EMPLOYMENT TRIBUNALS

Claimant: **Mr M Waluk**

Respondent: **North Cumbria Integrated Care NHS Foundation Trust**

Heard at: **Manchester**
On: **2-5 October 2023 (and in Chambers on 15 and 16 January 2024)**

Before: **Employment Judge Eeley**
Mr A Gill

Representation
Claimant: In person
Respondent: Ms A Niaz-Dickinson, counsel

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well founded and is dismissed.

2. The claimant's complaint of harassment related to disability is not well founded and is dismissed (section 26 Equality Act 2010).

3. The claimant's complaint of victimisation is not well founded and is dismissed (section 27 Equality Act 2010).

4. The claimant's complaint of unauthorised deductions from wages is not well founded and is dismissed.

5. The claimant's complaints of direct disability discrimination (section 13 Equality Act 2010) are dismissed upon withdrawal by the claimant.

REASONS

1. By a claim form presented on 7 August 2021, the claimant brought claims of unfair dismissal and discrimination relating to the protected characteristics of disability, sex, race, and religion/belief. Prior to the final hearing the claims relating to sex, race and religion/belief were withdrawn. The claimant also pursued a claim for unauthorised deductions from wages.

2. The case was listed for a final hearing before a full Tribunal. One of the Tribunal Members listed to hear the case became unwell and could not attend and a replacement could not be arranged. The options available to the parties were explained and both parties signified their consent, in writing, to the case being heard by a two-person Tribunal.

3. At the outset of the hearing the list of issues was discussed and amended as set out in the appendix attached to this judgment and reasons. The portion of the list of issues dealing with unauthorised deductions from wages was further clarified by the parties during the hearing and by the provision of further documents. During the course of his oral evidence, the claimant withdrew all of his claims of direct disability discrimination (section 13 Equality Act 2010). The following claims remained for determination by the Tribunal at the conclusion of the final hearing:

   (a) Unfair dismissal;
   (b) Harassment related to disability (section 26 Equality Act 2010);
   (c) Victimisation (section 27 Equality Act 2010);
   (d) Unauthorised deductions from wages.

4. The respondent conceded that at all material times the claimant was disabled, within the meaning of section 6 of the Equality Act 2010, by reason of anxiety and depression.

5. We received written witness statements and heard oral evidence from the following witnesses:
   (a) The claimant, Mr Mariusz Waluk;
   (b) Miss Christine Stewart, Service Manager Eden ICC & Rheumatology (who managed the claimant's sickness absence);
   (c) Mrs Angela Reynolds, Deputy General Manager for Community (who conducted the final formal review meeting and grievance hearing);
   (d) Mrs Salli Pilcher, Collaborative Lead Nurse (who heard the claimant's appeal against dismissal and the grievance outcome.)

6. We also had regard to the documents contained within the agreed hearing bundle which contained 582 pages. We read the pages in the bundle to which we were referred by the parties. We were also referred to the following documents in connection with separate County Court proceedings:
   (a) Copy letter of claim (dated 20 July 2021) from Legal Recoveries and Collections Ltd to the claimant seeking repayment of £1056.51 by the claimant;
   (b) Amended Particulars of Claim in case number H6AH8D3M in Carlisle County Court between the respondent Trust and the claimant (who was the defendant in those proceedings.)
   (c) The defence in County Court case number H6AH8D3M

(d) Order striking out the claim in H6AH8D3M pursuant to CPR 3.3 on the basis that the claimant (in the County Court proceedings) had failed to comply with paragraph 2 of the Court Order dated 12 July 2022. (Dated 2 August 2022)
(e) Witness statement and exhibits from Michael Warwick (from the respondent Trust) in County Court case number H4AH468J (also between the NHS Trust as claimant and Mr Waluk as defendant.)
(f) Order of Deputy District Judge Walthall in case number H4AH468J dismissing the claim at a hearing on 26 August 2022.
(g) Document entitled "Notification of Change" relating to a temporary change to hours for the claimant effective 8 January 2018 until a review date of 8 July 2018.

7. In addition, we had the benefit of a chronology and cast list produced by the respondent. We received written closing submissions from the respondent, which counsel supplemented orally. The claimant addressed us orally in closing.

8. Numbers in square brackets are references to pages within the hearing bundle, unless otherwise indicated.

Findings of fact

9. The respondent is an NHS Foundation Trust providing community and acute health services to patients throughout Cumbria. The claimant was employed as a Band 3 Rehabilitation Assistant until his dismissal on 3 March 2021.

The respondent's policies.

10. The respondent managed the attendance of its employees under its "Attendance Management Policy and Procedure." The policy provides a series of 'trigger points' for different stages of the process. An absence review at Stage 1 of the procedure would be triggered by [142]:
(a) 3 episodes of sickness in a 12 month rolling period;
(b) 2 episodes of sickness totaling 14 calendar days or more in a rolling 12 month period; or
(c) A noticeable pattern of absence giving cause for concern; or
(d) Any combination of the above.

If a trigger point is hit then a formal meeting is arranged and the employee will be placed on Stage 1 of the procedure with a review period of 12 months. Stage 2 of the process is triggered if, within the review period, there are 2 further episodes of sickness or 7 calendar days or more of further sickness. A Stage 2 meeting is arranged and a further review period of 12 months is instigated. If there are a further 2 absences within the Stage 2 review period, then the employee is asked to attend a further meeting to consider the future of their contract of employment with the respondent. At Stage 3 of the process the manager must have a recent report from Occupational Health to ensure that medical advice is taken into account when considering termination of the employee's contract of employment. At Stage 3 the respondent may choose to terminate the contract of employment or to put the employee back on Stage 2 for a further review period of 12 months.

11. Management of long term absences is provided for at section 3.3 of the procedure [144]. Long term absence is categorised as relating to episodes of sickness absence of 28 calendar days or more. The procedure states that following 14 days of absence, the line manager should refer the employee to Occupational Health (if they have not already done so.) The frequency and form of communication between employee and line manager is a matter for agreement between them and will depend on individual circumstances, including the reason for and duration of the sickness absence. Support mechanisms should also be discussed between the manager and the employee.

12. The long term sickness absence process indicates that the line manager will arrange to meet with the employee after the 28th day of absence or sooner, if this is appropriate. There will then be meetings on a regular basis thereafter. The frequency of the meetings will depend on the nature of the absence. The employee has the right to be accompanied. The stated purpose of such meetings is to support the employee and explore any assistance which may be required to facilitate a return to work. A number of issues are to be considered at such meetings including:

    (a) Occupational health advice and any other medical advice available;
    (b) Further support required;
    (c) Potential return to work, length of sickness and any adjustments that may be required (either temporary or permanent) and if this should be on a phased basis. (The policy notes that this must always be fully considered if the employee has a disability);
    (d) Potential for re-deployment if advised by occupational health;
    (e) Any re-training, mentorship or additional support needed;
    (f) Ill health retirement, if applicable.

13. The process further stipulates that a sickness absence review meeting should take place prior to a Final Review Meeting to ensure a final collation of up to date information is added to the management report to ensure the fairness of process.

14. If the employee has still not returned to work/is unable to return to work in a reasonable time period despite the prior steps having been carried out, a final review meeting should be held with the employee, HR and an appropriate manager. The policy clearly states that: "*If it is not likely that the employee will return within a month of the final review meeting, the appropriate manager will consider all of the information/evidence and the action taken to date. If they are satisfied that all the appropriate action has been taken then the following options may be considered:*

    (a) Consider potential redeployment to another post within the Trust (this should result in a timely return to work and an expectation that the employee will maintain good attendance in the new role.)
    (b) Consider a further review period, which would not normally exceed 9 months from the first date of the absence, although in exceptional cases and following advice from occupational health, this may be extended to 12 months.
    (c) The employee is dismissed on the grounds of capability due to ill health (this will require supporting documentation and advice from

Occupational Health if agreed with the employee. If the employee does not give consent to release Occupational Health information then decisions will be taken in the absence of Occupational Health information.)

…Any decision or recommendations will be fully discussed with the employee at the review meeting."

15. Finally, a dismissed employee has the right of appeal against the decision to terminate the employment.

16. The respondent also operated a grievance procedure [154]. The procedure provides for informal resolution of grievances and 'facilitated discussions' and mediations. It also provided for a formal grievance process. This provided various options for fact finding and investigation of grievances, grievance meetings and appeals.

Chronology of events

17. The claimant was first employed by the respondent under terms and conditions dated 6 June 2009. He was employed as a Health Care Assistant, which is Band 2 role. He was then offered the role of Rehabilitation Assistant on 17 June 2010. This was a Band 3 role.

18. A temporary change of hours was agreed between the parties to move the claimant from a 21 hour working week to a 14 hour working week. The effective date of the change was 8 January 2018 and a review date was set for 8 July 2018 [183]. We saw a further "Authorisation and Notification of Change" document [185-187] which removed any reference to a review date and was signed by the claimant's then line manager (Claire Appleton) on 20 December 2019. This was 'scanned to payroll' on 29/01/2020 and seems to have made a permanent change to the claimant's working hours. This document was not signed by the claimant. Whilst an employee's signature on such a document would habitually be sought, if the employee was unavailable (e.g. on sick leave) the changes in such a form would take effect without such signature in any event. The claimant accepted (in his evidence to the Tribunal) that once he reduced his hours from 21 to 14 hours per week, they were never increased back up to 21 hours a week. At one point the claimant wished to reduce his hours still further, and the respondent did not agree to this. In any event, the claimant never returned to working a 21 hour working week during his employment with the respondent.

