Solicitor*** EKEAT/0086/10I).

Failure to make reasonable adjustments (s20-21 **EqA)**

100. Employers have a duty to make reasonable adjustments where a **provision, criterion or practice** applied by the employer puts a disabled person at a

substantial disadvantage in comparison with those who are not disabled. The employer must take such steps as it is reasonable to take to avoid the disadvantage (s.20(3) **EgA**).

101. A failure by the employer to comply with this requirement constitutes a failure to comply with the duty to make reasonable adjustments and, as such, discrimination against a disabled person (s. 21(1) and (2) EA).

102. The duty to make adjustments only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. What constitutes a reasonable step for an employer to take will depend on all the circumstances of each individual case. The **EgA** Code of Practice (the “**EHRC Code**”) indicates that the following factors might be taken into account when deciding what is a reasonable step for an employer to have to take:
 - 102.1. whether taking any particular steps would be effective in preventing the substantial disadvantage;
 - 102.2. the practicability of the step;
 - 102.3. the financial and other costs of making the adjustment and the extent of any disruption caused;
 - 102.4. the extent of the employer’s financial or other resources; and,
 - 102.5. the type and size of the employer.

103. The test for reasonableness is objective and to be determined by the Tribunal (*In Smith v Churchill's Stairlifts plc* [2006] IRLR 41).

104. In *Powell v University of Portsmouth & Keeble* [2024] EAT 56 the EAT gave guidance on the issue of stress risk assessments in the context of a duty to make reasonable adjustments. Eady P stated:

'[20] Although the July occupational health report had suggested that a risk assessment be carried out to try and mitigate the possible causes of stress in the workplace, the Employment Tribunal noted that this was on the assumption that the Claimant would return to his normal hours by the end of August, which did not happen. The Tribunal again accepted Miss Curtis is evidence that such an assessment would have been very difficult absent the Claimant's attendance and work that had reasonably understood that the Claimant was still not fit enough to return at this time.

[40] As for the claimants argument that undertaking a risk assessment in relation to his blackouts might have been a reasonable adjustment, the Employment Tribunal noted that as a matter of law, the duty on the employer is to act, not to consult, and as such, a risk assessment did not amount to a reasonable adjustment. In any event. It agreed with Mr Curtis is evidence that this was very difficult to undertake absent the claimants attendance at work.

[80] Given the position thus facing the 1st Respondent at the start of the academic year in 2018 the Employment Tribunal was entitled to find that a workplace risk assessment at that time was not practical measure, not least as the Claimant was unable to properly return to the workplace.'

Discrimination Arising from disability (s15 EqA)

105. Section 15(1) provides that a person (A) discriminates against a disabled person (B) if:
- (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
 - (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
106. The proper approach to be followed by tribunals in establishing causation was summarised in ***Pnaiser v NHS England and anor 2016 IRLR 170***, EAT:

- 106.1. The Tribunal has to identify whether the Claimant was treated unfavourably and by whom. It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator. This might require an examination of the conscious or unconscious thought processes of that person (though the actual motive of the alleged discriminator in acting as he or she did is irrelevant); and,
- 106.2. The Tribunal must then determine whether the reason was “something arising in consequence of the claimant’s disability”. This stage of the causation test is objective question and does not depend on the thought processes of the alleged discriminator.
- 106.3. The burden of proof is on the employer to make out the objective justification defence. When assessing whether unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim, the discriminatory effect of the treatment must be balanced against the reasonable needs of the employer. The treatment must be appropriate and reasonably necessary to achieving the aim.
107. There are two parts to the causation test for s.15 claims:
- 107.1. Did A treat B unfavourably because of an (identified) something? and,
- 107.2. Did that something arise in consequence of B's disability?
108. It is clear from case law that the test is objective and can arise from a series of links (***Pnaiser*** at §31(d)).
109. Section 15 does not require disability to be the cause of the treatment. It is sufficient for disability to be a significant influence or a cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment (***Pnaiser*** at §31(b)).

110. Case law indicates that it may be reasonable for an employer to at least explore whether it would be appropriate to extend sick pay beyond its usual policy for a disabled employee (***Browne v Commissioner of Police of the Metropolis*** UKEAT/0278/17 at §63-§64). The EHRC Code on Employment states that “*Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so*” (§17.21).
111. Unfavourable treatment “*is that which the putative discriminator does or says or omits to do or say which places the disabled person at a disadvantage*” (***T-System Ltd v Lewis*** UKEAT/0042/15 (22 May 2015, unreported).
112. Unlike direct discrimination, there is no comparative element with those who are not disabled.

Unfair Dismissal (s98 ERA)

113. Assuming that the employee satisfies the qualifying period of two years’ continuous employment, the dismissal of an employee will be unfair unless:
- 113.1. The employer can show that the reason (or principal reason) for the dismissal was one of the five potentially fair reasons under s.98(1) and (2) Employment Rights Act 1996 (“**ERA**”). One such reason relates to the capability or qualifications of the employee of performing the work of the employee in question (s.98(2)(a) ERA);
- 113.2. The Tribunal finds that, in all the circumstances (including the employer's size and administrative resources) the employer acted reasonably in treating that reason as a sufficient reason for dismissal (s.98(4) ERA); and,
- 113.3. If so, the Tribunal considers that dismissal fell within the range of reasonable responses of a reasonable employer.

114. The two leading authorities for assessing whether or not an ill health capability dismissal is fair are the EAT decisions in ***Spencer v Paragon Wallpapers Ltd*** [1976] IRLR 373 and ***East Lindsey District Council v Daubney*** [1977] IRLR 181. In ***Paragon***, the EAT stated that:

“Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?” [emphasis added].

115. In ***East Lindsey***, the EAT emphasised the importance of consultation and knowledge of the employee’s medical condition, stating that:

“Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.”

116. If the Tribunal establishes that the employer acted reasonably in treating ill health as a sufficient reasonable for dismissal, the next question is whether such dismissal was a fair sanction. As relevant here, the following factors in making this assessment identified in ***Paragon*** are:

- 116.1. The employer’s ill health policy;
- 116.2. The needs and resources of the employer;
- 116.3. The effect on other employees;
- 116.4. The likely duration of the illness;
- 116.5. Alternative employment; and,
- 116.6. Length of service.

117. An employer will find it difficult to claim that he has acted reasonably if it takes no steps to try and fit the employee into some other suitable available job.

However, there is no duty on an employer to create a new job for the employee, whatever their length of service (*Merseyside and North Wales Electricity Board v Taylor* [1975] IRLR 60).

118. Where employee's ill health may have been caused by the conduct of the employer, a Tribunal might require the employer to demonstrate extra concern before dismissing. However, this does not mean that a dismissal is necessarily unfair (*McAdie v Royal Bank of Scotland* [2007] EWCA Civ 806).
119. In summary, case law has established that fairness involves a consideration of the following key elements:
 - 119.1. Ascertaining the up-to-date medical position;
 - 119.2. Consulting with the employee; and,
 - 119.3. Considering the availability of alternative employment.

[6] Our Conclusions

120. We turn now to our conclusions on each of the Issues that exist between the parties. We shall deal first with conclusions of a more general nature, which have guided us on our analysis of the specific factual allegations, as follows:

The Claimant's credibility as a witness

121. The Respondent invited us to conclude that the Claimant was not a reliable witness. Four examples were provided for our consideration, these related to (i) being given impossible tasks by Kim Hammond, (ii) repeated criticism from Kim Hammond, (iii) avoiding answering direct questions and (vi) suggesting a

severance package had been prevented by the timing of the final absence decision hearing. We consider that the Claimant had a genuine belief in all of those matters, even if, upon a close examination, they could not all be fully substantiated. A witness may get things wrong. That is not the same as dishonesty. We conclude that the Claimant was an honest witness and that she did her best to give us honest answers to the questions that were put to her.

Time – General Conclusions

122. The Claimant notified ACAS of a dispute on 7th October 2022 and obtained her Early Conciliation certificate on 8th November 2022 [1]. She presented her Claim Form 8th November 2022 [2]. S207B(4) **Employment Rights Act 1996** does not apply in this case. Using 207B(3) we are to add back in the 38 days spent in conciliation, means that incidents prior to **2nd July 2022** are out of time. Acts of discrimination occurring after this date, or (if a single continuing act) ending after this date are in time.
123. Would it be just and equitable to extend time? The Claimant explained the delay in presenting her claims by stating that she only found out what the Respondent had said about her in January 2022 and that she issued her claim in November 2022. The Claimant says that she thought they would give her a job and that she'd get better².
124. The Claimant's partner, Andy, is an ex-Trade Union representative representing staff at HMRC, being a role he held for 10 years, between 2000 and 2010. The Claimant told us that she did not discuss work matters with her partner. However, we note that on 28th September 2021 the Claimant attended a grievance investigatory meeting with Anna Evans [610] at which she stated that she did tell her partner about the meeting 12th May 2021 that evening and

² During afternoon on Day 2.

he told her to *'write down everything that was said, so that you don't forget, because I think you have been treated unfairly here'* [619]. This demonstrates that not only were work matters discussed, but that Andy was advising her to keep a record of the meeting as she was being treated unfairly. This indicates that challenging the fairness of her treatment was in the Claimant's mind as early as 12th May 2021.

125. The Claimant told us that Andy did not know about time limits, but we conclude that both were well aware of Tribunal's and her right to challenge the fairness of the Respondent's treatment at them. On 21st December 2021 the Claimant submitted an appeal against the formal investigation outcome [817] which she concludes by saying *'I feel I've been bullied and harassed, belittled, victimised, intimidated and degraded or suffered from much distress. Delays have contributed towards my bad health. ... if there is any information you could provide me to assist me with the process of this appeal. I would greatly appreciate it as I have no union representative and the only advice I can get it from ACAS, but this is very general'* [827].
126. In the Claimant's response document to the Grounds of Resistance she stated *'it is true that she had seen a solicitor for assistance who advised her regarding these issues during the appeal process. However, due to the length of time the procedure took and now being on nil pay, the Claimant sadly ran out of funds but her initial guidance was extremely helpful. The solicitor advised her continue to Tribunal as she believed had a strong case.'* The appeal process ran from February to March 2022.
127. We conclude that it would not just and equitable to extend time earlier than **2nd July 2022**. No explanation has been provided for delay after advice has been obtained and Solicitor has told the Claimant that she had a good case. Whilst the Claimant says the advice was only a 1 hour free session, this is contradicted by [141]. The evidence was given at trial over two years after July 2022. In discrimination claims such as this we can be invited to draw an

inference against a Respondent if its witnesses cannot provide an explanation for something they did or wrote. This creates a risk of prejudice to a Respondent if it is being required to respond in details to events occurring up to 18 months before this, in the earlier part of 2021.

The Disability Issues

128. There are a number of disability issues. Are conclusions on them are as follows:

From what date was the Claimant disabled?

129. The Claimant relies on the mental impairment of stress and anxiety, with a debilitating tremor as a symptom / feature of her stress and anxiety ('the Condition'). The tremor is not relied on as a free standing disability. As discussed, the Claimant attended a meeting on 12th May 2021 to discuss issues in the team. She found this to be a very stressful meeting. The Claimant claims that the meeting was so horrific that it immediately disabled her with the mental impairment of stress and anxiety and that she has not yet recovered from it. She asserts that she has been disabled by the Condition from the date of that meeting, 12th May 2021 to date.
130. The Claimant was signed off work due to stress at work from 14th May 2021 (2 days after the meeting) continuously until her dismissal for long term capability (14th May 2021 [492], 11th June 2021 for 1 month [546], 2 August 2021 [530], 7th September 2021 [579], 6th October [579], 8th November [807], 6th December [808], 6th January 2022 [830], 9th March 2020 [900] and 10th May [1126]). The Respondent accepts that the Claimant met the statutory definition of disability 12 months after her sickness absence began, ie by 12th May 2022. We have to determine when the Condition was likely to last 12 months. The July 2021 absence review meeting [552] notes that the Claimant was on

prescribed medication (sertraline and diazepam) but notes that the Claimant stated that she wished to get back to work. This indicates to us that condition was (at that point) likely to last less than 12 months. Claimant confirmed this is a follow up email [554].