19. Prior to Ms Stewart's involvement in the case, the claimant had already been managed under the Attendance Management Policy and was issued with a stage one warning on 10 September 2018. This would remain on his record for 12 months [188]. The claimant had been absent on three occasions due to headaches and cold/flu symptoms.

20. The claimant was subsequently absent from work on long term sickness absence from 17 November 2018.

21. The claimant was referred to Occupational Health and attended a telephone assessment on 12 February 2019. The Occupational Health

report [190] indicated that the claimant had been absent from work due to anxiety and stress but that he was fit to undertake his duties. The report indicated that the claimant's health condition was likely to result in further absences from work. The report indicated that the claimant was fit to attend further absence/welfare/redeployment meetings with the respondent. The report went on to indicate that it would be positive for the claimant to meet with his manager to discuss what his concerns were and to consider the completion of a stress risk assessment. A follow up appointment with Occupational Health was to be arranged.

22. The claimant was invited to a long term absence review meeting which was due to take place on 1 March 2019 [192]. The claimant failed to attend the meeting. A further meeting was due to take place on 18 March 2019 but the claimant did not attend.

23. The claimant was again referred to Occupational Health. Occupational Health closed down the referral once the claimant had failed to attend two appointments that had been arranged for him [193].

24. The claimant was invited to attend a further long term absence review meeting on 1 May 2019. It was intended that this should take place away from the claimant's workplace in light of the claimant's anxiety about returning to the workplace. The claimant was told that the meeting could take place at his own home, if that was his preference. The claimant was provided with a copy of the HSE stress indicator tool to complete and return prior to the meeting so that it could be used to agree a supportive action plan to address the identified areas of concern.

25. The claimant did not complete the stress indicator tool and he did not confirm his preference for the location of the meeting. Consequently, the meeting did not go ahead.

26. The claimant had been absent from work for a period of 180 days from 17 November 2018 until 14 May 2019. He then completed a phased return to work over a three week period and was due to return to 15 hours per week from 17 June 2019.

27. The absence review meeting took place on 12 June 2019 [196]. The claimant had made a request for flexible hours. It was agreed that that the reduction in working hours from 21 hours to 14 hours per week would be monitored in line with the Flexible Working Policy. The claimant had been undertaking project work but was due to return to his duties as Rehabilitation Assistant in the near future. The claimant would continue to have regular supervision with Claire Appleton as Team Lead in order to review his progress on return to work and his role. An Occupational Health referral was planned. It was noted that the support that the claimant had been receiving from a private counsellor had come to an end but that he was receiving support from Validium EAP which he was stated to be finding beneficial.

28. The claimant was placed at Stage 2 of the absence management procedure for a further 12 month period until 12 June 2020. The letter following the June meeting reiterated that the claimant's level of attendance was unacceptable and that two further episodes of absence

may result in a move to Stage 3- Final Formal Absence Review Meeting. He was warned that any such further absence meeting may result in termination of his employment [196.]

29. Occupational Health spoke to the claimant on 24 July 2019 and he advised that things were improving for him and that his manager had been very supportive allowing him additional time (using annual leave) within his phased return to work. A further appointment with Occupational Health was made for 7 August 2019 [198].The claimant did not attend the Occupational Health appointment on 7 August.

30. Ms Stewart started to become more involved in managing the claimant's absence by supporting Claire Appleton. Ms Appleton had found managing the claimant's absence difficult and stressful.

31. On 26 November 2019 Ms Stewart wrote to the claimant to invite him to a long term absence review meeting on 13 December 2019 [200.] The claimant had been absent from work since 10 October, for a period of 64 days. A further copy of the stress indicator tool was sent to the claimant for him to complete for the meeting. He was also sent another copy of the respondent's Attendance Policy and was reminded that he had access to the respondent's EAP service.

32. The meeting actually took place on 16 December rather than 13 December. The claimant was accompanied by his GMB trade union representative Mr Wilkinson.

33. Ms Stewart summarised the discussion in her outcome letter to the claimant dated 19 December [201]. During the meeting the claimant had told Ms Stewart that he was feeling less anxious and had started taking medication which he felt was effective at controlling his symptoms. He was having appointments with a psychotherapist which he was finding helpful and had identified that his anxiety was related to wearing his work uniform. The claimant said that he associated this with behaviours within the team. Ms Stewart informed the claimant that several people had now left the team and that the working environment had improved. The claimant told Ms Stewart that his psychotherapist's opinion was that his role was no longer suitable for the claimant and that the symptoms he was suffering were the result of a 'work related injury.' However, when they discussed further investigation into the issues raised by the claimant (relating to 'behaviours within the team') the claimant stated that he did not want to pursue this any further at that time. The claimant had declined the offer of investigations into his complaint regarding the behaviour of other team members and colleagues and so the respondent took it no further at that stage.

34. The claimant gave verbal consent for a further Occupational Health referral having stated that he now felt well enough to attend. The claimant was reminded that the respondent needed access to all the advice and information in order for it to fully inform their action plan. There was an agreement that the parties would meet again once the Occupational Health report had been received in order to discuss how the respondent could best support the claimant's return to work. The claimant was sent a further copy of the stress risk assessment with a further request that he

complete and return it at his earliest convenience. He was reminded of his entitlement to access the EAP service. Ms Stewart's evidence to the Tribunal was that the claimant was asked to give consent for his psychotherapist to share information with the respondent that might be pertinent to his return to work but that this was not forthcoming. She did not include a reference to this in the outcome letter. However, we have no reason to disbelieve her evidence in relation to this. In any event, the claimant never did provide the respondent with evidence from his own psychotherapist prior to these Tribunal proceedings.

35. Shortly after the meeting the claimant provided a fit note indicating that he was unfit for work for three weeks from 23 December 2019. This was followed by another fit note signing him off until 3 February 2020.

36. The claimant consulted Occupational Health on 13 January 2020 [205]. The report referred to the claimant's qualifications (obtained in Poland) not being recognised in the UK such that he had been undertaking roles which did not fully utilize his capabilities and therefore negatively impacted on his psychological health. Once Ms Stewart became aware of this she advised the claimant to contact the Royal College of Occupational Therapists in order to explore converting his Polish qualifications so that they could be recognised in the UK.

37. The Occupational Health report noted that the claimant had benefited from talking therapies but that he still remained unfit for work. According to Occupational Health, a return to work in the foreseeable future was unlikely and therapeutic services advised that he might never overcome his feelings with regard to his substantive post and his perceived treatment.

38. Occupational Health discussed the possibility of redeployment with the claimant. This would mean looking for alternative employment for a period of 12 weeks. They explained that if this was not successful then the outcome would be that his contract would be terminated. The report recommended redeployment to a role where the claimant could utilize his skills and where there was flexibility in the role and a feeling of control. However, the report also indicated that redeployment to a clinical role at that time was unlikely. The report cautioned that any recovery from the claimant's current underlying condition would be lengthy. The report also referred to the claimant saying he had evidence to suggest that he could not perform in his role due to preconceptions from other team members. The report referred to looking at re-training opportunities. The claimant told Occupational Health that he could not ever return to his substantive post. Occupational health said that all reasonable treatment would have to be completed before they would be able to advise that he was permanently unfit. The report also confirmed that the claimant was well enough to attend absence review meetings. Criteria for ill health retirement were not met.

39. Ms Stewart wrote to the claimant to invite him to a long term absence review meeting on 26 February in order to discuss the advice from Occupational Health. At that point the claimant had been absent from work since 10 October 2019. In the invitation letter the claimant was notified that an HR adviser would be present and that he had the right to be accompanied at the meeting. The claimant was also reminded of his right

to access the respondent's confidential employee assistance programme ("EAP").

40. That meeting did not go ahead. The claimant notified the respondent that his trade union representative could not attend. Ms Stewart could not accommodate the two days where the union representative could attend. She therefore requested the union representative's further availability. She did not receive a reply. A further meeting was offered on 16 March but the claimant's union representative was apparently unavailable. An invitation was sent out on 25 March asking the claimant to attend a meeting on 3 April. As the country was in lockdown (due to the Covid 19 pandemic) that meeting was due to take place via teleconference. In the event, the meeting did not take place. The claimant sent an email to explain that his union representative was no longer available due to the pandemic. He asserted that it would not be fair to rearrange the meeting at all until the situation had improved. The respondent did not agree to that request and a rearranged meeting was set for 8 April via Microsoft teams.

41. The meeting did take place by Teams on 8 April. The outcome letter from that meeting summarised the contents of the discussion [211]. The claimant had been absent since 10 October 2019 and a fit note covered further absence to 30 April 2020. The claimant had been told that he would move to nil pay on 12 April 2020. The claimant had not completed the stress risk assessment despite it having been sent to him on a number of occasions. During the meeting he suggested that he would complete it on his return to work.

42. During the course of the meeting, in light of the most recent advice from Occupational Health, it was agreed with the claimant that he would be placed on the redeployment register for 12 weeks until 7 July 2020. Ms Stewart explained that the claimant would be contacted if any suitable roles were identified but that, in the meantime, if he saw any posts himself on 'NHS Jobs' that he was interested in, he should contact HR so that this could be considered. The claimant was informed that the respondent would make efforts to identify a suitable post for him during the redeployment period but that he was also responsible for identifying jobs for himself and contacting the respondent to inform them. The follow-up letter from the meeting enclosed a Redeployment Interview Form for the claimant to complete. This form would help to identify the type of work that was suitable for him and any restrictions that the respondent needed to take into consideration. It was agreed that the parties would meet every four weeks during the redeployment period for an update and to make sure that the claimant was receiving appropriate support. HR were due to contact the respondent's Redeployment Hub (which was set up during the Covid 19 pandemic) to see if there were any temporary roles suitable for the claimant whilst permanent redeployment was sought for him.

43. The Tribunal heard evidence (and accepted) that, pursuant to the respondent's redeployment process, if a suitable post was identified for the claimant, an appointment would be made on a prior consideration basis providing that he met the criteria of the post or could be trained to meet the criteria within a short space of time. If there were no other individuals seeking that redeployment he would be slotted into the post. This would

be subject to an informal interview with the appointing manager to ensure suitability and advice would also be sought from Occupational Health. Any such appointment would be subject to a trial basis. If others were seeking redeployment into the role, a competitive interview process would need to take place to choose the employee for the post. Ms Stewart explained to the Tribunal that redeployment is intended to redeploy employees into posts with similar terms and conditions to their original substantive post. If this is not possible the respondent cannot offer pay protection. All changes to pay and conditions are explained to the individual concerned at the relevant time.

44. In the outcome letter from the meeting Ms Stewart reiterated that, if at the end of the 12 week period redeployment efforts had failed, and no suitable alternative employment had been identified, then it would be necessary to terminate the claimant's employment on grounds of ill-health. She also confirmed that, if necessary, they would meet towards the end of the redeployment period to discuss the matter further and to make sure that he fully understood the situation.

45. Ms Stewart had a phone call conversation with the claimant on 3 July to discuss the situation as the parties were now almost at the end of the 12 week redeployment period. Ms Stewart took notes of that phone call and these were produced to the Tribunal [569]. The Tribunal accepts these notes as an accurate summary of what was said and discussed during the conversation. The Tribunal has no reason to doubt the accuracy of the record.

46. At the start of the telephone conversation Ms Stewart asked how the claimant was and he indicated that there was uncertainty about redeployment and also that he had received a letter from legal services asking for repayment of the money he owed from being overpaid. He indicated that this was not the first letter he had received from them. The claimant indicated that he was very angry about the letter. He confirmed that it was from a third party "Legal Recovery and Collection Service". Ms Stewart asked whether the claimant had been in touch with either the Trust Payroll Department or the recovery firm. The claimant confirmed that he had not and that he did not know if what they were saying was correct. He indicated that he had not looked at his pay slips for a long time as he had been off sick. Ms Stewart advised the claimant to acknowledge receipt of the letter so at least the parties would know that it had been received. She also suggested that if he spoke to Payroll, they could advise regarding paying the money back over a period of time.

47. The claimant also indicated that he was angry about letters from HR saying that he had to comply with the sickness absence policy when he wasn't well. Ms Stewart empathised but reminded him that all of them had a duty to comply with the policy. The claimant suggested that this had set him back. Mr Stewart enquired as to whether he was receiving any support. The claimant confirmed that he was taking medication and was using online counselling but had been told that the Employee Assistance Programme could not help him any more. It appears that the claimant had already used his allocated number of sessions. The claimant confirmed that he was no longer seeing a private therapist. Ms Stewart asked if the

claimant could think of any further support that the respondent could offer him but he could not.

48. Ms Stewart enquired as to how the claimant was getting on with redeployment. He indicated that he had heard nothing. She asked whether he had seen anything on NHS Jobs that he would be interested in. He indicated that there were two or three jobs but that he realised that he could not apply for some of them. She asked whether he looked on the website on a regular basis and reminded him that he needed to be looking in addition to the redeployment team. The claimant confirmed that he did look regularly but not so much now. Mr Stewart suggested that he make additional efforts to have a look for himself. She also pointed out that his criteria were quite specific and that he might want to consider if he had any flexibility on those criteria. She was evidently trying to maximise the chances of him obtaining suitable alternative employment.

49. The claimant also raised the issue of uniform. He alleged that Ms Stewart told him that he could not wear a T-shirt for work but that he had seen other people wearing T-shirts. It was clarified that the claimant was referring to polo shirts. Ms Stewart noted that they did discuss that at a previous meeting and that she had stated that the claimant *could* wear a polo shirt but that it would have to be in the maroon colour of his uniform and with the NHS logo on it. The claimant had stated that he could not wear any uniform. She asked him to confirm whether he would be willing to wear a polo shirt rather than a tunic top. He said that he would not.

50. The conversation then moved on to the claimant's lease car. The claimant confirmed that he had extended the lease on his car until 4 August 2020. Ms Stewart pointed out that this would take him past the end of the redeployment period on 24 July. Whilst he might be eligible to apply for a replacement lease car if he obtained redeployment, if he did not, he would not be eligible for a replacement under the Trust scheme as he would no longer be the respondent's employee. The claimant therefore suggested that he ought to remove his private number plates from the lease car and Ms Stewart confirmed that that was a good idea.

51. At the end of the meeting Mr Stewart sought confirmation that the claimant understood the process for the end of the redeployment period. She reiterated that both parties would be looking for suitable roles. She reminded him to get in touch with the respondent if he found something suitable. She reminded him that it if no redeployment was found, there would be a further meeting to have a capability hearing as employment might be terminated on grounds of ill-health. At this point the claimant (sounding angry) alleged that Ms Stewart was ringing to terminate his employment that day. She explained that this was *not* the case. Rather, she was just outlining what would happen if the claimant was not redeployed. The claimant reiterated his assertion that she was terminating his employment during that conversation. She again sought to confirm that that was *not* the case and that she was just explaining the process. She directed him to review the letter that she had sent out after the last meeting to refresh his memory on the process. She said that she would set him up a copy of the sickness absence policy. She asked if there was anything further that he wanted to discuss during the call. There was not. There was then a short exchange about the claimant's private business. It appears

that the claimant ran his own care service and that it had been difficult during the pandemic. A lot of clients did not want carers going into premises during the pandemic and he was not able to get any support from the government. Ms Stewart brought the call to an end by summarizing and recapping what had been agreed during the call.

52. Due to sickness absence, Ms Stewart took time off work from 15 July to 10 January 2021 so management of the claimant was taken over by Kerry Harmer, the Community ICC manager. She invited the claimant to a meeting on 25 August to discuss the situation further. The claimant did not attend the call. The meeting was rearranged to take place on 10 September via Microsoft Teams. That meeting took place and a discussion took place about all the efforts that had been made to identify suitable redeployment opportunities for the claimant. Those efforts had been unsuccessful [216]. The claimant had identified three roles. One was not within the Trust. The other two were roles where he did not meet the essential criteria on the person specification. Ms Harmer explained that the purpose of the meeting was to ensure that the claimant fully understood the situation before he was invited to the final review meeting. In her letter she recorded that she had discussed the issues he previously raised in relation to inappropriate behaviour within the team. They had discussed the fact that the claimant did not wish to pursue these issues further when they were discussed at the meeting with Ms Stewart in December 2019. However, by this stage the claimant had mentioned unfair treatment and harassment in recent emails, so Ms Harmer asked him to think over the next seven days whether he wanted to raise his concerns formally via the Dignity at Work policy. A copy of the policy was enclosed with the letter.

53. The letter also referred to the salary overpayment issue. It stated, *"You advised you were unhappy that you continue to receive letters regarding salary overpayment and the detrimental impact this is having on your mental health. The £5633.93 debt has now been passed to LRC (debt recovery agency) as you have not responded to the several letters sent from the Trust's Payroll and Finance Department. You requested a copy of any amendments to your contract as you believe the reduction in hours from 21 hours to 14 hours was only temporary for six months, please find attached the amendment form that shows there was no review date set as to when the reduction in hours would end. You also requested copies of your payslips for the period in which the error was made so that you can confirm the amount overpaid is correct, please find those attached as requested. We made you aware court action will be taken if a repayment plan has not been agreed prior to the 24/09/2020, you agree to contact Michael Warwick, Accounts Receivable Supervisor, in the Trust's Finance Department at…. [email address stated but redacted] regarding a repayment plan as you do not want to deal with an external company."* The letter went on to address the issue of the lease car. It stated, *"Your lease car agreement expired at the end of April 2020 and you arranged with Knowles Associates to extend your agreement on a monthly basis whilst on the redeployment register. The Trust have been unable to deduct your monthly fee from your salary due to you being in nil paid after exhausting your sick pay entitlement. Finance have confirmed the outstanding amount from April 2020 to September 2020 is £2710.22, which will be added to your repayment plan if the balance is not paid. You told us that you will take further advice on this matter as you disagree you are liable for these*

payments." The claimant was advised to contact a particular individual to arrange for collection of the lease car once the private plates had been removed. The letter concluded by reminding the claimant of his ability to access the Employee Assistance Programme.

54. By the time the claimant's case came to the final formal review meeting stage Ms Stewart was off work on long-term sick leave. Consequently, Angela Reynolds was appointed to conduct this meeting. She had had no prior involvement with the claimant.

55. Ms Reynolds sent a letter of invitation dated 23 September 2020. The proposed date for the meeting 30 September 2020. The claimant was notified that the purpose of the meeting was to review his sickness absence and consider his continued employment with the Trust. The respondent would review the content of the latest Occupational Health report and consider any recommendations. The claimant was forewarned that the meeting could result in termination of his employment. The claimant was notified that Kerry Harmer would be presenting the management statement of case and that Alison Smith would attend as a representative of Human Resources. The management statement of case was enclosed with the letter. The claimant was informed of his right to be accompanied at the hearing. He was reminded about his right to access the Employee Assistance Programme.

56. Kerry Harmer was unexpectedly absent prior to the final hearing. The claimant preferred to postpone the hearing rather than have someone else present the management statement of case at the hearing. Thus, the hearing was rearranged.