131. The next absence review meeting was 20th October 2021 [781]. The Claimant stated that there could be no return to work until her grievance process was over. It notes that even working from home would be a challenge. That said, a return to work once the grievance process is over was anticipated. In the circumstances whilst the period absence is approaching long term, as at October 2021 it too early to say that it was likely to last 12 months.
132. The Next absence review meeting was on 18th January 2022 [844] . The notes of the meeting indicate that the Claimant was incapable of working and that she remained on prescribed medication. It also noted that Claimant was now incapable of driving, which is a day to day activity. We consider that the Condition could fairly have been considered 'likely to last 12 months' upon receipt of January sick note on 6th January [830] and upon the conclusion of the 18th January Absence review meeting [844]. By then the Claimant had been off work for 8 months and had just received her first 2 month sick note, keeping the Claimant off work for 10 months.
133. The Occupational Health report of 10th June 2021 (after just one month of absence) [541] makes no conclusion or gives advice on disability. The 2nd Occupational Health report dated 31st January 2022 [865] states '*Belinda continues to be strongly impacted by the ongoing situation and reports that this has so adversity impacted on her mental health that she is unable to live her life as normal and experiences severe anxiety when leaving the house*' and the author notes that Occupational Health is unable to provide a return to work date. The report does conclude that Equality Act is unlikely to apply, but we conclude that, on balance, and for the reasons stated above, it does. We consider the conclusion reached by Amanda Goldbold of Occupational Health

to be difficult to understand given the evidence available at the time. By January 2022 all of the evidence points to a Condition that has substantial adverse effects on the Claimant's day to day activities, being likely to last at least 12 months.

134. By July 2022 (after the date the Respondent accepts the Claimant's condition meets the definition) the Claimant had been off work for 12 months and OCH concluded that there is no prospect of a return to work.
135. Thus, by 31st January 2022 we conclude that the Claimant's stress reaction to the meeting on 12th May 2021 had evolved into a disability, and that it met the definition of disability as set out in s6 **EqA**. From the point onwards the Claimant was disabled.

Respondent's date of actual or constructive knowledge

136. By the April 2022 Absence Review meeting [1123], we conclude that the Respondent had clear constructive knowledge that the Claimant's Condition amounted to a disability, in that there was enough evidence for the Respondent to conclude that the Claimant had a mental impairment that was having a substantial and long term adverse effect on her ability to carry out day to days. The Respondent noted the following about the Claimant's Condition at that review:

- 136.1. The absence from work had lasted 11 months absence and was clearly likely to continue for some time;
- 136.2. The Claimant said she felt 'worse than ever';
- 136.3. The Claimant remained on prescription medication for stress and anxiety (sertraline and diazepam);
- 136.4. The Claimant was continuing to have anxiety attacks;
- 136.5. The Claimant did not want to go out or do the housework;

- 136.6. The Claimant was scared to see people she knew;
- 136.7. The Claimant could not drive or use public transport;
- 136.8. The Claimant reported being angry, short tempered and upset when her medication was reduced.
137. Whilst, by April 2022 the Respondent had not been told that the Claimant was disabled by stress and anxiety, so there was no actual knowledge, we have no doubt that the above stated matters gave the Respondent constructive knowledge that the Claimant's Condition would meet the statutory definition under the **Equality Act 2010**. Could constructive knowledge be fixed at an earlier date? A fair reading of the January absence review meeting notes and the January Occupational Health report would appear to give the Respondent sufficient knowledge from which constructive knowledge can be imputed from that date. However, we note that in January the Respondent was being advised by Occupational Health, albeit incorrectly in our judgment, that the Equality Act was unlikely to apply. In our judgment, that direct assertion by Occupational Health in January that the Act was unlikely to apply overrides the imputation of constructive knowledge at that point, even if all of the indicators were all still present.
138. In summary it is our judgment that the Claimant became disabled by the Condition in January 2022 and that the Respondent had constructive knowledge of it in April 2022, one month before it accepts that it did.

Direct Age Discrimination (s13 EqA)

139. The Claimant was 61 years old at her effective date of termination. She places herself in the Age Group of the over 60s. The Claimant entered this age group on 10th October 2020. There are no allegations pre-dating 10th October 2020.

140. The Claimant's age discrimination claim is based on events occurring during 2021, when the Claimant was in the age group of the over 60s.

Less favourable treatment because of Age (direct discrimination)

141. The Claimant relies on 7 incidents of the Respondent treating her less favourably and it would treat others because of her age, ie being over 60 years old.
142. The first 3 incidents occurred on the same day, 20th August 2021. They are all 11 months out of time. They are:
- 142.1. At an informal investigation meeting held on 20th August 2021, looking into the events of 12th May 2021, Katy Bingham told the investigator, Claire Johnson that the Claimant '*struggles to accept change*' [e568];
- 142.2. At the same informal investigation meeting '*she is not good at change*' [e569];
- 142.3. At the same informal investigation meeting '*she is a lady nearing retirement and she has just gone pop for whatever reason*' [e570].
143. These comments are captured in the notes of the investigation meeting and it is accepted by the Respondent that they were said. The Claimant was not present at this meeting. The comments were not said to her. The Claimant first learned about the comments when she read the minutes of the investigation meeting which had been provided in a grievance appeal pack, in February 2022. This is not presented as a claim of age related harassment. It is presented as a claim of direct discrimination. We cannot change a head of claim and we are required to determine the case put to us by the Claimant.

144. As a direct discrimination claim it occurred on the day the words were said, 20th August 2021. Were the words said 'because of' the Claimant's age? At the time the Claimant was 60 years old. She relies on the age group 'over 60' so strictly speaking she was 'over 60' at the time. For the words to be because of age the Claimant is inviting the Tribunal to adopt an ageist stereotype and apply it in this case, namely that older people are not good at change. However, people of all ages are not good at change (as Katy Bingham herself conceded at [515]). This is not limited to people over 60. The context for this is the merging of the North and South departments into one department. We conclude that the words used were not because of age, but were simply because it was Ms Bingham's view that the Claimant did not like change.
145. On issue of '*she is a lady nearing retirement and she has just gone pop for whatever reason*' we find that the 'nearing retirement' was said because of the Claimant's age, and we conclude the '*she has just gone pop*' comment was also because of age (rejecting the Respondent's argument that 'for whatever reason' suggests a different unrelated and unidentified reason). We then ask if the comments amounted to unfavourable treatment of the Claimant. We noted that the Claimant was not present when the expression was used. We can see no detrimental or unfavourable treatment of the Claimant arising out of these comments. Our conclusions on this may well have been different had this been a claim of age related harassment, but it was not. The words cannot be said to be part of a single continuing act. It was a single event on 20th August 2021, some 11 months out of time. In the circumstances this allegation fails.
146. Turning to the 4th and 5th direct age discrimination claims:
- 146.1. During the formal investigation between September and November 2021, the Claimant was not given a second interview to allow her to address allegations from the nurses.
- 146.2. During the grievance appeal process between February and March 2022 was the Claimant was not allowed to refer to the management

case, bundle or investigator's report until she completed her own appeal submission.

147. Factually, both of these are admitted by the Respondent. They are 8 months and 4 months (respectively) out of time. The Claimant relies on Emma Hillyard as her comparator. Ms Hillyard was 50 years old at the material time **[186]**. She was the medical secretary for the epilepsy team. She was, accordingly, 10 years younger than the Claimant. The closer the comparator is to the Claimant's age, the less likely it is that the age was the reason for any difference in treatment. It is accepted that the Claimant was not given a second interview by the investigator, Anna Evans. We find that the circumstances were not the same. Ms Hillyard was not investigated by Anna Evans, but by a different investigator. Ms Hillyard changed her allegations after her first interview such that a second interview was necessary. This was not so for the Claimant. Ms Evans did not consider a 2nd interview was needed in the Claimant's case **[AE5-6]**.
148. We consider it unlikely that the Respondent would be content for complainants aged 50 to have two interviews but to determine that those over 60 to only have one. It makes no real sense and we find that the Claimant has not proven facts from which we could conclude that age was a factor. Had we upheld this allegation on its facts, we would have determined that it was a single act of discrimination for the whole of the investigation process, from September 2021 to November 2021. However the investigation process ended 8 months prior to the earliest point any claim could have been presented in time. The Claimant took advice in December 2021. We might have extended time to December 2021, however the Claimant delayed until October 2022 before contacting ACAS. It would not be just and equitable to extend time for that period.
149. In respect of the allegation that the Claimant could not refer to the Management Case during her appeal, her grievance appeal took place on 7th

February 2022 [869]. It was chaired by Rob Cunningham. It went part-heard and was reconvened on 29th March 2022 [995]. Rob Cunningham did not allow the Claimant to refer to the Management Case at the appeal hearing on the grounds that it did not exist when the Claimant submitted her appeal and therefore could not have been influenced by it when the Claimant drafted her own appeal [1001, 1006].

150. We conclude that this was detrimental treatment as it curtailed the points that the Claimant was trying to make. We also consider that Rob Cunningham's rationale for preventing the Claimant from referring to the Management Statement of Case makes no real sense. The Claimant is constrained to her grounds of appeal, but she could and should be able to refer to any of the appeal documents, including the Management Statement of Case, as part of her appeal submissions and/or putting her case. To prevent that creates a clear risk of unfairness, and had Mr Cunningham been chairing an appeal against the Claimant's capability dismissal, we may well have found that such a restriction created an unfairness in the dismissal process.

151. However, this is an allegation of direct age discrimination. No actual comparator is relied on in this case, so we have to ask whether Mr Cunningham would have been more accommodating to a younger employee. There is no evidence that this strange policy decision would have been lifted for a younger employee. Applying s136 **Equality Act 2010** there are no facts from which we could conclude that the Claimant's age of over 60 was a factor in the decision. The Appeal process ended in March 2022, which is the date of the last act of discrimination. Allegations occurring prior July 2022 are out of time. For the reasons previously stated, we concluded that it would not be just and equitable to extend time. This allegation fails.

152. The 6th and 7th direct age discrimination claims are:

- 152.1. Did the Respondent ignore the Claimant's request to working from home as an outcome in her grievance?. This incident began in November 2021 and continued past 2nd July 2022.
- 152.2. Did the Respondent not allow the Claimant's request to return to work but not work for Kim Hammond as an outcome at her grievance meeting? This incident began in November 2021 and continued past 2nd July 2022.
153. Both incidents began in November 2021 and, if factually correct and valid claims, they continued past 2nd July 2022. We would have considered both to be separate single continued acts, and accordingly, if the allegations were made out, we would have concluded that the claims had been presented in time.
154. These matters can be taken together, as they both relate to what the Claimant asserts she was seeking as a resolution of her grievance, submitted on 7th September 2021 [577]. The Claimant identified her preferred grievance outcome [577] as follows:
- 'It is very difficult to know what I want is an outcome because I'm so unwell. ... As things stand at the moment, I cannot return to working with Kim Hammond or Catherine Bingham (and to a point now that I know that the meeting could have been avoided, to work under Christina Whittenbury would be difficult because I feel she let me down and did not protect me during the meeting). In summary, until my future can be decided, because of the huge delays and the failings of management and colleagues in following the acceptable standards of behaviour policy, I would like to be considered for suspension with full pay'.*
155. We conclude that the Claimant was stating that she could no longer work for Kim Hammond or Catherine Bingham, could no longer drive and no longer go to Evesham Hospital and could not be redeployed unless she could do it from home until she was better, or in words until she was fit to work. The Claimant's preferred outcome was suspension on full pay [1402-1403]. The Claimant did

not, as a matter of fact, ask to work from home or work away from Kim Hammond. She was not fit enough to work at all, so none of these options were viable until she was. The Claimant asked if she could stay off work on full pay until she was better, notwithstanding the fact that she had exhausted her full sick pay allowance.

156. We were told by Christina Whittenbury [CW33] that Emma Hillyard (the Claimant's comparator) had a discussion about her return to work options, and part of her return to work plan did involve not working for the person at the centre of her complaint and being allowed to work from home. This arose because Ms Hillyard had reached a point that she was well enough to return. That puts her in a different set of circumstances to the Claimant, circumstances that were not materially the same, because the Claimant was never fit enough to return to work. Even if the Claimant had been fit enough to return (thus placing her in similar circumstances to Ms Hillyard) the Claimant has failed to adduce facts from which we could conclude that age was a factor in any decisions taken.
157. Home working and working away from Ms Hammond would both have been matters that a stress work assessment would have identified, at a point that the Claimant was fit enough to work again. This allegation fails on its facts and in any event the Claimant failed to prove facts from which we could conclude age played any part at all.