57. Due to the time which had passed since the last Occupational Health report the claimant was referred once again to Occupational Health for an up to date report. That report was received from Dr Andrews dated 15 October 2020 [221]. In that report Dr Andrews confirmed that the claimant was unfit for work and did not see himself returning to work. Dr Andrews was unable to predict a likely return to work date or identify measures that would facilitate a return to the claimant's substantive post. However, he did not have medical evidence to support an assertion that the claimant was likely to be unfit for his job either permanently or for the foreseeable future and consequently the criteria for ill-health retirement or redeployment on medical grounds would not, in Dr Andrews' opinion, be met at that time. Dr Andrews was unable to identify any workplace modifications or adjustments that could be made that would enable a return to work. He noted that it would be a legal decision whether the disability provisions of the Equality Act applied, but he counselled that it might be prudent to assume that this would be the case. There were no medical objections to the claimant participating in meetings/discussions regarding absence and welfare.

58. The claimant was invited to a rearranged final review meeting on 2 November. Jennifer Barbour, Interim ICC Community Manager, was due to attend and present the management statement of case accompanied by Andrea Reid from HR. The claimant was reminded that a possible

outcome was termination of employment. He was reminded of his right to be accompanied at the meeting.

59. A copy of the management report was emailed to the claimant on 29 October 2020. This was an amended version to that which had previously been sent to him. It had the letters in chronological order and his contractual hours had also been corrected.

60. The claimant emailed Ms Reid on 30 October saying that he was unable to confirm attendance at the meeting because the email had not been clear. Clarification was provided that the meeting was scheduled for 2 November. The claimant's response was that he was unable to attend and he asked that the meeting be rescheduled again. The claimant again requested rescheduling and it was rearranged for 10 November 2020 in person (as the claimant had no Covid 19 related objections to meeting in person.)

61. The day before the final review meeting was due to take place, the claimant raised a formal grievance via email. He also asked that the meeting take place via Microsoft Teams. In his grievance the claimant made a number of allegations including that the respondent had failed to recognise its statutory duties in respect of health and safety at work and he confirmed that he believed that a number of factors had a negative impact on his physical and mental health. The claimant confirmed that he had been diagnosed with work-related stress, panic attacks and depression, which he said were a direct result of his working environment. He proposed another referral to Occupational Health so that reasonable adjustments could be explored. He also asked that a stress specific risk assessment was undertaken and suggested he might benefit from a short sabbatical. He alleged that the Trust had failed to carry out proper health surveillance which had resulted in injuries to his health. He also asserted that he had been 'set up to fail' in terms of the demands of his role and workload. He alleged that he had been subjected to bullying and harassment on grounds of gender, religion, race and disability. He also said that he no longer wished to work with the management team of the service in which he was employed. In his grievance document the claimant made reference to various legal cases and statutes and quoted from sections of the Equality Act. He wanted the respondent to address his grievance promptly.

62. The final formal review meeting and grievance hearing took place on 10 November [367]. The claimant attended accompanied by a trade union representative. Ms Reynolds opened the meeting, summarised the purpose of the meeting and reminded all present that dismissal was a potential outcome. The claimant's representative requested clarification regarding the grievance. Ms Reynolds explained that, having considered the content of the grievance, it was felt that a lot of the concerns raised would be dealt with in the final review meeting. Therefore, it was seen as sensible and appropriate to deal with them as they arose in the course of the meeting. If, at the end of the meeting, there remained aspects of the grievance that had not been dealt with, then there would be an opportunity to discuss those matters further and for further investigation, if required.

63. In Kerry Harmer's absence Jennifer Barbour summarised the key points from the management statement of case report. It was noted that the claimant had worked for the respondent as a Rehabilitation Assistant since 2009. He had initially worked for 21 hours per week before reducing his hours to 14. The claimant had been absent for 181 days before returning to work in May 2019 on a phased return until October 2019. During the phased return to work the claimant was not required to wear an NHS uniform. When the claimant was required to return to his clinical role he went off sick on 10 October 2019.

64. Since November 2018 the claimant had been absent for 568 days with anxiety and stress (and one day's absence due to a headache.) The management's case was that the team were below capacity and struggled to support hospital discharges and prevent hospital admissions. There was also a reduction of available staff to cover weekend shifts. It was noted that long-term sickness absence reviews took place in December 2019 and October 2020, during which there was a discussion about the issues the claimant had regarding behaviours within the team. On both occasions the claimant confirmed that he did not wish to pursue that issue further. It was further pointed out that Occupational Health had been involved throughout the periods of sickness absence and that the claimant had failed to attend three scheduled appointments. Occupational Health advice in January 2020 had been that the claimant was not fit for work and a return to his substantive post was unlikely in the foreseeable future. In October 2020 the consultant occupational physician was unable to predict a likely return to work date or identify any measures to facilitate the claimant's return to work. The claimant had been placed on the redeployment register for 12 weeks in April 2020. This was extended to 16 weeks in July 2020. The claimant set parameters to narrow down the list of potential roles he was willing to be redeployed into. The claimant stipulated that he was to remain based in Penrith, that the role needed to be a corporate or managerial role at Bands Three, Four or Five (his substantive role was at Band Three.) The claimant wanted to work between 15 and 22.5 contracted hours per week. He did not want an administrative or clerical role or any role within the Community Team (i.e. the team he had previously worked in.) The claimant was not willing to wear a uniform.

65. During the course of the redeployment period the claimant had identified three roles that he was interested in but he did not have the required qualifications for two of them. The third role was not with the respondent Trust. The redeployment process had been unsuccessful. The claimant had failed to attend six out of ten scheduled long term sickness review meetings and on occasions had refused to speak to his manager, preferring to communicate with Andrea Reid in HR. The claimant had been asked to complete a stress risk assessment on four occasions (in writing and in person) but had so far failed to do so.

66. Once Jennifer Barbour had concluded the summary of the management statement of case, Ms Reynolds asked the claimant if he had any questions for Ms Barbour. The claimant told Ms Reynolds that he did not attend the sickness review meetings because he was unwell. He objected to the language of the management report which implied he did not want to wear a uniform. He claimed that it was actually the case that he could not wear the uniform. Andrea Reid explained that the uniform had been

associated with perceived ill-treatment but that the claimant had been given the opportunity to wear a polo shirt instead. The claimant disputed that this was the case so all present referred to the notes of the conversation between the claimant and Ms Stewart. From the notes, Ms Reynolds could see that Ms Stewart had asked the claimant whether he be willing to wear a polo shirt rather than a tunic top and the claimant had said that he was not. The claimant complained that this meeting had been recorded without his knowledge. Ms Barbour explained that these were notes of a telephone conversation and not a covert recording. Ms Reid pointed out that the claimant had been provided with a copy of the notes following the call and so was aware that a note had been made of the discussion.

67. Ms Reynolds asked the claimant if there was anything else he wanted to raise and asked how he was feeling. The claimant responded that he was not the same person that he had been before being absent from work despite the therapy he was receiving. The claimant was given an opportunity to put forward his case in respect of management of the sickness absence and also his grievance.

68. The claimant alleged that he had been subjected to bullying and harassment due to his sex and nationality. When asked to provide more details the claimant told Ms Reynolds that his role of Rehabilitation Assistant had changed and he was increasingly required to carry out care responsibilities such as emptying commodes and changing incontinence pads. He alleged that he was doing a job that he had not signed up for. He said patients were asked if they were okay being looked after by a Polish man. He found this disrespectful. He complained about the hours he worked in a typical week (over 70) but acknowledged that not all of those hours were for the respondent Trust. He said that his manager suggested that he shadow the Occupational Therapists but then he was asked to wash a lease car.

69. Andrea Reid pointed out that she had spoken to Claire Appleton (the claimant's manager) before she left the Trust. She had confirmed that she had agreed that the claimant could shadow the Occupational Therapists to work towards his own qualification. Claire Appleton recalled that she told the Occupational Therapist team that the claimant would approach them to initiate this but, as far as she was aware, he had never done so. The claimant alleged that he had been promised a secondment by Helen McGahon but it had been forgotten about. Andrea had also asked Claire Appleton about this and she had said that it was before she started with the Trust but that, to her knowledge, the claimant has been interviewed for the post and was unsuccessful so it was offered to another applicant. The claimant disagreed with this and said that he had not been interviewed for it and it was not given to another applicant.

70. Andrea Reid also confirmed that Ms Appleton had explained (repeatedly) to the claimant in supervision meetings about the introduction of the Home Care Practitioner Service, which would provide care support on discharge. This would mean that the claimant's care responsibilities would reduce. Claire Appleton was also developing the Rehabilitation Assistant role to fulfil Band Three job specifications. This part of general workforce planning may have seen some of the direct or personal care aspects of the

claimant's role diminish and more of the rehabilitation aspects focused on. Whilst this would not have meant the claimant working to a more senior level, it would have meant him being able to concentrate more on the rehabilitation element of his role, rather than direct caregiving.

71. Claire was not aware of any team members asking patients if they were happy to be cared for by a Polish person. She told Andrea that some patients did not want personal care to be provided by a man but she was unable to find any evidence that nationality was ever discussed. When the claimant raised this with Claire Appleton she said she would monitor things to ensure nationality was not an issue with staff or patients.

72. Claire Appleton had also told Andrea Reid that the claimant had raised concerns regarding medication. As this was something she wanted to improve, she agreed to allocate responsibility for a medication audit to the claimant. The respondent's Safety Quality Lead was also involved and met with the claimant. The claimant had been asked to send his audit to the audit team but she did not think he had ever done so.

73. After an adjournment the claimant was given a further opportunity to raise any matters in relation to his grievance or sickness absence. The claimant said he was upset about the way his absence had been handled but did concede that he could understand, with hindsight, that procedures needed to be followed. He complained that initially he did not have any contact and felt as though he did not matter. He also objected to letters being sent to him inviting him to absence reviews and Occupational Health appointments. The claimant said he was unable to engage in the meetings and felt unsupported. He stated that all of the support provided made him worse.