Direct (and Perceived) Disability Discrimination (s13 EqA)

158. The Respondent accepts that the Claimant was disabled (as stated above) from May 2022. It clearly perceived her to be from that date. The issue here is whether the Claimant was perceived to be disabled by stress and anxiety from March 2021. Did the Kim Hammond, Katy Bingham and Christina Whittenbury perceive the Claimant to be disabled by a mental impairment?

159. Katy (Catherine) Bingham told us that in the lead up to the meeting on 12th May 2021 she thought the Claimant was withdrawing and not acting within her normal character, and showing signs of shaking. She recalls a colleague's birthday and asking the Claimant in the kitchen if she was ok, as she was shaking, to which the Claimant said she was anxious **[CB13]**. Catherine did wonder whether the shakes was the result of drinking³ **[CB16]**. This perception, which was incorrect, was not a perception of disability. In cross examination Catherine Bingham told the Claimant that she (Bingham) knows a lot about mental health issues and she never perceived the Claimant to be disabled⁴.
160. Christina Whittenbury told us that she never perceived the Claimant to be disabled when she was in work **[CW5 & CW32]** also rejected any suggestion that she perceived the Claimant to be disabled, when questioned by Ms Harty⁵ the Claimant⁶ and the Judge⁷.
161. Kim Hammond also told us that she never perceived the Claimant to be disabled when she was working with the Claimant **[KM11, 13, 18]**. At her investigation meeting into the events on 12th May 2021, on 16th August 2021 **[565]** Ms Hammond gave her view on the Claimant's behaviour, stating '*I felt it was cognitive, mental health*'. In answer to supplementary questions Ms Hammond said that she had raised cognitive issues because the Claimant had been negative, but did not relate this to any disability. In cross examination she told us that she had no idea or perception of disability⁸. In answer to questions from the Judge⁹ Ms Hammond said '*the kitchen incident was before 12th May 2021 meeting, I did not perceive her to have mental health issues.*

³ In answer to a question from the Judge

⁴ Day 8 (am post-break)

⁵ Day 9 (am pre-break)

⁶ Day 9 (am post-break)

⁷ Day 9 (pm)

⁸ Day 6 (pm pre-break)

⁹ Day 7 (am post-break)

Her motivation and concentration was very good. Her changed behaviour did not raise any alarm bells'.

162. We accept the evidence of both Katy Bingham and Christina Whittenbury that they did not perceive the Claimant to be disabled, during the period that the Claimant was in work prior to May 2021.
163. In terms of Ms Hammond, we note her investigation interview statement that she thought the explanations for the Claimant's behaviour in May 2021 was '*cognitive, mental health*'. In her witness statement Ms Hammond said that this was a result of the change in the Claimant's behaviour during Covid pandemic when she seemed to withdraw herself [KH21]. Categorising the Claimant behaviour as due to '*cognitive, mental health*' is not the same as a perception that the Claimant was suffering from stress and anxiety. We conclude on the balance of probabilities that Ms Hammond did not perceive the Claimant to be suffering from stress and anxiety at this time.
164. We have already concluded that the Respondent had constructive knowledge of the Claimant's disability by April 2022. In the circumstances all of the allegations of less favourable treatment prior to April 2022 cannot have been because of any perception of disability because no-one had that perception. This is sufficient to dismiss all of the disability claims (perceived or otherwise) prior to April 2022.
165. We now turn to the specific allegations of disability discrimination.
166. **Did Kim Hammond subject the Claimant to repeated, unpleasant phone calls?** The Respondent accepts that calls were made by Kim Hammond to the Claimant between January 2021 and 22nd March 2021 [KH10-11]. The Claimant says that the calls became increasingly unpleasant and caused her distress [BY12]. We accept that the Claimant may well have felt that way about the calls, but there is little evidence that they were unpleasant. No

complaint was raised about the calls at the time. We note that in her email to Christina Whittenbury on 28th April 2021 [466] the Claimant said (of Kim Hammond) *'Early a month ago [ie March 2021] she was ringing me daily and there were no problems'*. This contradicts the assertion that the March 2021 calls were considered unpleasant. In any event we have concluded that the Claimant was not disabled at this time, nor was she perceived to be. In the circumstances this claim fails, without needing a specific conclusion on whether the calls were, as a matter of fact, unpleasant. Furthermore, this course of conduct, which ran from January to March 2021 is 16th months out of time and we would not have extended time on just and equitable grounds for it to have proceeded.

167. **Did Kim Hammond escalate the Claimant's emails to the Team Lead as passive aggressive?** The Respondent accepts that the Claimant was asked to a meeting on 30th March 2021 with Christina Whittenbury and Katy Bingham [382] following Kim Hammond's email on 23rd March 2021 [401]. We do not consider this email to be passive aggressive, and as stated, it had nothing whatsoever to do with the Claimant's disability or perceived disability, as at time the Claimant was not so disabled. This incident, occurring on 23rd March 2021 is 16 months out of time and we do not extend time for the reasons stated.
168. **On 20th April 2021 did Kim Hammond unfairly accuse the Claimant of negative and belittling behaviour in a team meeting earlier that day?** Kim Hammond did email Christina Whittenbury on 20th April 2021 [415] stating, *'Unsure if Belinda is aware that belittling and humiliating Katie and I in a meeting is not the most productive!!! I was going to speak directly with her, however, Katie said not to as you are managing her'*. As a matter of fact this allegation is upheld with regard to the words used. However, we are not satisfied that the accusation was unfair. Christina Whittenbury sent a text to the Claimant upon receipt of Kim Hammond's email which said *'Just to mention, as I forgot to say when we were chatting, I know you're trying to*

support Katie by saying she can't manage things, but please be mindful it can come across rather negatively. Just a consideration'. We do not consider this to be less favourable treatment. It was reasonable advice in all of the circumstances. In any event the Claimant was not disabled at the time, nor perceived to be, so the allegation fails as disability discrimination. It was also 13 months out of time and we would not have extended time for that period.

169. **On 28th April 2021 did Christina Whittenbury dismiss the Claimant's concerns when she reported feeling victimised by Kim on 28th April?**

The Claimant's email is at [466]. She does not use the word 'victimised' although she does say that Kim's attitude towards her in the Office clearly showed that there was a problem. Christina's response [465] did not dismiss the Claimant's concerns. On the contrary Christina says that '*we need to ensure we get this sorted*' and that a meeting is needed to get everything out into the air and sorted. The allegation that Christina dismissed the Claimant's concerns is plainly contradicted by her response and as such the allegation is dismissed on its facts. In any event the Claimant was not disabled at the time, nor perceived to be, so the allegation fails as disability discrimination.

170. **Was the Claimant required to attend a meeting on 12th May 2021 to face discriminatory allegations about her work and behaviour at the request of Kim Hammond?**

On 28th April 2021 Kim Hammond did ask for a face to face meeting with the Claimant, and either Christina or Katy [460]. The Claimant replied on the same day, suggesting a meeting would not be constructive but asks Kim to list her issues [459]. On 29th April 2021 Christina then suggests that a meeting should be held [465] and the Claimant agrees on the same day [465]. On 11th May 2011 Kim Hammond asks whether tomorrow's the meeting is informal [471] and on the same day Christina replies to Kim and states '*Tomorrow is an informal mediation process. If we cannot resolve things tomorrow we will move to a more formal process and I will involve HR. I will be doing minutes for it*' [471]. The Claimant did not know and was not warned that a formal process might follow.

171. The Claimant asks whether there is an Agenda [457] and Kim Hammond replies by stating '*tomorrow's about our little team, Just you, me, Katy and Christina, our issues that we have and how to move on*' [473]. We conclude that Kim Hammond and Christina Whittenbury agreed between themselves that minutes would be taken and the matter escalated to HR if there was no resolution, but then suggested to the Claimant that the meeting would be more informal. Kim then did prepare a list of matters about the Claimant's work and behaviour [485-486] which the Claimant was required to face. This allegation in this issue is factually correct, save for the assertion that the list of work and behaviour issues was discriminatory. That specific allegation is not made out. We conclude that the reason for it was to ventilate and address Kim Hammond's concerns about the Claimant's work and behaviour. The Claimant was not disabled, or perceived to be at the time. In the circumstances this allegation fails.
172. Whilst there is no further allegation relating to this meeting on 12th May 2021, we conclude that Kim Hammond and Christina Whittenbury did not conduct this meeting fairly or appropriately. The Claimant was misled about its purpose true purpose beforehand. It was not to discuss the small team and how to move forward, it was to work through Kim Hammond's agenda of problems that she had with the Claimant, that had been circulated to every other attendee in advance, but not circulated to the Claimant. This had the effect of hijacking the Claimant, it was unfair and it does Ms Hammond and Ms Whittenbury no credit at all. We understand why it greatly upset the Claimant, as indeed Claire Johnson accepted when she was interviewed about her investigation into the 12th May meeting. We regret that the meeting was conducted in that way. It was 'ground zero' for the Claimant's illness and disability and it led directly to her absence from work and ultimately her dismissal on capability grounds.

173. **On 13th May 2021 did Christina Whittenbury fail to take the Claimant's grievance request seriously?** On the morning of 13th May 2021 the Claimant spoke to Ms Whittenbury on the telephone, which the Claimant then followed up by email [503] stating that she felt extremely upset and ill, and that she had felt victimised at the meeting on 12th May 2021. Ms Whittenbury then sought advice from Carol Walker in HR as the Claimant has told her that she is very upset and feels victimised [507]. She emails Ms Hammond to ask if Ms Hammond was ok, and remarks that the meeting on 12th May was 'full on' [506]. This allegation fails on its facts as it is clear that Ms Whittenbury did escalate the matter to HR and take advice in response to the Claimant telling her that the Claimant had felt victimised at the meeting on 12th May [507]. The Claimant asserts that contacting HR was not taking her grievance seriously, but we consider an escalation to HR to be the opposite. The Claimant was not disabled, or perceived to be at the time.
174. **During the Investigation into workplace relationships, did Kim Hammond and Katy Bingham make unsupported claims about the Claimant's mental and cognitive health?** Kim Hammond did say, during her investigation meeting on 16th August 2021, that she felt the reason for the Claimant's behaviour was 'cognitive, mental health' and that there had been Team issues since day 1 [537]. On its facts, the allegation against Kim Hammond is well made. The allegation against Katy Bingham is not well made [568]. Ms Bingham does refer to the Claimant being always difficult, not liking change and nearing retirement. She refers to her not being well for a long time and noting the shakes, but queries whether this is the result of drinking. She calls her dangerous and manipulative. Katy Bingham does not pull her punches in this interview, but we do not conclude that she was making unsupported claims about the Claimant's mental and cognitive health. Against Ms Bingham this allegation fails.
175. Whilst Ms Hammond did make reference to the Claimant's issues being cognitive and mental health, we have already concluded that the Claimant was

not disabled by stress or anxiety at the time, nor was she perceived to be, so this allegation must fail. Further a reference to 'cognitive, mental health' could refer to a wide range of conditions. It is not an obvious reference to stress and anxiety and we are not persuaded that stress and anxiety was the impairment that Ms Hammond had in mind when she made the comment.

176. **Did Kim Hammond and Katy Bingham discuss the Claimant's state of health in the office, making incorrect assumptions about her mental health?** This is a reference to the incident in the kitchen. We find on the balance of probabilities that this occurred prior to the 12th May 2021 meeting, probably by a few months before, in or around March 2021. Both Kim and Katy admit to having a discussion about the Claimant's health, as she had been seen to be shaking. Katy suggested alcohol was the reason. Kim Hammond suggests that she had valid reasons for being worried about the Claimant's health. Taking paragraphs 14 and 21 of Ms Hammond's statement together, we conclude on the balance of probabilities that Ms Hammond did moot that the explanation was cognitive and due to mental health issues. This could be a reference to any neurodiverse condition or any other mental health concern. In the circumstances this allegation fails on its facts against Katy Bingham, but is established on its facts against Kim Hammond.
177. However, as we have already concluded, the disability we are considering is stress and anxiety. The Claimant was not disabled by that condition, or perceived to be disabled by that condition, at that time. Accordingly this allegation must fail. The Claimant contends the comment was made pre-Covid, (ie pre March 2020). Whilst we note that Kim refers to having concerns 'before Covid' **[KM21]** we conclude on the balance of probabilities that the kitchen incident occurred in or around March 2021. This would make it 16 months out of time and that it would not be just and equitable to extend time.
178. **Was the Claimant instructed to attend her Long Term Absence Panel Hearing alone on 22nd August 2022 at Kings Court, contrary to**

reasonable adjustments for her disability? On 12th August 2022 the Claimant was invited to attend a long term absence meeting, either by Webex or in person at Kings Court on Thursday 25th August 2022 [1225]. The invitation warned the Claimant that dismissal was a possible outcome and told the Claimant of her right to be accompanied by a staff side representative or a colleague. On 17th August 2022 [1552] the Claimant emailed Amanda Oliver with her statement of case [1235]. She confirmed that she could attend on 25th August, with her partner nearby, but that her representative, Kim, could not attend on that day.

179. On 19th August 2022 the Claimant did request a postponement as she was hoping to arrange a severance payment via her solicitor [1231]. On 22nd August 2022 Chloe Bishop emailed the Claimant [1230] to confirm that any discussions with solicitors regarding a severance process was separate to the Long Term Absence process, such that it was not a good reason to postpone.
180. Ms Bishop stated that the panel would prefer the Claimant to attend in person, and noted her request for her partner to be nearby if needed. On 24th August 2022 Chloe Bishop and the Claimant discussed matters by telephone [1233]. The notes record the Claimant being willing to attend the hearing without her Kim Spooner (her representative) if she could do the hearing from home with her partner in the house. The hearing took place on 25th August 2022 [1226] by Webex, and that the Claimant's partner was in the house. It was confirmed that he could sit in the meeting and that the Claimant was happy to proceed [1261]. In the circumstances these allegations fails on its facts.
181. **On 12th August 2022 did the Respondent refuse to postpone the Claimant's Long Term Sickness Hearing Panel meeting to allow her colleague to attend, showing insensitivity to her disability?** As we have already concluded this allegation fails on its facts.

182. **Require the Claimant to have to attend the Long Term Sickness Hearing via WebEx with her partner present despite her having said she was not keen to do this?** As we have already concluded this allegation fails on its facts.
183. Even if any of these allegations had been established on their facts, the Claimant has failed to prove facts from which we could conclude that the reason for the treatment was the Claimant's stress and anxiety.
184. These allegations, if made out, would have been in time.

Harassment related to disability / perceived disability (s26 EqA)

185. In considering the Claimant's harassment claims we are tasked with determining:
- 185.1. Did the incidents occur as the Claimant asserts?
 - 185.2. Was it related to the Claimant's disability;
 - 185.3. Did it have the purpose of effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
186. **Did Kim Hammond make withheld phone calls to the Claimant between January 2021 and 22nd March 2021?** The Claimant asserts that Kim Hammond became angry, ending the call abruptly, upon learning that the Claimant had assisted Katy with a funding form for a palliative care patient. We conclude, upon considering Ms Hammond's explanation [749] that Ms Hammond probably did get angry with the Claimant. However, the Claimant was not disabled at this time, nor perceived to be, so this incident was not related to the Claimant's disability, and accordingly fails.

187. **Was the Claimant was asked to attend a meeting on 30th March 2021 with Ms Whittenbury and Ms Bingham [399] to discuss strained communications.** The Respondent admits that she was. However, the Claimant was not disabled at this time, nor perceived to be, so this incident was not related to the Claimant's disability, and accordingly fails.
188. **Did Kim Hammond set difficult or impossible tasks outside of the Claimant's remit?** The Claimant has identified being given North patient tasks in March and April 2021 which she could not complete without the help of Karen Moody, the North secretary. The requests arose out of the North and South teams merging. Whilst the requests would have created challenges, we do not conclude that Kim Hammond was intentionally setting difficult or impossible tasks. More fundamentally such requests were and could not be related to the Claimant's disability as she was not disabled, or perceived to be, at the time.
189. **Did Kim Hammond did give out the Claimant's phone number to the North patients, rather than the number of the North Secretary [KM17] as the North Secretary was only in for 3 days a week.** The Respondent accepts that she did. The Claimant asked her to stop doing this by email on 28th April 2021 [461]. There is no basis for asserting that giving the Claimant's number to North patients was related to the Claimant's disability or perceived disability. This allegations fails.
190. **Did Kim Hammond complain about the Claimant's behaviour towards Katy Bingham after a meeting on 20th April 2021?** Katy Bingham told us about the meeting on 20th April 2021, stating '*the meeting was about the Team's move to Countrywide and the Claimant stated something about how I would not be able to cope with it at all, stating how disorganised I am. These comments really upset me to the point that I had to remove myself from the view of the camera because I was crying.*' Following that meeting on 20th April

2021 Kim Hammond did complain about the Claimant's behaviour to Christina Whittenbury [432]. She said, '*Unsure if Belinda is aware that belittling and humiliating Katy and I in a meeting is not the most productive. I was going to speak directly with her, however Katie said not to as you are managing her.*' On its facts this allegation is established. However, we conclude that the reason for Kim Hammond's email was simply because the Claimant had upset Ms Bingham at that meeting, as demonstrated by the fact that it reduced Ms Bingham to tears. The reason had nothing whatsoever to do with any disability or perceived disability of the Claimant's. This allegation fails.

191. **Did Christina Whittenbury send texts to the Claimant stating that her behaviour could be seen as negative without providing details or an opportunity to defend herself?** The Respondent admits that Christina Whittenbury sent a text at 5.22pm that day [441] to the Claimant in the following terms '*I know you are trying to support Katy by saying she can't manage things, but please be mindful that it can come across rather negatively. Just a consideration*'. In response [442] the Claimant apologised and said '*it is always a little joke Katy and I had*'. Ms Whittenbury told her not to worry as she knew it wasn't malicious. The Claimant knew she was being referred to as negative and she provided an explanation. The fact that a text was sent is established as fact. The assertion that no details were provided and that the Claimant had no chance to defend herself is not made out on the facts. The reason for the text was sensible line management, to alert an employee that their communication could be seen as negative. There is no basis at all for concluding that this related to the Claimant's disability or perceived disability, had she had either at the time.
192. **Did Kim Hammond constantly criticise the Claimant's work including North tasks which should not have been assigned to her?** Kim Hammond did raise concerns about the Claimant, and after the complaint that the Claimant had belittled Katy Bingham, in April 2021, Ms Whittenbury did say that she would keep track of the Claimant and monitor her behaviour [431].

We find that Kim Hammond did raise concerns, but that at the time the Claimant was not disabled, or perceived to be, such that the complaints cannot be related to disability, in any whatsoever. This allegations fails.

193. **On 28th April 2021 did Kim Hammond informed the Claimant that she had requested a face to face meeting with the Claimant, Katy and Christina following many recent issues [460].** The Respondent accepts this factual allegation. The Claimant responded by stating '*I don't feel at this stage a meeting would be constructive, but if you could list your issues I would be happy to try and address them. I'm happy for you to share this with Christina and Katie*' [459]. No such private discussion took place and then the 12th May 2021 meeting was arranged. This allegation is made out on its facts. However, there is no basis for asserting that the request for a meeting was related to the Claimant's disability or perceived disability. The Claimant has failed to prove facts from which we could conclude that. In addition, as stated on other allegations, she was not disabled, or perceived to be, at that time.
194. **Did Christina Whittenbury ignore the Claimant's request not to attend the meeting when the Claimant reasons were that she felt victimised?** The Claimant's response to Kim was copied into Christina Whittenbury [459]. In addition, that day, the Claimant sent a further email stating that she was not happy to have any meeting at the moment, raising concerns about Kim Hammond's attitude towards her [466]. The Claimant did not say in that email that she felt victimised. Ms Whittenbury did respond on 28th April [465] stating that a meeting would be best to get everything out in the air, and that the Claimant should take a week off beforehand to get some space. This allegation fails on its facts as it cannot be said that Ms Whittenbury ignored the Claimant or her suggestion.
195. **Did Kim Hammond did make a list of complaints ahead of the meeting on 12th May 2021 [485] which she did not share with the Claimant.** The Claimant says that she asked for a copy and Kim refused to give her a copy

[BY44]. Kim accepted this in during her oral evidence. We accept this evidence, and this allegation is made out on its facts. We conclude that Kim did this, in order to raise a number of concerns or complaints that she had with the Claimant and that she did not provide the list in advance because she did not want to forewarn the Claimant or give her time to prepare a response. We have already observed that this did Kim Hammond no credit at all. This, however, was the reason for the list. It was not related to the Claimant's disability as the Claimant was not disabled at the time, nor perceived to be. This allegation therefore fails.

196. **Did Kim Hammond forward her list to both Katy Bingham and Christina Whittenbury before the meeting on 12th May 2021?** Ms Whittenbury stated that she understood that Kim Hammond was doing an aide memoir for the meeting, but that she could not recall if it was shared with her before the meeting **[CW18]**. In her oral evidence Ms Whittenbury changed her position in that she denied that she had seen Kim's list in advance of the meeting¹⁰. Katy Bingham denies that Kim shared the list with her prior to the meeting **[KB14]**, however in oral evidence Ms Bingham accepts that Kim's list of concerns was given to her in advance of the meeting by Kim, in order to print¹¹. Kim Hammond makes no reference to whether she shared her list in advance in her statement. In the circumstances we find that the list was sent to Ms Bingham, but we have no evidential basis for concluding that it was sent to Ms Whittenbury, although we are satisfied that Christina Whittenbury knew that a list had been compiled. We find that the reason it was sent to Ms Bingham was ostensibly for printing, but in circumstances in which Ms Hammond was very content for it to be read by Ms Bingham in advance. We conclude that the reason or at least part of the reason for telling Ms Whittenbury about the list in advance and the reason for sending it to Ms Bingham was to bolster Ms Hammond's position in the meeting and to create unity or an agreed common position between the clerical staff in advance. Whilst that rationale was not

¹⁰ Day 9 – post midmorning break.

¹¹ Very end of Day 8

reasonable conduct, it was not discriminatory conduct either. It could not have been related to her disability as the Claimant was not disabled, not perceived to be, at the time. Even on the Claimant's own case she was not disabled prior to 12th May 2021. This allegation fails.

197. **Was the Claimant told not to interrupt by Ms Whittenbury when she tried to query Kim Hammond's reference to clinical supervision?** In her statement Ms Whittenbury says that she would not have told the Claimant not to interrupt. This is not the same as a direct recollection of what she said. In her email of 13th May 2021 the Claimant did raise a concern about Kim's use of the expression 'clinical supervision' [503]. She states '*one thing I recall at the very beginning of the meeting was Kim mentioning clinical supervision that was discussed about a year ago. I have no idea what she was talking about and this concerns me. I was under the impression that admin staff don't have clinical supervision*'. On 13th May 2021 Ms Whittenbury did confirm to the Claimant to that the expression clinical supervision is for medical staff only [497]. The Respondent accepts that only medical staff are subject to clinical supervision (ie supervising medical practices) and that the expression would not be used to describe administration staff. Clearly it was important to the Claimant that she was not categorised as needing clinical supervision. On the balance of probabilities we find that Claimant did interrupt Kim to query the use of the expression clinical supervision, and that Christina did ask her not to interrupt. This allegation is therefore made out on its facts.
198. However we conclude that the reason Ms Whittenbury asked the Claimant not to interrupt was so that Kim could make all of her points. The Claimant has not proved facts from which we conclude that the comment was related to disability. The Claimant did not meet the definition at that point in time, and was not perceived by anybody to have met it.
199. **Did Kim Hammond subject the Claimant to allegations regarding her capability as administrator and her personality?** We conclude that the

nature of Kim Hammond's concerns are better described as attacks on the Claimant's personality rather than attacks on her capability. Everyone accepted that the Claimant was good at her job, but at the meeting on 12th May 2021, Kim was raising concerns that relate to her personality, such as her negativity. This allegation is made out on its facts. However the personality concerns could not related to disability as the Claimant was not disabled and not perceived to be at the time.