74. When asked what outcome he was hoping for, the claimant said he wanted somebody to look at his grievance. Ms Reynolds prompted him to provide his desired outcome to the grievance. The claimant said he wanted to return to work in a different role but reiterated that he could not wear a uniform because he associated the logo with how he had been treated and he was unable to travel far to work.

75. Andrea Reid commented on the claimant's assertion that he felt unsupported. She summarised the measures that had been taken to support the claimant including by making adjustments to the procedure such as avoiding the place of work for meetings. The claimant went on to say that when told he would need to wear a uniform by Christine he ended up in the Minor Injuries Unit with a suspected heart attack (although it did not turn out to be a heart attack.)

76. Andrea Reid's explanation for the limited contact with the claimant when he was initially absent from work was because the reason for his absence was flu. Consequently, he was not expected to be absent for a long time. His absence commenced on 17 November 2018 in the run-up to Christmas and all the NHS staffing difficulties that that presents. These were a distraction.

77. Ms Reynolds specifically asked the claimant whether being allowed to wear a polo shirt instead of the NHS uniform would have any impact on his

ability to return to work. He confirmed he would not return to that team or his substantive post.

78. The meeting was brought to a conclusion so that everything could be considered. There would be a further meeting where Ms Reynolds could deliver the outcome on the sickness absence and the grievance. The claimant's representative and Jennifer Barbour agreed that as a fair way to move forward. The claimant suggested that he was in possession of relevant evidence which would have a bearing on the respondent's decisions. It was suggested he should provide this to the respondent so it could be considered when Ms Reynolds came to her conclusions. The claimant was asked to provide the evidence within 7 days but he requested 21 days. A turnaround period of 14 days was agreed between the parties. It was anticipated that the final meeting would take place in the fourth week after the substantive hearing.

79. Ms Reynolds followed up with a letter on 12 November 2020 confirming what had been agreed, and the timescales that they were working towards.

80. Following the meeting Andrea Reid provided Ms Reynolds with the email she had received from Claire Appleton when she originally put the claimant's concerns to her in September 2020 [374]. Claire Appleton explained the negative impact that sickness absence had upon the wider team and the pressure placed on them. Ms Reynolds could also see Ms Appleton's account of the care aspects of the claimant's role, the comments about his nationality, the medication audit and the project with Helen McGahon. These were consistent with the report from Andrea Reid during the review meeting. Andrea Reid also provided Ms Reynolds with a management supervision record for the claimant from August 2019 [376]. A note recorded that the claimant felt that staff were asking patients if they minded someone Polish caring for them. The claimant confirmed he had not escalated his concern at the time. It was also recorded that Claire reassured the claimant that changes would be made to the team which would reduce the amount of care responsibilities he had. It was also recorded that the claimant would carry out a medication audit as part of his phased return to work.

81. On 24 November Ms Reynolds received an email from the claimant providing further detail around the allegations in his grievance, with exhibits [379]. He asked that the note of the telephone conversation between the claimant and Christine Stewart not be taken into account because it was an untrue statement. He also stated that he was still waiting for his legal representative to clarify the position regarding sharing evidence he had been collecting for a significant period of time. He would then be able to provide further evidence which supported his case. The timescale that had previously been agreed was that the claimant would provide all his evidence for consideration by 24 November.

82. The information provided by the claimant set out the following points:

    (a) The claimant said that his excessive workload was evidenced in his shift starting at 8am with his first calls being allocated in Appleby or Penrith, which he found stressful.

(b) When the claimant was first absent on long-term absence, he left several messages asking his manager to contact him but he was ignored for over two months.

(c) The claimant alleged that proper training was not provided to staff before they carried out clinical work, including dispensing medication.

(d) The claimant was employed as a Rehabilitation Assistant but believed that he was actually doing the work of a Care Assistant

(e) Other employees asked patients if they were comfortable being visited by a male Polish individual, which caused him distress.

(f) Staff spoke about Muslims and Islam in an abusive way which caused him to conceal his faith and pray in secret.

(g) He was invited to get involved in a project in 2015 but ultimately was not given the job. He felt that the respondent had 'used' him.

83. The claimant alleged that he applied for secondment at the suggestion of Helen McGahon and following the interview he was assured by Helen that the post was his. He referred to Exhibit 4 as being evidence that he met with managers to update them on this work and that they were all happy with the work that he was doing. However, on review, Ms Reynolds noted that the emails at Exhibit 4 did not include any appraisal of the work that the claimant was doing but dealt with arranging a convenient time to 'catch up.' The purpose of Exhibit 8 was to demonstrate that the claimant continued to carry out work on the project following his interview. Ms Reynolds noted that the emails were exchanged on 25 April 2015 but the claimant's interview was arranged to take place on 7 May.

84. As part of her investigation, Ms Reynolds met Kirsty Franklin on 7 December 2020 [450]. Kirsty explained that the role of Rehabilitation Assistant had changed over recent years because previously there were no separate Home Care Practitioners ("HCPs"). That situation was starting to change now that HCPs had more involvement so that Rehabilitation Assistants were able to focus on rehabilitation. Kirsty confirmed that sometimes an employee's gender would be discussed with a patient as a patient might have a preference to be seen by a carer of the same gender (given the potentially personal/intimate nature of the care provided). However, she said that nationality would never come into the process of introducing a carer to a patient. She further explained that there was no formal arrangement in place for washing the team's pool car but that if somebody had capacity at any given point in time then they would be asked to help out in keeping it clean. This applied across the team, not solely to the claimant. Washing the car entailed taking it across the road to the garage to go through a car wash, not washing the car by hand.

85. Kirsty also explained that if a Rehabilitation Assistant started work at 8am and their first call was in Appleby or Penrith this did not mean they needed to be at the appointment itself at 8am. Rather, they would arrive at the office ready to start work at 8am, would pick up their allocation for the shift, and then read the patients' notes. 8am was the start of the shift and not the start time for the appointment at the patient's home. There would only

be an expectation for the employee to be at the patient's address for 8am if they were meeting with a care agency, not a patient.

86. Angela Reynolds also met Suzanne Robinson (Occupational Therapist, [452]). Suzanne explained that when she was working in Eden there were no Band 2 two roles in place which meant Band 3 employees needed to carry out more care work. Plans were put in place to change this as this was not ideal. The fact was that at that point in time there were no Band 2 roles. All Band 3 employees knew and accepted that care was an important part of their job, as well as the rehabilitation aspects. Ms Robinson confirmed her view that patients would be asked about their preference of the carer's gender but that nationality would never be mentioned. She also confirmed that it was the responsibility of all individuals who used the pool car to keep it clean. If somebody had downtime they would be expected to help out and get the car cleaned because there was nobody employed and designated to wash cars. In relation to patient visits in areas such as Appleby or Penrith, Suzanne explained that efforts would be made to allocate these patients to carers who lived in the area. Unless a carer was informed of the need to attend an appointment at a certain time, the process would be that they attended the office at 8am and then travelled to the patient's address once they had collected the allocation sheets and patient notes. Patients would not be given a specific appointment time but would be told if it was to be a morning or afternoon call. If anybody had issues with the schedule, they could raise them with the therapist on duty on that particular day. Suzanne also talked about the standard induction process for Rehabilitation Assistants and the regular supervision and training. After the meeting Suzanne emailed Angela Reynolds as she remembered sending an email to all staff about the expectations around the pool car on 8 December 2017 [456]. The email confirms that all staff were told that they were responsible for this and the instruction was that during quiet periods a general check on the car should be carried out by those with capacity to do so.

87. Angela Reynolds spoke to Tanya Coates who added that Eden was one of the last teams to get HCPs and so Rehabilitation Assistants were required to pick up a higher proportion of care work [454]. Ms Coates' evidence on the other points was consistent with that of her colleagues.

88. Angela Reynolds wrote to the claimant on 8 December 2020 inviting him to a meeting so she could provide feedback from the various investigations she had carried out. She apologised for the delay in the investigation and explained that the meeting would take place via Microsoft Teams due to social distancing requirements. The claimant's trade union representative had been included in the meeting invitation.

89. On 9 December Ms Reynolds spoke to Jill Robertson, Senior Occupational Therapist [459]. She was able to explain the project management post being advertised in 2015 as an opportunity for Band 3s and 4s to be seconded for a period of six months. She thought that the claimant and a female employee had been interested in the post but she was not sure if it had been offered to the other employee. She was also aware that the claimant had carried out some project work on dementia. She was also aware of the claimant wanting to shadow Occupational Therapists in order

to work towards his qualification but she also recalled that he had not approached her at any point to ask if he could spend time with her.

90. Angela Reynolds was provided with a copy of the claimant's learning history and Learning Needs Analysis on 11 December 2020 [461]. The claimant had requested that his supervision and training record be reviewed as part of his allegation of a lack of training, support and supervision. Ms Reynolds reviewed the relevant documents.

91. The outcome and feedback meeting took place on 16 December 2020 so that Angela Reynolds could communicate her findings and conclusions to the claimant. No notes were taken at the meeting but the detail of the outcome was provided to the claimant in writing on 21 December 2020 [469]. Alison Smith from HR attended the meeting, as did the claimant's representative from the trade union, Mr Gow.