200. **The Claimant withdrew the allegation that Kim Hammond had laughed during the meeting when the Claimant had become upset¹².** It is dismissed on withdrawal.

201. **Did Ms Whittenbury and Ms Bingham prevent the Claimant from leaving the meeting? Did Ms Whittenbury stand in order to prevent the Claimant from leaving?** Ms Bingham denied this in her witness statement [KB14] '*At no point did the Claimant try to leave and no one, including myself tried to physically stop her from leaving the meeting. The Claimant calmed down and we started to talk about ways to move forward. ... Kim, the Claimant and I left the meeting together chatting amicably*'. Christina told us that she was sat opposite the Claimant, such that standing up could not have prevented the Claimant leaving. She did accept that she tried verbally to discourage the Claimant from leaving, but that no-one prevented her from leaving. We accept the Respondent's evidence on this. We have already found that the three clinical staff sat on one side of the table. The act of any of them standing would not have prevented the Claimant from leaving. This allegation fails on its facts.

202. **On 13th May 2021 did Christina Whittenbury tell the Claimant that they had not been completed when in fact they had been sent to Kim Hammond for her approval?** Ms Whittenbury's minutes of 12th May meeting were sent to Catherine Bingham [495]. Christina Whittenbury told us in her

¹² Paragraph 31.14 of the Claimant's closing submissions

witness statement [CW20] that she also sent the notes to Kim Hammond to approve [505]. She did not send them to the Claimant. We find as a fact that the minutes were sent to Kim Hammond.

203. Ms Whittenbury told us that she knew that the Claimant had taken sickness absence that she did not want to upset her further, which she believed sight of the minutes would upset her further. Accordingly we find that she did indicate to the Claimant that they were not ready, when in fact they had been completed, subject to the approval of Ms Hammond and Ms Bingham. This allegation is made out on its facts.
204. What was the reason? Whilst we conclude that Ms Whittenbury was aware that the Claimant had become very upset at the meeting, we do think that Whittenbury and Bingham (as medical practitioners) naturally sided with Kim Hammond (also a medical practitioner) in a dispute with a secretary. The Claimant, given the way the meeting panned out, felt as if she was in Court. Kim Hammond shared her notes in advance with Ms Bingham and the medical staff agreed the notes of the meeting between themselves without involving the Claimant. We consider that not sending the minutes of the meeting to the Claimant to approve was part of the 'them and us' medical staff / administrative staff perception. This was the explanation. The Claimant was not disabled, or perceived to be, and the decision was not related to disability at all. Whilst the nurses' approach was unreasonable, as an allegation of disability discrimination it fails.
205. **On 13th May 2021 did Ms Whittenbury prevent the Claimant from making a complaint about the meeting by falsely stating that HR had already started a formal investigation?** On the morning of 13th May 2021 the Claimant spoke to Ms Whittenbury on the telephone, which the Claimant then followed up by email [503] stating that she felt extremely upset and ill, and that she had felt victimised at the meeting on 12th May 2021. Ms Whittenbury then sought advice from Carol Walker in HR as the Claimant has told her that she

is very upset and feels victimised [507]. Christina Whittenbury does commission an Acceptable Standards of Behaviour investigation into the meeting on 12th May 2021 [537] which did conclude that whilst the process was well intended it did not follow the processes in place for such discussions [571]. The Claimant was not prevented from complaining about the meeting and this allegation fails on its facts.

206. **Did Ms Whittenbury tell the Claimant not to come into the office inferring that to do so might jeopardise and investigation into the Claimant?**

Christina Whittenbury accepted in her oral evidence that she encouraged the Claimant not to come into the office to give herself some space, to work from home as she was not well¹³. The Claimant responded by text on 14th May 2021 confirming that she had taken Christina's advice and would work from home [509]. There is nothing in Christina's evidence or in the Claimant's evidence that she was being told to work from home as she might jeopardise the acceptable standards investigation. In the circumstances we reject this allegation on its facts.

207. **Was the investigation actually into workplace relationships and did it follow the acceptable standards policy?** The investigation by Claire Johnson (described as informal) was not into workplace relationships generally. It was very specifically an investigation into the meeting held on 12th May 2021, which concluded that the meeting did not meet the acceptable standards of behaviour [571]. The Claimant accepted this conclusion and was pleased that it had been reached [573]. There is no evidence that Claire Johnson's investigation failed to follow the acceptable standards policy. In the circumstances this allegation fails on its facts as it was not a general investigation into workplace relationships. Even if the investigation (or for that matter the meeting of 12th May 2021) had fallen below the acceptable standards policy, it is difficult to discern how either could be related to the

¹³ Day 9 (after lunch)

Claimant's disability, had she been, or perceived to have been, disabled at the time.

208. **At the Claimant's grievance interview, did Anna Evans constantly tell her that her allegations were just her perception?** The Claimant attended her formal grievance interview with Anna Evans on 28th September 2021 [610-677]. The purpose was to consider whether the Claimant was bullied by Mssrs Whittenbury, Bingham and Hammond prior to the meeting on 12th May 2021 and whether Whittenbury and Bingham did not support the Claimant at the meeting [610]. Anna Evans did make repeated references to the Claimant's perception (for example at paragraphs [197, 199, 242, 286, 317, 322]). In the circumstances this allegation is upheld on its facts.
209. The use of the word 'perception' was being used to suggest that whilst a particular matter may have been believed by the Claimant, it was not or may not, in Anna Evans' opinion, be a fair or accurate point for the Claimant to make. We consider that the word is often used by an investigator to acknowledge a point that is being made without accepting it as fact. We conclude that this was why the expression was used by Ms Evans. We note that in her interview with Kim Hammond, Anna Evans also makes multiple references to Kim Hammon's perception of events [748]. It was part of Ms Evans toolkit for managing witnesses in an investigation. It was not related to the Claimant's disability. In any event, in September 2021, the Claimant was not disabled, nor perceived to be. This allegation fails.
210. **Did Anna Evans dismiss the Claimant's request not to have to work with Kim Hammond in the future?** The Claimant does ask Anna Evans at the investigation hearing on 28th September 2021 whether she could return to work, but not as Kim Hammon's secretary, suggesting that Karen Moogan, the North secretary worked for Ms Hammond instead [658]. Ms Evans points out that the North and South were to merge, so having Karen Moogan work solely for Kim Hammond was not a realistic option [658]. However, the outcome of

the investigation expressly does not dismiss working for someone other than Kim Hammond. Kath Stanbra concludes by stating [812] *'rest assured that as soon as you feel able to plan your return to work, we will explore options for you to work in an alternative team. This remains your preference and with the support from Occupational Health we very much value your skills. Would not want to lose your valuable contribution to the organisation'*. In the circumstances, this allegation fails on its facts.

211. **During the appeal process, did the Claimant receive a management bundle which included statements containing distressing comments from her colleagues?** The Respondent accepts that on 31st January 2022 during the grievance appeal process the Claimant did receive a management appeal bundle [864] which included statements made by the Claimant's colleagues which distressed her. The Claimant considered the comments made by Hammond [565-567] and Bingham [568-570] as distressing. In the circumstances, we uphold this allegation on its facts.
212. We have already found that the comments themselves were not related to the Claimant's disability. The inclusion of the statements in the report was made in order for the Claimant to have all of relevant documents. This was not related to the Claimant's disability. In the circumstances this claim must fail, notwithstanding the fact that the Claimant found it distressing. At the time (January 2022) the Claimant was disabled by stress and anxiety, however the Respondent did not perceive that to be the case, nor have constructive knowledge of it, until April 2022.
213. **Did the invitation letters to Ms Bingham and Hammond incorrectly accuse them of bullying the Claimant, leading those witnesses to treat her detrimentally?** The Respondent accepts that Kath Stanbra and Anna Evans informed Bingham [588] and Hammond [590] that the Claimant had accused them of bullying. The point was made again at the opening of their investigation interviews [736]. It is clear that Hammond was shocked at the

suggestion that she had bullied the Claimant [739 & 756]. We find that most of this allegation is made out on its facts. Letters were sent, and the witnesses were led to believe that the Claimant had accused them of bullying. This part of the allegation is made out on its facts.

214. However, the final part, that it caused the witnesses to behave detrimentally as a result is not made out. By this time (October 2021) the Claimant had been off work for 5 months. Hammond and Bingham did not treat the Claimant detrimentally after that point, as they had no opportunity to do so. The issue here is whether the invitation letters, which referred to the Claimant making allegations of bullying was disability related harassment. The Respondent said that the wording used reflected the acceptable standards policy wording. We accept this explanation and find that it was not related to the Claimant's disability. In October 2021 the Claimant was not disabled nor perceived to be.

215. **Did Ms Hammond and Ms Bingham discuss and make incorrect assumptions about the Claimant's health?** It is accepted that that Hammond and Bingham discussed the Claimant's health, albeit in the kitchen for an event prior to May 2021. Assumptions were made or aired that were incorrect. At the time the Claimant's stress and anxiety did not meet the definition of disability. The Claimant's condition was mooted to be because of drinking or cognitive mental health.

216. In the circumstances this allegation is made out on its facts and it was something likely to cause the Claimant's distress. However it was not related to the Claimant's disability of stress or anxiety.

Victimisation (s27 EqA)

217. The Claimant did perform a protected act when she submitted her appeal dated 21st December 2021 [817]. This was properly conceded by the Respondent in its legal submissions¹⁴. In the appeal letter the Claimant referred to being victimised and subject to harassment. In our judgment the Claimant's letter of appeal qualifies as a protected act as defined by s27(2)(d).
218. We are tasked with determining whether the matters that we are about to refer to happened, and if they did, whether they were acts of detriment, and if they were, whether the reason for the act was the presentation of the Claimant's appeal dated 21st December 2021. The alleged treatment is:
- 218.1. Were the Claimant's appraisals from 2014 to 2020 removed from her HR file and duplicates from her locked desk drawer, at some stage during the Claimant's appeal process in May 2022?
- 218.2. Was her 2020 appraisal tampered with during the same period (ie during appeal process?)
- 218.3. Did Kath Stanbra fail to correctly address the Claimant's second grievance made in Summer 2022 concerning appraisals in a timely manner? For the avoidance of doubt this is not an allegation about how Jan Austin dealt with matters.
219. On the issue of the missing appraisals, we found this a very difficult to follow. There is a dispute as to whether all of the appraisals did go missing, from either the HR file or the Claimant's draw. However, even if we were to assume that they did go missing, the Claimant has no evidence and no real idea as to when that happened, let alone why. She has failed to prove from any facts from which we could conclude:
- 219.1. If all of the appraisals went missing;
- 219.2. When they went missing;
- 219.3. Who moved them;

¹⁴ Page 32, paragraph 138

219.4. Why they moved them.

220. Her case is that, as an act of revenge or retaliation for submitting an appeal against her grievance outcome someone, unknown to her, removed her appraisals. The Claimant, by that stage, had been off work for 12 months. There are a wide range of explanations for how documents could get lost during that period. At its very highest it is guess work by the Claimant, which is not supported by any evidence whatsoever. The Claimant has not been able to prove facts that establish when the appraisals went missing, who took them and what their motivation was. The appraisals were not relevant to the grievance appeal. The Claimant's case on this was not put to any of the Respondent's witnesses. In the circumstances this allegation fails on its facts.
221. We have already found that the Claimant has not proved facts from which we could conclude that her 2020 appraisal was tampered with. As high as she can put it is that the document (which bears her signature) she cannot recall signing. In the circumstances this allegation fails on its facts. Even if we were to find that her signature had been added at a later stage by someone else, there is no evidence and nothing to suggest why that was done as an act of revenge for raising a grievance. This allegation is not proved and in fact, makes no sense. The allegation fails.
222. The last alleged act of victimisation is that Kath Stanbra, in response to the Claimant's grievance appeal, failed to address the Claimant's 2nd grievance about the lost appraisals in a timely manner. On 30th May 2022 the Claimant asked Kath Stanbra to assist her in locating her missing appraisals [1173]. Siobhan Padfield responded about two weeks later on 15th June to confirm that Kath Stanbra that she had attended the Evesham Community Hospital and had not been able to find any of the Claimant's appraisals [1163]. On 18th June 2022 the Claimant asked the Respondent to clarify that her SADR appraisals had gone missing from her lockable draw and were missing from her personal file [1162]. On 28th June 2022 Ms Padfield replied to say that Ms

Stanbra was on annual leave until 4th July 2022. She suggested a meeting at which she and Ms Stanbra could address the Claimant's concerns. Ms Stanbra replied after her annual leave on 8th July 2022 [1158] suggesting a meeting. The Claimant replied on 10th July to confirm that she wished to continue her grievance to Jan Austin.

223. Accordingly on 15th July 2022 Jan Austin offered to take over the investigation and complaint into the missing appraisals. On 23rd July the Claimant raised a grievance over her missing SADR appraisals and that her 2020 SADR appraisal had been tampered with [1148]. The Claimant has made it clear that this allegation does not relate to any investigation undertaken by Jan Austin.
224. It is clear that Ms Stanbra did look for the appraisals and, with Ms Padfield, was keen to arrange a meeting to understand the Claimant's concerns and take things forward. This could not be arranged immediately due to the Claimant's ill health. Whilst there was a delay of a few days, and periods of annual leave, we do not think that the responses of Ms Stanbra and Ms Padfield on her behalf, were such that it could be said that Ms Stanbra had failed to respond in a timely manner. On its facts this allegation fails. Even if it had been made out on its facts the Claimant had not adduced any facts from which we could conclude that the reason for any lack of a timely response was because the Claimant had submitted an appeal against her original (and factually completed unrelated) appeal.

Victimisation and Time

225. All of the incidents relating to the lost appraisals occurred in May 22 and are 2 months out of time. Had we upheld those claims on their facts, given the short period of delay we would have extended time on just and equitable grounds for these two claims to proceed.

226. We consider that the complaint against Kath Stanbra not proceeding timeously ran from the point she was first asked to help until the point Jan Austin took over. Any such period of delay we consider would properly be viewed as a single act of discrimination and as such would have been in time, had we considered it to have merit.

1st Failure to make reasonable adjustments (s 20 - 21 EqA)

227. The Claimant asserts that there were two provision, criterion or practices ('PCPs') that placed her at a disadvantage. We have considered each in turn:

228. The first is this: Did the Respondent have provision, criterion or practice ('PCP') that the Claimant was to be line managed by Kim Hammond? The Claimant confirmed in her witness statement who her line managers had been **[BY1]:**

228.1. Her first line manager was the Nurse Consultant Rosie Grove. Ms Grove completed the Claimant's 2013 and 2014 Appraisals;

228.2. Kath Stanbra took over line managing the Claimant after the retirement of Ms Grove. She undertook the Claimant's appraisals on 12th February 2015 **[242]**, 21st January 2016 **[258]**, 26th January 2017 **[273]** and 22nd February 2018 **[289]**.

228.3. Following Ms Stanbra's promotion in early 2019, Christina Whittenbury became the Claimant's line manager. Ms Whittenbury completed the Claimant's appraisal for 2019 **[296]**.

228.4. In early 2020, Christina Whittenbury appointed Katy Bingham to take over as the Claimant's line manager. Katy Bingham completed the Claimant's appraisal for 2020 **[333]**. Ms Bingham remained the Claimant's line manager.

228.5. Ms Bingham also line managed Kim Hammond. Ms Hammond was a clinical staff member in the team, and it is correct that the Claimant

was to provide administrative and clerical support for her. It is also correct that on 23rd March 2021 Kim Hammond completed the Claimant's 2021 appraisal [387]. However neither of these matters means that Ms Hammond was ever appointed as the Claimant's line manager.

229. In the circumstances it is our judgment that the Claimant has failed to establish that the PCP of being managed by Ms Hammond ever existed. The Claimant may well have provided administrative support to her (and therefore had to work with her) but this is not the same as being her line manager. The Claimant has also failed to establish that the PCP (had it ever existed) would have been applied on the Claimant's return to work. This assertion is contradicted by Kath Stanbra's promise that the Respondent would look to moving the Claimant away from Kim Hammond, had the Claimant been able to return to work. Given that we have found that the first PCP was not in place all of the rest of the Claimant's failure to make reasonable adjustments case, based on that PCP, must fail.
230. We have considered the rest of the claim for completeness. Had that PCP been in place, the issue of whether the Respondent should have made an adjustment to it by giving the Claimant a new or different line manager could only be tested upon the Claimant's return to work. The Claimant accepts that she was never, at any point fit enough to return. The adjustment and the duty to make it could only have been applied upon her return to work. In the circumstances the duty never arose and the Respondent was never in breach of it.
231. We turn next to the adjustments that the Claimant contends the Respondent should have made to the purported PCP of being line managed by Kim Hammons. They are:
- 231.1. The completion of a stress risk assessment;

- 231.2. Being moved out of Kim Hammond's line management;
 - 231.3. Being redeployed;
 - 231.4. Being allowed to work from home;
 - 231.5. Not being placed in a work environment until the Claimant had recovered.
232. We have already referred to the meeting between Kath Stanbra and the Claimant on 26th November 2021 [809] in which Ms Stanbra said '*rest assured that as soon as you feel able to plan your return to work, we will explore options for you to work in an alternative team if this remains your preference and with support from Occupational Health, we very much value your skills and would not want to lose your valuable contribution to the organisation*'.
233. Following **Powell**, we conclude that none of the adjustments contended for could sensibly have been undertaken until the Claimant was ready to return to work. Whilst the Claimant did request them during her sickness absence, she already knew that Kath Stanbra had assured her that alternatives would be looked at when she was ready to return. Only at that point could a position for the Claimant, away from Kim Hammond, been identified. We consider that all adjustments should have been considered before the Claimant returned to work, but only after a return to work date had been identified. Had both the Claimant and her GP and/or Occupational Health agreed on a particular return to work date, then we would have expected Kath Stanbra to make good on her promise of exploring the options for the Claimant's return. However, as early as 16th June 2022 the Claimant stated that she could not see herself returning to work in the NHS [1192]. If an return date had been identified the returning adjustments could have been agreed (for example not providing administrative or secretarial support to Kim Hammond) and then a stress risk assessment could have been undertaken to double check that the proposed adjustments removed or reduced the risk of additional stress. We agree with Christina Whittenbury's evidence [CW24] that there was little point in undertaking that assessment when the adjustments had not been agreed and no return date for

the Claimant was known. We do not consider that the obligation to make adjustments to the PCP of being line managed by Kim Hammond (if it had existed, we found it did not) would not have arisen until the preparations for a return to work could be undertaken.

234. Did the Respondent have provision, criterion or practice ('PCP') that the Claimant had to attend the 2nd and 3rd Grievance Appeal meetings in person? In our judgment there was no such provision, criterion or practice. The first grievance appeal meeting was held by video [841]. Plainly no such PCP was in place for that hearing. Whilst the next two meetings were in person meetings, these do not point to a PCP that the meetings had to be held in person unless there is some evidence that the Claimant asked for a virtual meeting and was told that it was the Respondent's practice to conduct them in person. There is no evidence of any such conversation for the 2nd grievance appeal, and in respect of the 3rd, the Claimant was asked to confirm her attendance [1119] which she duly did without raising an issue over the in person meeting and/or asking it to be transferred to a virtual meeting [1119], by way of an adjustment to an 'in person only' meetings rule or generally. Given that we have found that the 2nd PCP was not in place all of the rest of the Claimant's failure to make reasonable adjustments case, based on that PCP, must fail. We have considered them nonetheless for completeness.
235. There is no evidence that any requests for a postponement or virtual hearing was refused. The issue of a colleague attending is not linked to the PCP of conducting grievance appeal hearings in person. This PCP relates to the hearing venue not who can attend.
236. The invitation letter dated 12th August 2022 [1225] for 25th August meeting did invite the Claimant to an in person hearing. However it also offered the Claimant the choice of a Webex meeting. This undermines any alleged PCP that the meetings had to be in person. Whilst Chloe Bishop did tell the Claimant that the meeting was to be held in person [1230] after the Claimant

had asked for a Webex meeting [1552] ultimately a Webex meeting was been agreed [1234]. This PCP fails on its facts.

237. On time, we note that the discussions over venue occurred in August 2022 and accordingly they were all in time.

Discrimination arising from disability (s15 EqA)

238. We find as a fact, and the Respondent accepts, that the Claimant's sickness absence from May 2021 until her dismissal was something that arose out of the Claimant's disability. We have found that the Respondent knew or should have been reasonably expected to know that the Claimant had a disability from April 2022.

239. In terms of alleged unfavourable behaviour relied on by the Claimant in support of her s15 **EqA** claim, we make the following judgment:

239.1. We accept that the issue of a stress risk assessment was directly related to the Claimant's absence from work and accordingly her disability. However for the reasons set out above, we do not consider that the failure to conduct one was unreasonable treatment. We have found that the reasonable time to conduct one would have been when a return to work date was known. Had a stress risk assessment been refused at that point our analysis would have been different. This allegation of unfavourable treatment fails on its facts.

239.2. The alleged unfavourable treatment of failing to assure the Claimant she would not have to return to Kim Hammond's line management is not made out on its facts. As we have already found as a fact, at the start of the Claimant's absence that Kath Stanbra did assure the

Claimant that all options, including moving out of Kim Hammond's line management, would be discussed.

- 239.3. Fail to act on the recommendations of the Occupational Health Nurse. This relates, and rephrases the stress risk assessment point, which we have dealt with. The decision to delay the assessment until a return to work date was known was no unreasonable treatment.
- 239.4. Fail to allow the Claimant time to recover after her appeal. This allegation relates to whether the Respondent should have allowed the Claimant time to recover as she believed had been agreed by the Appeal Chairperson in the final appeal meeting on 20th May 2022? The Appeal Chairperson was Rob Cunningham [1104]. The Claimant relies on the comments made by Mr Cunningham '*Then you continue with your recovery and at the appropriate point we and you are very much in control of this. We think about what does employment look like? [1142]*' and '*We've talked a little bit about trying to think about moving forward and when you're ready to do that, how we, as an organisation, very much want to support that to happen, because you are clearly a valued experienced skilled member of staff.*' [1143].
- 239.5. We conclude, reading the transcript of the whole hearing, that Rob Cunningham is stating that the proposals for reintegrating the Claimant back into work (new team, manager, redeployment etc) would be looked at when the Claimant was ready. He was not giving a guarantee that an Absence Decision meeting would be postponed indefinitely, or until/if the Claimant said she was ready to attend that meeting. Mr Cunningham was chairing the grievance appeal, he was not involved in or conducting the sickness absence process. By the time of the Absence Decision meeting the Claimant had been off sick for 15 months. We do not consider that the time between the appeal hearing in May 2022 and the Decision hearing in August 2022 to be

unreasonable. If the Claimant's submission was correct then it would mean that a decision meeting could never be heard until the employee concerned was fit to return to work. That is not the law and this allegation is dismissed.

- 239.6. For the reasons that we are about to explain (when we set out our analysis on the Claimant's unfair dismissal claim) we do not consider that dismissing the Claimant at the time and in the manner in which the Claimant was dismissed, amounted to unreasonable treatment. Accordingly this allegation is dismissed.
240. Because we have dismissed the Claimant's s15 **EqA** claim on its facts (the Claimant has not established facts from which we could conclude unreasonable treatment) we have not had to consider whether the treatment could be justified. For completeness we conclude that the Respondent did have the aim of managing the sickness of its long term absent employees and ensuring an efficient service delivery. This was a legitimate aim.
241. For the reasons set out below we consider that dismissal, in the circumstances in which it occurred was a proportionate means of achieving that legitimate aim.
242. Had the Claimant's s15 **EqA** claims proceeded, we would have found them to have been presented in time, on the grounds that they would have been a single continuing act ending with the Claimant's dismissal.