92. In the outcome letter Angela Reynolds summarised the claimant's sickness absence history and noted that his current period of absence had started on 10 October 2019. Prior to that he had been absent from 17 November 2018 until 15 May 2019. The claimant had been invited to seven occupational health assessments and had attended four. He had been asked to complete a stress risk assessment on four separate occasions but had not done so. When the claimant indicated he had issues with the team he worked in he was encouraged to provide further information and meet with his manager to reach a resolution. At long term sickness absence meetings in December 2019 and October 2020 the claimant had explained that he did not want to take his concerns any further. In May 2019 the claimant had been allowed a phased return to work. He was then placed on the redeployment register in April 2020 for a period of 12 weeks which was later extended to a period of 16 weeks ending in July 2020. During the redeployment process the claimant registered his interest in three roles but was not qualified for two of them and the other was not within the respondent Trust. It had not been possible to find redeployment for the claimant. By this point in the chronology an individual employee would normally have been removed from the redeployment register and dismissed but in the claimant's case the respondent opted not to do that and continued to make attempts to find work for the claimant. This effectively gave him a far longer period of redeployment than most other individuals would receive.

93. On 15 October 2020 the Consultant Occupational Physician had advised that he was unable to predict the likely return to work date or identify measures to facilitate the claimant's return to the claimant's substantive post.

94. During the phased return to work in May 2019 the claimant was given the opportunity to complete a medication audit until October 2019. The claimant had identified medication management as an area that he was interested in. Despite this, the claimant went absent due to sickness in October 2019 when he was due to return to his clinical role.

95. At the review meeting on 16 December the claimant had advised that, with the help of a psychotherapist, he had identified that it was the requirement to wear a uniform in his substantive post that was causing him anxiety.

After this a total of nine sickness absence review meetings were arranged, of which the claimant attended only three. At the meeting in April 2020 there was a discussion of the Occupational Health report of 15 January 2020 which suggested redeployment to another role. Angela Reynolds took into account the impact that the claimant's absence was reported to have had on the service. She noted that the team had been left with a lack of capacity to support hospital discharges and prevent hospital admissions and there had been a reduction in staff available to cover weekend shifts. She went on to summarise the submissions that the claimant had made at the review meeting and the evidence that he had provided to her since that meeting. He had felt that he was prevented from carrying out Rehabilitation Assistant tasks due to the large proportion of personal care work he was required to carry out. He alleged that he had been harassed on grounds of gender, religion, race and disability and that his dignity had not been protected. He alleged that a secondment he was promised in 2015 did not materialise and that opportunities to shadow Occupational Therapists were not progressed. He referred to the requirement to wear a uniform and a lack of support during his sickness absence. He alleged that he was given an excessive workload which was prejudicial to his mental and physical health. He complained about a lack of support, training and supervision and a failure by management to inform him who he should direct his grievances towards.

96. In the outcome letter Angela Reynolds summarised the steps she had taken to investigate, including interviews she had with Ms Robertson, Ms Franklin, Ms Robertson and Ms Coates. She had reviewed the feedback provided by Andrea Reid following a discussion with Claire Appleton. She reviewed the notes of meetings on 10 November 2020 and the additional evidence provided by the claimant on 24 November. She had reviewed the supervision and appraisal dates in 2016 and 2018. She had reviewed the management supervision record in August 2019. She had discussed the secondment project role with the recruitment team and she had reviewed the claimant's organisational essential learning records and core skills record. She pointed out that, despite her best efforts to carry out a full investigation, the passage of time between the alleged events and the claimant raising concerns meant that it had been difficult, on occasion, to investigate as fully as he would have liked. People had left the Trust and information had not been retained. Memories naturally fade over time. She also noted that, when asked what he wanted as a grievance outcome, the claimant said he wanted an opportunity to raise concerns and then return to work in a different role.

97. In her outcome letter Angela Reynolds set out her findings on the main points of the claimant's grievance. In relation to care work distracting the claimant from the role of Rehabilitation Assistant, she found that Rehabilitation Assistants were aware that there was a care element to their role. The claimant had been told by Claire Appleton that the new Home Care Practitioner service would cater for more of this type of work once it was implemented. It would therefore be less likely that he and other Rehabilitation Assistants would need to carry out tasks such as emptying commodes. However, until that time came, care remained an important part of his Rehabilitation Assistant role. She found that the claimant had accepted that this situation was not unique to him and that other Rehabilitation Assistants were also required to carry out care work.

98. In relation to the allegation of harassment due to gender, religion, race and disability, Angela Reynolds found that, on occasions, a patient might be asked if they have a preference regarding the gender of the person providing care to them. She found no evidence support the allegation that the claimant had ever been introduced as a Polish individual. The claimant had been unable to provide names of people who had behaved in this way or any details of such an incident. In addition, he had been unable to provide specific details of the allegedly abusive way in which staff spoke about Muslims and Islam. Without any identification of the alleged perpetrators, she was unable to uphold this point without supporting evidence.

99. In relation to the secondment into the project role in 2015, Ms Reynolds was unable to clarify exactly what had happened. She found that the claimant's own account was contradictory, initially stating that interviews did not take place and later stating that he had been unsuccessful at interview. The people involved at the time no longer worked for the Trust and, ultimately, she could not uphold this point without supporting evidence.

100. In relation to the issue of shadowing the Occupational Therapists, it had been confirmed that it was agreed that the claimant could shadow the Occupational Therapists in order to work towards his own Occupational Therapist qualification. The Occupational Therapists had been notified of this but the arrangement was that the claimant would initiate the shadowing. None of the therapists recalled the client approaching them to arrange the work shadowing and the claimant never claimed to have done so. Ms Reynolds was, therefore, satisfied that if the claimant wished to shadow the Occupational Therapists, then the onus was on him to progress that once the initial approval for it had been given to him. Consequently, she did not uphold this point as she was satisfied that the fact the desired work shadowing did not take place was due to the claimant's own inactivity.

101. In relation to cleaning the pool car, Ms Reynolds was satisfied that all members of staff were expected to contribute to this task. She did not find that extending this to the claimant was unacceptable, undignified behaviour which was prejudicial to his health.

102. There was a difference of recollection in relation to discussions about the suggestion of wearing a polo shirt instead of NHS tunic uniform. The claimant denied that he had been offered the opportunity to wear a polo shirt, whereas Andrea Reid's recollection was that Christine Stewart had made this offer. In any event, when Angela Reynolds asked the claimant what he would do if it was offered to him now, the claimant confirmed that he would not be able to return to work if the polo shirt was offered as an option. Ms Reynolds concluded that Andrea's recollection was accurate and Christine Stewart had in fact explored the option of wearing a polo shirt with the claimant but the claimant did not find it acceptable. Angela Reynolds found nothing wrong with this. She understood why the Trust could not agree to someone in the claimant's role (with one-to-one access to vulnerable patients) having to display the NHS logo on their clothing.

She also noted that the NHS logo is prominent throughout NHS buildings and cannot be avoided.

103. In relation to a lack of support, training and supervision, Ms Reynolds was unable to establish whether there had been a delay of two months before the claimant's manager contacted him when he was first absent on sick leave. That manager was no longer working for the Trust. Andrea Reid did confirm that there had been some delay initially because the absence was due to flu, the absence was not expected to become long-term and also because it spanned the Christmas period which presented significant difficulties for staffing. The claimant alleged that he was not supported during his absence but Ms Reynolds concluded that this was not the case. Adjustments were made so that meetings could take place away from the claimant's place of work, he was referred to Occupational Health in order to get further information about suitable adjustments around a return to work. He was also put on the redeployment register for an extended period of time. He was invited to nine sickness absence review meetings but only attended three. He said he was not well enough to attend but Occupational Health advice was that he was fit to attend. The claimant attended only four out of seven Occupational Health appointments. He was asked to complete a stress risk assessment on four occasions but failed to do so. She therefore found that, rather than a lack of support, the claimant was actually offered a significant amount of support but failed to cooperate with those providing it. She also found that the claimant did not have an excessive workload and that he did not need to drive fast to get to patients' homes in Appleby or Penrith by 8am. Patients were not given specific times for the visits.

104. Ms Reynolds was reassured by her investigation that all new members of staff got a standard induction and received support as they worked through competencies during their first months of employment. She concluded that minimum standards in respect of appraisal and supervision were being met. She noted that the claimant was not compliant in any areas on his organisational essential learning record and core skills record. The responsibility for maintaining mandatory training sits with the employee, with performance management oversight from management. Ms Reynolds also did not accept that the Trust did not conduct training in dealing with bullying and harassment or equalities policies and procedures. She noted that Equality, Diversity and Human Rights are part of the core skills framework which all Trust employees are required to complete. There was no record that the claimant had completed this training. She also found that it was not the case that the claimant was not told where he should direct grievances to. The grievance procedure and other internal policies were readily available on the intranet and there was specific reference to the policies in the contract of employment applicable to the claimant. She also noted that in meetings on 16 December 2019 the claimant had confirmed that he did not want to formally pursue the issues raised. He was provided with a copy of the Dignity at Work policy on 10 September so that he could consider whether he wanted to pursue this further formally. He never did so.

105. In light of the above Angela Reynolds concluded that she did not have grounds to uphold the claimant's grievance. She acknowledged there was always room for improvement within the respondent and she intended to

review practices around training and supervision. She thanked the claimant for bringing his concerns to her attention. She offered an assurance that the claimant would not be subjected to any detriment for raising a formal grievance.