Unfair Dismissal (s98(4) ERA)

243. We turn now to consider the Claimant's claim that her dismissal was unfair, pursuant to s98(4) Employment Rights Act 1996. We have started this analysis after making the following preliminary findings of fact:

- 243.1. The Claimant was an employee of the Respondent;
 - 243.2. At her effective date of termination she had been continuously employed for a period of eleven years.
 - 243.3. The Claimant's unfair dismissal, occurring on 28th August 2022, was presented in time.
 - 243.4. The Respondent relies on medical capability as the potentially fair reason. We find that medical capability was the reason relied on by the Respondent for dismissing the Claimant.
244. We now have to consider whether the Respondent acted reasonably in the circumstances, considering its size and administrative resources, in treating medical capability as the reason to dismiss? We have found the following matters as fact:
- 244.1. The Claimant commenced a period of sickness absence on 14th May 2021. As at the date of the termination of her employment, the Claimant was still too unwell to return to work;
 - 244.2. The Respondent took steps to establish the nature of the Claimant's illness from occupational health, obtaining three reports on 10th July 2021 [540], 31st January 2022 [865] and 26th July 2022 [1396];
 - 244.3. The Claimant's entire absence is covered by Fitness for Work certificates confirming that the Claimant was not fit to work due to stress at work (for example [579]).
 - 244.4. The Claimant attended six long term absence meetings, prior to the final Long Term absence decision meeting, as follows:

- 244.4.1. On 8th July 2021 **[552]** the Claimant said she did not feel much better, was still on prescription medication and was continuing with Counselling.
- 244.4.2. On 20th October 2021 **[781]**. The Claimant said that she could not return until the investigation into the May 12th meeting was at an end and that she did not feel that she could work with specific complex neurology nurses going forward. The claimant stated that even working from home would be a challenge and she was fatigued, that her thinking was slower and that she can use the wrong words when speaking.
- 244.4.3. On 14th January 2022 **[844]**. The Claimant confirmed that she could not move forward and was incapable of working anywhere at that moment. The Claimant was on prescribed medication (sertraline and diazepam) for anxiety and depression. The Claimant said that she was too ill to consider redeployment at that time.
- 244.4.4. On 14th April 2022 **[1123]**. The Claimant stated that she would not be able to return to work for the Complex Neurology Team. She questioned whether she could work for the NHS.
- 244.4.5. On 16th June 2022 **[1191]** at which the Claimant's options were identified, namely (i) redeployment, (ii) mutual termination, or (iii) ill health retirement **[1183]**.
- 244.4.6. On 13th July 2022 **[1198]**. The Claimant's sickness absence was extended into September. She also confirmed that she was not well enough to reconsider redeployment.

The Claimant said that she would just like this to be finished so that she could move on. The Claimant confirmed that she would like to make an application for ill health retirement.

244.5. On 10th August 2022 Jackie Murphy's report that there was no indication that the Claimant could return at that point. Ms Murphy concluded by stating that she did '*not feel that this is sustainable by the team due to the shortfall of staffing levels, pressure this puts on other staff members and the ongoing cost of cover*' [1215].

244.6. The Claimant attended a number of Counselling sessions in an attempt (albeit unsuccessful) to facilitate her recovery.

244.7. The Claimant prepared her own statement of case for the Long Term Absence decision meeting [1236] in which she stated her desired outcome was a settlement negotiated with her solicitor.

244.8. At her decision meeting the Claimant told Kerry Wykes, the hearing manager:

I've seen documentation which has been extremely upsetting and has made it impossible for me to return to my team....

So it's over now and I just feel I can't be redeployed. I think the occupational health people are right. Returning to the NHS would just be a trigger to all the upset.

I've made the resolution now that I have to leave. ... I know I can never work for the NHS again.

If we consider redeployment, you do not feel you're fit and well enough at this stage to consider redeployment into any role within the organisation, is that correct? Yes, unfortunately.

I mean I know that once a decision is made and you know, I know, I have to go.

I have just got to put that behind me you know, and just get on with it now. You know, move on to the next chapter, as I said to Chloe

yesterday. You know life's life, isn't it? You have just got to move on with things and you just think enough is enough.

245. Following the guidance from **Spencer** and **East Lindsey** we have to determine whether the Respondent has taken reasonable steps to inform itself of the medical position and consult with the Claimant and thereafter balance the needs of the organisation against the Claimant's absence. The reality of this case is that by the end, by the Decision meeting, the Claimant told Kerry Wykes that she could not return to the Respondent or the NHS. The Claimant had been told ill health retirement was not an option on medical grounds (this is something over which the Respondent has no control) and all she sought was a severance package. Whilst we can understand the Claimant's position, there is no legal obligation or duty to provide one, and not providing a settlement package does not render an otherwise fair capability dismissal unfair.
246. The Claimant has invited us to conclude that terminating her contract with a payment in lieu (ie immediately) was unfair because it preventing her from applying for a severance package **[1198, 1230-1231]**. We reject that argument because there is no obligation to offer one. Furthermore the Respondent, an NHS Trust, is constrained in what it could offer. Any package beyond contractual notice (which the Respondent paid) requires Treasury approval and is very rarely approved **[1538]**. We find on the balance of probabilities that had the Respondent allowed the Claimant to remain employed and on sick leave for her notice period, no settlement package would have been approved by the Treasury or offered to the Claimant.
247. The Claimant chose not to appeal against her dismissal.
248. In all of the circumstances we consider that the Respondent (Kerry Wykes) reached the only decision that was reasonably open to her and accordingly we dismiss the Claimant's unfair dismissal claim.

249. Finally, had the Claimant succeeded in any of her Claims, she sought an ACAS uplift. Such an uplift in damages is only available where a pleaded claim succeeds. We also note that the ACAS Code does not apply to capability dismissals. There is nothing about the Respondent's handling of the Claimant's various grievances processes which we conclude would merit an uplift. This claim also fails.

[7] Concluding Summary

250. In drawing all of the above together, it is our Judgment that:

250.1. The Claimant's claim of unfair dismissal, pursuant to s98 **ERA** is dismissed.

250.2. The Claimant's claims of direct age discrimination pursuant to s13 **EqA** is dismissed.

250.3. The Claimant's claims of direct and perceived disability discrimination pursuant to s13 **EqA** is dismissed.

250.4. The Claimant's claim of a failure to make reasonable adjustments pursuant to s20-21 **EqA** is dismissed.

250.5. The Claimant's claim of discrimination arising from disability pursuant to s15 **EqA** is dismissed.

250.6. The Claimant's claim of harassment related to her disability pursuant to s26 **EqA** is dismissed.

250.7. The Claimant's claim of victimisation pursuant to s27 **EqA** is dismissed.

251. To the Respondent we say this: we were deeply troubled by the Respondent's conduct of the team meeting on 12th May 2021. It was intended to, and had the effect, of hijacking the Claimant. The conduct of that meeting caused the Claimant to have to leave work from an illness that she was unable to recover from. Whilst the Claimant's claims have not been upheld for the reasons we

have set out, we expect the Respondent to review how these types of meetings should be conducted, and whether it was appropriate to keep the Claimant in the dark about the true purpose, to arrange 3 clinical staff against one secretary and allow a disgruntled clinical staff member take over that meeting. The Claimant remarked that she felt like she was in Court. We consider her experience in that meeting was likely to be considerably worse than any Court experience that the Claimant might have experienced. The handling of that meeting does the Respondent no credit at all and we expect an NHS Trust to do better.

252. To the Claimant we say this: For the reasons stated we have dismissed your claims. However we have recognised that 12th May meeting, your ground zero, was not conducted in the way that we expect of employers. We regret the impact that it has had on you and we wish you the very best recovery.

Employment Judge Gidney

15th October 2024

Annex 1 – List of Issues
(Excluding Harassment Issues)

Disability (s6 EqA).

1. The Claimant relies on the mental impairment of stress and anxiety, with a debilitating tremor as a symptom / feature of her stress and anxiety ('the Condition'). The tremor is not relied on as a free standing disability. She asserts that she has been disabled by the Condition from 12th May 2021 to date.
2. The Respondent accepts that the Claimant was disabled (as stated above) from May 2022.
3. Was the Claimant disabled by the Condition from 12th May 2021 (as the Claimant contends) or May 2022 (as the Respondent contends)?
4. Did the Condition have a substantial and long term adverse effect from 12th May 2021 on the Claimant's ability to carry out normal day-to-day activities?

Direct Age Discrimination (s13 EqA)

5. The Claimant was 61 years old at her effective date of termination. She places herself in the Age Group of the over 60s.
6. The Respondent accepts, as a matter of fact, that:
 - a. At an informal investigation meeting held on 20th August 2021 Katy Bingham said:

- i. that the Claimant '*struggles to accept change*' [e568];
 - ii. and '*she is not good at change*' [e569];
 - iii. and '*she is a lady nearing retirement and she has just gone pop for whatever reason*' [e570].
 - b. During the formal investigation, the Claimant was not given a second interview to allow her to address allegations from the nurses.
 - c. During the appeal process was the Claimant was not allowed to refer to the management case, bundle or investigator's report until she completed her own appeal submission.
7. Were the matters at (6.1) to (6.3) because of the Claimant's age?
 8. Did the Respondent treat the Claimant less favourably than it treated or would treat others from a younger age group?
 9. Were the matters at (6.1) to (6.3) a proportionate means of achieving a legitimate aim?
 10. Did the Respondent subject the Claimant to the following treatment:
 - a. Ignore the Claimant's request to working from home as an outcome in her grievance?
 - b. Not allow the Claimant's request to return to work but not work for Kim Hammond as an outcome at her grievance meeting?
 11. If the matters at (10.1) to (10.2) occurred as the Claimant asserts, was it because of the Claimant's age?
 12. Did the Respondent treat the Claimant less favourably than it treated or would treat others from a younger age group?
 13. Were the matters at (10.1) to (10.2) a proportionate means of achieving a legitimate aim?

Age Discrimination and Time.

14. All of the incidents referred to in (6.1) are 11 months out of time.
15. The incident in (6.2) refer to the informal investigation in September to November 2021 and are 8 months out of time.
16. The incident in (6.3) refer to the grievance appeal process in February to March 2022 and are 4 months out of time.
17. The incidents in (10.1) to (10.2) began in November 2021. Did they continue past 2nd July 2022?
18. Are the incidents at (6.1) to (6.3) and (10.1) to (10.2) part of the single act of discrimination ending on or after 2nd July 2022?
19. If not, would it be just and equitable to extend time to enable those claims to proceed?

Direct (Perceived) Disability Discrimination (s13 EqA)

20. In the period March 2021 to 20th May 2021, did the Kim Hammond, Katy Bingham and Christina Whittenbury perceive the Claimant to be disabled by a mental impairment?
21. Did Kim Hammond, Katy Bingham and Christina Whittenbury subject the Claimant to the following treatment:
 - a. Did Kim Hammond subject the Claimant to repeated, unpleasant phone calls?
 - b. Did Kim Hammond escalate the Claimant's emails to the Team Lead as passive aggressive?
 - c. On 20th April 2021 did Kim Hammond unfairly accuse the Claimant of negative and belittling behaviour in a team meeting earlier that day?
 - d. On 28th April 2021 did Christina Whittenbury dismiss the Claimant's concerns when she reported feeling victimised by Kim on 28th April?

- e. Was the Claimant required to attend a meeting on 12th May to face discriminatory allegations about her work and behaviour at the request of Kim Hammond?
 - f. On 13th May 2021 did Christina Whittenbury fail to take the Claimant's grievance request seriously?
 - g. During the Investigation into workplace relationships, did Kim Hammond and Katy Bingham make unsupported claims about the Claimant's mental and cognitive health?
 - h. Did Kim Hammond and Katy Bingham discuss the Claimant's state of health in the office, making incorrect assumptions about her mental health?
22. If the matters at (21.1) to (21.8) occurred as the Claimant asserts, was it because the Claimant was perceived to suffer from a mental impairment?
23. Did the Respondent treat the Claimant less favourably than it treated or would treat others that were not perceived to suffer from a mental impairment? The Claimant relies on Emma Hillyard as an actual comparator.

Direct Disability Discrimination (s13 EqA)

24. Did the Respondent subject the Claimant to the following treatment:
- a. Instructed the Claimant to attend her Long Term Absence Panel Hearing alone on 22nd August 2022 at Kings Court, contrary to reasonable adjustments for her disability?
 - b. On 12th August 2022 refuse to postpone the Claimant's Long Term Sickness Hearing Panel meeting to allow her colleague to attend, showing insensitivity to her disability?

- c. Require the Claimant have to attend the Long Term Sickness Hearing via WebEx with her partner present despite her having said she was not keen to do this?
25. If the matters at (24.1) to (24.3) occurred as the Claimant asserts, was it because the Claimant's mental impairment?
26. Did the Respondent treat the Claimant less favourably than it treated or would treat others that were not disabled? The Claimant relies on Emma Hillyard as an actual comparator.

Disability Discrimination and Time.

27. All of the incidents referred to in (21.1) to (21.8) occurred between March and 20th May 2021 and are 14 months out of time.
28. The incident in (24.1) to (24.3) occurred after July 2022 and are in time.
29. Are the incidents at (21.1) to (21.8) part of the single act of discrimination ending on or after 2nd July 2022?
30. If not, would it be just and equitable to extend time to enable those claims to proceed?

Harassment related to disability / perceived disability (s26 EqA)

31. Refer to the separate list of harassment issues at **Annex 2**.

Victimisation (s27 EqA)

32. The Claimant did perform a protected act when she submitted her appeal dated 21st December 2021 **[817]**.
33. Did the Respondent subject the Claimant to the following treatment:

- a. Were the Claimant's appraisals from 2014 to 2020 removed from her HR file and duplicates from her locked desk drawer at some stage during the Claimant's appeal process in May 2022?
- b. Was her 2020 appraisal tampered with during the same period (ie during appeal process?)
- c. Did Kath Mullins fail to correctly address the Claimant's second grievance made in Summer 2022 concerning appraisals in a timely manner? For the avoidance of doubt this is not an allegation about how Jan Austin dealt with matters.

Victimisation and Time

34. All of the incidents referred to in (33.1) to (33.2) occurred in May 22 and are 2 months out of time.
35. Are the incidents at (33.1) to (33.3) part of the single act of discrimination ending on or after 2nd July 2022?
36. If not, would it be just and equitable to extend time to enable those claims to proceed?

Failure to make reasonable adjustments (s 20-21 EqA)

37. Did the Respondent have provision, criterion or practice ('PCP') that the Claimant be line managed by Kim Hammond?
38. Did the PCP put the Claimant at a substantial disadvantage in comparison with a person who was not disabled?
39. Did the Respondent take such steps as were reasonable to avoid the disadvantage?

40. When did the Respondent know, or ought reasonably to have known that the Claimant was a disabled person? The Respondent accepts that the Claimant was a disabled person as at May 2022.
41. When did the Respondent know or ought reasonably to have known that the adjustments could have removed the disadvantage?
42. The following matters are relied on by the Claimant as reasonable adjustments that should have been made to remove the disadvantage:
 - a. The completion of a stress risk assessment;
 - b. Being moved out of Kim Hammond's line management;
 - c. Being redeployed;
 - d. Being allowed to work from home;
 - e. Not being placed in a work environment until the Claimant had recovered.
43. To assist the Tribunal in determining the reasonable adjustments issues, the following questions are posed:
 - a. Did the Respondent follow up on the Occupational Health Nurse's recommendations of 10th June 2021, get followed up including a Stress Risk Assessment?
 - b. Did the Claimant reiterate her comments in a telephone conversation of 4th June 2021 when she expressed her desire to work under specific conditions avoiding Kim Hammond in the Long-Term Absence Meeting on 8th July 2021? Was this addressed?
 - c. Did Christina Whittenbury omit the Claimant's request from the Long-Term Absence Report on 23rd July 2021?
 - d. Did the Claimant request working from home as a grievance outcome in her grievance letter dated 7th September 2021? Was this noted in the Formal Investigator's (Anna Evan's) report. Was it acted on?
 - e. Did the Claimant propose working from home to avoid working with Kim Hammond in her Long-Term Absence Meeting on 20th October 2021?

- f. Were the recommendations from the Occupational Health Nurse's report on 31st January 2022 to remove the Claimant from working with Kim Hammond and avoid contact, implemented?
44. Did the Respondent have provision, criterion or practice ('PCP') that the Claimant had to attend the 2nd and 3rd Appeal meetings in person?
45. Did the PCP put the Claimant at a substantial disadvantage in comparison with a person who was not disabled?
46. Did the Respondent take such steps as were reasonable to avoid the disadvantage?
47. The Respondent accepts that the Claimant was a disabled person as at May 2022.
48. When did the Respondent know or ought reasonably to have known that the adjustments could have removed the disadvantage?
49. The following matters are relied on by the Claimant as reasonable adjustments that should have been made to remove the disadvantage:
- a. Allow a postponement to allow her colleague to attend;
 - b. Allow the Claimant to attend by Webex with a colleague present;
 - c. Allow the Claimant more time to recover.
50. To assist the Tribunal in determining the reasonable adjustments issues, the following questions are posed:
- a. On 12th August 2022 did the Respondent refuse to postpone the Claimant's Long-Term Absence Hearing to allow her colleague to attend showing insensitivity to her disability?
 - b. On 22nd August 2022 did the Respondent email the Claimant telling her she had to attend her Long Term Absence Hearing in person unaccompanied?

- c. Following further communication, did the Claimant have to attend via WebEx at home with her partner in the house despite her stating she would rather attend in person with her colleague?
- d. Was Claimant allowed the time to recover, that she believed had been promised during her final appeal hearing?

Reasonable Adjustments and Time

- 51. All of the adjustments referred to in (49.1) to (49.3) were sought in August 22 and are in of time.
- 52. Over what period were the adjustments referred to in (42.1) to (42.5) sought? Are they part of the single act of discrimination ending on or after 2nd July 2022?
- 53. If not, would it be just and equitable to extend time to enable those claims to proceed?

Discrimination arising from disability (s15 EqA)

- 54. The Respondent accepts that the Claimant's sickness absence was something that arose out of the Claimant's disability.
- 55. Did the Respondent know or could it have been reasonably expected to know that the Claimant had a disability prior to May 2022?
- 56. Did the Respondent treat the Claimant unfavourably by:
 - a. Fail to conduct a stress risk assessment;
 - b. Fail to assure the Claimant she would not have to return to Kim Hammond's line management;
 - c. Fail to act on the recommendations of the Occupational Health Nurse;
 - d. Fail to allow the Claimant time to recover after her appeal;
 - e. Dismiss the Claimant.

57. Was the unfavourable treatment (if there was any) because of the Claimant's sickness absence? To assist the Tribunal the following questions may be relevant:
- a. When did the Claimant first become ill?
 - b. Could the Respondent have done something to assist the Claimant in her return to work?
 - c. Did the Respondent act on any of the recommendations of the Occupational Health Nurse or offer the Claimant a Stress Risk Assessment?
 - d. Could the Respondent have allowed the Claimant time to recover as she believed had been agreed by the Appeal Chairperson in the final appeal meeting on 20th May 2022?
 - e. Was the Claimant dismissed? Was it with immediate notice on the basis that she had applied for Ill-Health Retirement?
58. Did the Respondent have the aim of managing the sickness of its long term absent employees and ensuring an efficient service delivery? Was that aim a legitimate aim?
59. Was such treatment as is established a proportionate means of achieving its legitimate aims? In determining this, the following questions may assist:
- a. Due to the size of the Trust and the number of employees, could the Respondent have afforded to allow the Claimant to recover whilst on nil pay?
 - b. Has the Claimant ever been replaced by another member of staff or were her duties absorbed by other members of the team?

Reasonable Adjustments and Time

60. Over what period were the matters referred to in (56.1) to (56.5) applicable? Are they part of the single act of discrimination ending on or after 2nd July 2022?
61. If not, would it be just and equitable to extend time to enable those claims to proceed?

Unfair Dismissal (s98(4) ERA)

62. The Claimant was an employee of the Respondent.
63. At the Claimant's effective date of termination she had been continuously employed for a period of eleven years.
64. The Claimant's dismissal, occurring on 28th August 2022, was in time.
65. The Respondent relies on medical capability as the potentially fair reason.
66. Did the Respondent act reasonably in the circumstances, considering its size and administrative resources, in treating capability as the reason to dismiss?
67. The issues set out at paragraphs (42), (49) and (56) may assist in the determination of issue (66) above.
68. Did the Respondent follow a fair procedure (ERA 1996, s 98(4)) in the dismissal and in the grievance and appeal process?
69. Did the Respondent comply with the ACAS Code of Practice during the grievance and appeal and dismissal procedure?
70. Was the Claimant's contract terminated with immediate effect preventing her from applying for a severance package?

Remedy

71. If the Claimant succeeds in any of her claims, remedy will be determined at a separate hearing and subject to its own Remedy List of Issues.

Annex 2 – Schedule of Harassment Issues

No.	Allegation ¹⁵
1.	Respondent admits Kim Hammond made withheld phone calls to the Claimant in January 2021 until 22 nd March 2021. Did Kim became very angry, shouting at the Claimant, ending the call abruptly?
2.	Respondent admits Claimant asked to meeting on 30 th March 2021 with Christina Whittenbury and Katy Bingham following Kim Hammond's complaint regarding the Claimant's emails? Respondent says more than just emails.
3.	Did Kim Hammond set difficult or impossible tasks outside the Claimant's remit?
4.	Respondent accepts Kim Hammond gave out the Claimant's phone number to her North patients rather than the number for the North Secretary.
5.	Respondent accepts after a meeting on 20 th April 2021 Kim Hammond did complain about the Claimant's behaviour towards Katy Bingham.
6.	Respondent accepts Claire Whittenbury did send Claimant texts on her personal mobile during evening of 20 th April 2021 stating her behaviour could be perceived as negative without giving details or the chance to clarify or defend herself.
7.	Did Kim Hammond constantly criticise the Claimant's work including tasks that should not have been assigned to her?
8.	Respondent accepts on 28 th April 2021 Kim Hammond requested a management meeting citing numerous issues but ignored the Claimant's suggestion for a personal discussion?
9.	Did Christina Whittenbury ignore the Claimant's request not to attend such a meeting because she felt victimised?
10.	Did Kim Hammond prepare a lengthy list of complaints for the meeting on 12 th May 2021 about the Claimant which she refused to share with the Claimant?
11.	Had this list been shared with Katy and Christina before the meeting?
12.	Was the Claimant told not to interrupt by Christina Whittenbury when she tried to query Kim's first comment about clinical supervision?
13.	Did Kim Hammond subject the Claimant to allegations regarding her capability as an administrator and her personality?
14.	Did Kim Hammond laugh when the Claimant became upset?
15.	Did Christina Whittenbury and Katy Bingham prevent the Claimant from leaving the meeting? Did Christina stand up to prevent the Claimant from walking out?
16.	On 13 th May 2021, did Christina Whittenbury indicate to the Claimant that the minutes of meeting 12 th May 2021 had not been completed when in fact been completed and sent to Kim Hammond for her approval?

¹⁵ Allegation summarised for identification purposes only.

17.	On 13th May 2021, did Christina prevent the Claimant from making a complaint about the meeting on 12th May, falsely stating a formal investigation had already been organised by HR?
18.	Did Christina tell the Claimant not to come into the office or discuss the meeting as it may jeopardise the Claimant's situation inferring the investigation was into the Claimant?
19.	Was that formal investigation actually an "investigation into workplace relationships" and did it follow the Trust's Acceptable Standards of Behaviour Policy?
20.	During Claimant's grievance interview, did Anna Evans constantly tell her that her allegations were just her perception?
21.	Did the Investigator dismiss the Claimant's request to return to work but not work for Kim Hammond?
22.	Respondent accepts during the appeal process Claimant did receive a management bundle which included statements containing distressing comments made by her colleagues.
23	Respondent accepts that the invitation letters send by Kath Mullins and Anna Evans relating to investigations to Katy Bingham and Christina Whittenbury to their grievance meetings incorrectly stated that they had been accused of bullying? Did this cause them to form the view the Claimant had accused them of bullying and caused them to behave detrimentally as a result of the error?
24.	The Respondent accepts Kim Hammond and Katy Bingham did discuss the Claimant's state of health. Was that in the wider office? Dud they make incorrect assumptions about her mental health?