106. Ms Reynolds also had to decide what to do in relation to the claimant's ongoing absence from work due to sickness. She considered the three potential outcomes to a final review meeting (which were provided for in the attendance policy.) She did not consider that redeployment or setting a further review period were appropriate. The claimant had been on the redeployment register for eight months, which was well in excess of the 12 week time period in the policy. Even so, it had not been possible to find suitable alternative employment for him. She also did not consider that setting a date for another review meeting would be beneficial because the most recent advice from Occupational Health was that it was not possible to predict a likely return to work date or identify adjustments to facilitate his return to work. There was no evidence to suggest that the claimant would be able to return to work in the foreseeable future and so she explained that her decision was to terminate the claimant's employment on grounds of capability due to ill health. The claimant was entitled to 11 weeks' notice so that his employment would terminate on 3 March 2021. During his notice period he would remain on the redeployment register and efforts would continue to find suitable work for him. She encouraged him to continue to look at redeployment opportunities for himself and asked him to let her know if he wanted to alter the scope of the parameters he had previously set for the redeployment search. She also explained that whilst he was entitled to notice and payment for holidays accrued but untaken, deductions would be taken to claw back overpayments which had been made to him. She also notified him of his right to appeal both outcomes. She explained in her letter that he would need to set out his grounds of appeal clearly. She explained that his appeal against termination of employment must fall within one or more of three categories: new evidence; undue severity or inconsistency of penalty; and failure to follow procedure.

107. The claimant was informed of the outcome on 16 December 2020 and the outcome letter was sent to him on 21 December. This gave him 14 days to lodge any appeal against the outcome. The claimant emailed to appeal on 15 January, out of time, and did not include the grounds for the appeal in his email. Alison Smith asked the claimant to explain why he had not appealed within the 14 day timeframe. On 22 January 2021 the claimant explained that he had not read the outcome letter straight away as it was sent to his business address, he had been unwell for a few weeks and was now recovering from Covid.

108. The respondent decided to accept and consider the appeal even though it was lodged late. On 26 January 2021 the respondent emailed the claimant to ask him to provide the grounds for his appeal by no later than 1 February. The grounds of appeal were not forthcoming so he was chased for these, by email, on 2 February. On 8 February the claimant said he would provide an update once he had met with a barrister.

109. By letter dated 12 February, the claimant was invited to attend an appeal hearing on 25 February 2021. The respondent had still not received the claimant's grounds of appeal and so they were requested by no later than 18 February, so that they could be considered prior to the hearing. The claimant was told that if he failed to comply with the deadline for provision of the grounds of appeal, the hearing would not go ahead.

110. On 18 February, the claimant emailed to say that the grounds of appeal would be delayed. He asked for the appeal hearing to be rearranged. The claimant was invited to a rescheduled appeal hearing which was due to take place on 19 March 2021. The invitation letter confirmed that the appeal hearing was not an opportunity to re-hear the original final sickness absence review but rather, the respondent would consider the grounds of appeal, any new facts, and decide upon the process followed up to that date.

111. The appeal hearing took place on 19 March and was held by Microsoft Teams [501]. The hearing was conducted by Salli Pilcher. The claimant attended without representation. Angela Reynolds attended on behalf of management and was supported by Alison Smith from HR. Maria Stevens of HR attended to support the appeal chair (Ms Pilcher.) At the start of the meeting Ms Pilcher reminded the claimant of his right to be accompanied and asked him to confirm that he had chosen not to be accompanied. He did so. After making introductions Ms Pilcher asked the claimant to present his appeal.

112. The claimant referred to the points he had raised in his grievance and alleged that he had been unwell for over two years because of the way the NHS had treated him. He said that this was a case of discrimination. He confirmed that he was awaiting a doctor's report and a report from the psychologist. He told the Chair that he had requested access to his work emails and this had been refused because he was no longer employed by the respondent. He confirmed that he would make a Subject Access Request.

113. The claimant complained about the requirement to wear a uniform with the NHS logo on it because he had an issue with this which he had explored with his psychotherapist. He also complained about the requirement to carry out care responsibilities because he maintained that this was not part of his job. He alleged that he was going every day from Penrith to Kirby Stephen to empty commodes in lunchtime and then come back. He also asserted that he was asked to wash lease cars. He maintained that this was not the job that he had applied for.

114. He also asserted that when he was off work with stress. He felt the Trust had failed in its duty of care when sending letters about an overpayment. He criticised the quality of the Occupational Health evidence. He pointed out that assessments took place over the telephone and only lasted five or six minutes. He asserted that on that basis the Occupational Health report said that he was fit to attend meetings whereas the claimant maintained that he was not able to go 10 metres away from his home. He felt that everything was done according to a template. The claimant complained that he had been pursued for overpayment of wages.

115. He maintained that the job had changed and had become a care job without any consultation. He raised the fact that he had heard people debating whether a Polish man could go and see a patient. He asserted that an Occupational Therapist tried to explain that sometimes people might be scared of the claimant's accent.

116. He also asserted that he had been promised a secondment but it turned out that managers had not registered it. He also claimed that he had been challenged every time he went for a break, whereas other staff could even go to a hairdresser in work time.

117. The claimant complained about the lack of support sessions from the Employee Assistance Programme. He was asked to clarify and confirmed that he was allocated only eight sessions. After that it stopped. He criticised the respondent for telling him that he could use the service only for him to contact the service and be told he had exceeded his limit.

118. Ms Pilcher asked the claimant what his expectation was regarding the appeal. The claimant accepted that he knew his contract had already been terminated. He said that he hoped in that 12 weeks of notice he would be able to find something, a different job in a different department. He maintained that he just felt that managers and HR should have supported him a bit more and found him a job which he would be able to do. He maintained that he had now lost his job and his health. He continued, *"from the outcome, it looks like everything was done in the correct way. I lost my job. Lost most of my private life. Lost financially on whole situation. I definitely will consider to take this case to a Tribunal. I am attending the meeting today at request of my solicitor who told me to attend and see what the outcome will be. When I raised my grievance and appeal, I hoped something might happen. That I would be offered some settlement."*

119. Ms Pilcher pointed out that when the claimant met Christine Stewart on 16 December 2019 there was a discussion about further investigation into the issues he had raised relating to behaviours within the team. The records stated that the claimant did not want to pursue it any further at that time. He was asked why this was. His response at the appeal was that he did not feel well enough to continue with a grievance of this nature.

120. Ms Pilcher asked the claimant about the stress risk assessment. In section 8 of his grievance he had asked that a stress specific risk assessment be carried out in accordance with the Health and Safety Executive's Management Standards. However, in the management report it was noted that on a number of occasions, at least four, the claimant was asked to complete a stress risk assessment but did not do so. He was asked why this was. The claimant's response was that by that stage he was already engaged with his own psychotherapist who used a different kind of assessment. He then reverted to talking about the first three months of his sick leave when he asserted that no one from the respondent had rung him. He therefore believed that the stress risk assessment was a tick box exercise. He reiterated his complaint about the inadequacy of Occupational Health consultations. He also maintained that some of the

questions on the stress risk assessment were things that managers already knew. When the claimant sought to suggest that he had in fact completed a stress risk assessment, Angela clarified that the CQC assessment he had completed was a health and safety risk assessment. This was separate to the health and safety stress risk assessment that he had been asked to complete but repeatedly failed to do so. The claimant said this was because he was receiving treatment from a psychotherapist who used a different type of assessment.

121. The claimant provided the name of the Occupational Therapist who he alleged had explained that people might be scared of his accent. He was asked why he hadn't raised this before. His response was that, *"I've been told several times by my manager, "some people are who they are, they are not going to change. Some people are close to retirement, managers are just waiting for them to go." I accepted that. I felt I was strong enough to deal. I didn't realise one day I was going to crash. You can ask Alison Kitson about that conversation with the OT, she was there."* He confirmed the name of the occupational therapist was Adele Peascod. The claimant alleged that after witnessing this conversation, Alison Kitson had said to him that the comments were not right, that they were "terrible". When asked whether he had raised this incident with anyone prior to putting it in his grievance the claimant responded that there was nobody to raise it with.

122. During the course of the appeal hearing the claimant confirmed that it was agreed he would do a medication audit but he did not know what had happened to it. Ms Pilcher confirmed that there were competency frameworks in place regarding giving medication and at the relevant time there was also an external company providing training on medication. He accepted that the trainer was a good, knowledgeable person but that nobody did anything with the training or documentation they received. He asserted that he raised this with managers but did not confirm who he had told.

123. He was asked to talk about his workload. He maintained that he would start work and have a call at 8am at Appleby. In relation to washing lease cars he maintained that it was not his car and he never drove it. He was being asked to wash it and take the rubbish out of it. He maintained that it was not true to say that everybody did this. He alleged that other people who did not have their own lease cars used the pool car and then he was asked to clean it. There was also a discussion about the claimant's mobile phone contract being suspended. This was apparently due to lack of use but the phone could be re-connected relatively straightforwardly.

124. Ms Pilcher explored the issue with the NHS logo and the fact that the claimant said he had explored this with his psychotherapist. The claimant said that his psychotherapist had said it was about an association between the logo and the team. She had explained the association and that the claimant did not want the association hence the impact on his mental health of exposure to the logo. The claimant described his hands shaking when a letter with an NHS logo came to the house and he had to open it.

125. Ms Reynolds gave the management perspective on the case. She summarised the history of the case and the claimant's absences in line

with our findings of fact above. She confirmed that the outcome of the final review was termination of employment on the basis of Occupational Health advice that he was unable to return to his role. He had been placed on the redeployment register for 12 weeks and had very specific criteria about the sorts of jobs he would do. He identified three jobs which he wanted to be considered for but did not meet the essential criteria for two of them and the other was outwith the Trust. Ms Reynolds also confirmed that she had undertaken a fact find in relation to the claimant's grievance and had interviewed the people still employed by the Trust. She noted that because some people had left the organisation there was some historic knowledge and recollections of conversations that they could not obtain. The letter detailed the findings resulting from the factfind. Ms Reynolds confirmed that she could not find any evidence to uphold the claimant's grievance.

126. Ms Reynolds maintained that the respondent had tried to do as much as possible to redeploy the claimant and that he had had a total of eight months on the redeployment register. There was no evidence of a return to work in the near future from either Occupational Health or the claimant himself. She confirmed that the respondent continued to look for other work for the claimant during his notice. They asked the claimant if he could widen the scope of the criteria for jobs that he would consider. They never heard anything back from the claimant on that point. She also confirmed that the occupational health evidence was quite conclusive and that the claimant himself, when asked if there was any barrier to him returning, said that if he had to wear a uniform he did not think he could return.

127. The claimant interjected in relation to the specific parameters for the role. He said that it was a decision made with his psychotherapist that he should have part-time hours and to be based where he is based. He suggested that there was another job in Carlisle which he said he met the essential criteria for. Andrea had arranged a telephone conversation with the manager who said that role was not suitable for the claimant that he did not use the system used in the hospital and had never run any projects. Again he felt disappointed and tried his best to go back to the job was unwell.

128. Alison Smith from HR pointed out that Andrea had contacted the claimant about redeployment opportunities. The first of these was the "Living Well Coach". The claimant did not respond to that. The second opportunity was "Facilities Supervisor". The claimant responded saying that he was not very well with his mental health and had been diagnosed with Covid. He said that he hoped he would get better soon and there would be some job opportunities for him. In relation to the Endoscopy role, Emily Dickinson discussed it with the claimant and there was detailed feedback given as to why he was not suitable for that role. Ms Pilcher asked whether, if there had been broader criteria from the claimant, it is likely that there would have been more redeployment opportunities. Alison Smith confirmed that, yes, that was correct. The claimant maintained that, due to his illness, he was unable to consider working full time. He maintained that if he worked more than 21 hours per week it would impact him financially. The Endoscopy role was described as having condensed hours (i.e. longer daily hours but over four days per week.)

129. Ms Pilcher queried whether the respondent managers had explored the Alison Kitson scenario. Ms Reynolds confirmed that they had not, simply because they had asked for names of the people they should speak to about it and the claimant had not given them this name. The individual in question had only just been mentioned during the appeal. They had spoken to the individuals he had identified. They would need names of who was involved. She queried whether they had specifics such as the date of the incidents. She confirmed she was happy to speak to Alison Kitson but could not speak to Adele Peascod as she had since left the organisation.

130. When asked for more specifics the claimant said, *"Adele Peascod was insisting it was a good idea to mention to clients about the accent as my accent is different. I was quite upset about that. Alison Kitson at the time thought it wasn't right. I discussed it with a friend of mine, a doctor in MIU, who also said it wasn't right."* The claimant confirmed that this did not relate to particular client but to clients in general. He maintained that Adele Peascod had said that some people could be scared of his accent.

131. In relation to the logo/uniform issue, Ms Reynolds had thought that the issue that was being raised by the claimant at the grievance stage was about wearing a uniform rather than about the logo. She said that there had been a discussion about a problem wearing a polo shirt but the claimant did think that he could do that either at that stage. The claimant then indicated that he had recordings of various conversations which he had not previously disclosed. He suggested that he had discussed the logo specifically with managers.

132. Ms Reynolds confirmed that she had explored the claimant's concerns regarding his caseload. She explained that having an 8am call Appleby was very rare. Handovers took place at 8am so it would be unrealistic to provide for appointments themselves at 8am. She further explained, in relation to the lease car, that it is a team car and that the expectation would be that, as a team, they would look after the team's equipment whether or not they personally use it. Ms Reynolds confirmed that the requirement was actually to take the car across the road and drive it through a car wash rather than personally wash it by hand. The claimant disputed that and said that he had physically washed and cleaned cars before they went back to the lease company. He maintained that this was not everybody's job and that the Band 4 APs never ever washed a car. People had been chosen who had to do it. He said that he looked after his car and it was not his responsibility to clean a car and remove rubbish from it after someone else had used it.

133. Towards the end of the meeting Ms Pilcher confirmed that she wanted two further pieces of evidence: the feedback in relation to the Endoscopy role; and an interview with Alison Kitson about her recollection of the conversation that took place between the claimant and Ms Peascod. The claimant confirmed that this conversation had taken place when Alison Kitson was still a senior district nurse at Penrith with Linda Graham. Ms Pilcher drew the hearing to a conclusion saying that she would obtain this further information and would then provide a written response to the appeal

by the end of the following week. She would let the claimant know if there were going to be further delays. The final question was to ask whether everyone agreed that the hearing of the appeal had been conducted in line with Trust values. The claimant's last comment was, *"yes, I would love to have had the type of communication we've had here today in the team where I worked."*

134. Ms Pilcher's evidence to the Tribunal in relation to the claimant's hours of work was that the claimant had asserted that he asked for a temporary reduction in hours for a few months but that he was supposed to stay on 21 hours per week. Ms Pilcher maintained that the change to his hours had actually been a permanent one, as was recorded on the notification of change document. She maintained that there was a reduction from 21 hours per week to 14 hours per week which would remain in place unless and until the claimant requested an increase in hours. She said that this did not happen and in fact the claimant subsequently asked for his hours to be reduced again (to 6 hours per week.) That subsequent request could not be accommodated by the respondent but she maintained it was clear that the claimant reduced working hours rather than increased them (as he claimed.) She was satisfied that the claimant had been paid correctly by reference to the actual hours he was working, once the deduction was made from his final salary.

135. We looked at the documentation in the bundle. The document at page 183 purported to be a notification of change document. It recorded the change in hours from 21 hours per week to 14 hours per week. There was reference to this being a temporary change to hours with an effective date of 8 January 2018 and a review date six months later (8 July 2018.) However, in the document at page 185 the effective date was still recorded as 8 January 2018 but the review date was left blank. Page 187 of the document indicated that the document had been scanned to payroll on 29 January 2020. During the course of the evidence to the Employment Tribunal the claimant accepted that once his hours were reduced to 14 hours per week he never actually went back to working a 21 hour week. Therefore, whatever the intention, once the weekly hours were reduced, they never increased back to 21 hours per week and there is no record of the claimant protesting about this during the relevant period. He is not recorded as asserting that his hours should have reverted to 21 hours per week or that there had been some sort of mistake such that the review had not been carried out as originally intended. On balance, therefore, the Tribunal is satisfied that the reduction in hours was initially expected to be a temporary reduction for a trial period of six months. The review date came and went without either party to the employment contract taking note of it. The review never took place and the claimant never returned to a 14 hour week. The hours of work document was scanned onto the system showing 14 hours per week as late as 2020. We therefore conclude that, whatever the original intention, this became a permanent change to the hours of work. The claimant was engaged to work for 14 hours and was only entitled to be paid accordingly. The same was true of accrual of holiday entitlement and associated benefits.

136. Ms Pilcher also gave evidence as to the reasons why an NHS logo was a relevant requirement in the claimant's job role. She explained that it is

imperative that clinical staff working in patients' own homes (or in care homes) are identifiable as NHS employees. The uniform and the ID badge provide a professional image and identity which is important in order to instill confidence in patients and assurance that they 'are who they say they are.' Uniforms are also essential from an infection prevention and health and safety perspective and are regulated by the Trust's uniform and dress policy. They must be able to be laundered at a temperature that satisfies guidance on infection prevention and they also need to allow the wearer flexibility of movement from a moving and handling perspective.

137. Having heard the evidence in this case, the Tribunal is satisfied that these are legitimate factors for the respondent to have taken into consideration in this case. In particular, we heard that service users may have a number of individuals coming to their front door on any given day seeking to gain access to the service user's home. The service user will not have been given a specific appointment time for the services provided by the respondent. They will want to know who they are allowing into their homes and for what purpose. A polo shirt with an NHS logo is an important part of enabling them to properly identify the people coming into their homes. It is, at least partially, a safeguarding measure. This is particularly relevant in circumstances where service users may be having appointments with both NHS service providers and private sector providers. The respondent is entitled to make some form of visible and visual distinction between the two types of service. The Tribunal also noted that the claimant never really explained what the difficulty with the NHS logo was. He asserted that he had been told (by his psychotherapist) that he associated the logo with the poor behaviours of the other team members and his poor experiences with the respondent Trust. The respondent was not provided with evidence from the psychotherapist to this effect. Nor was the Tribunal. We would, effectively, have to take the claimant's word for it. Furthermore, if the claimant had provided specific details of the particular events which triggered these negative associations (between the logo and the Team behaviours) then the Tribunal might have felt able to accept the claimant's own assessment and explanation that there was a negative association (and trigger) for him between wearing an NHS logo and his mental health condition and symptoms. The Tribunal might not necessarily need to understand the precise way in which this trigger or association operated in order to be satisfied that it was a genuine trigger/association. However, the claimant never did provide either the respondent or the Tribunal with details of how this association between poor treatment by the team and the NHS logo came to be established. He did not explain what event or events linked the two things. This was not a case where the claimant could refer back to a specific traumatic event or series of events that he could identify as the source of the negative association. The Tribunal therefore had very little information to go on to understand this association. There was no evidence of an assault whilst at work, for example. The absence of this information led us to be somewhat sceptical about the claimant's stated difficulty with wearing an NHS logo on his clothing whilst at work. Without this information it was hard for the Tribunal to understand or accept the stated link between bad experiences at work and the need to avoid the NHS logo. The claimant had it within his power to provide the evidence to establish the link and yet did not do so (either for the Tribunal or for the respondent, whilst he was still employed by them.) The Tribunal was presented with, on the one hand, the bare assertion of a trauma link

to the NHS logo and, on the other hand, the respondent's evidence as to how it considered this issue. The respondent had to balance the asserted needs of its employee against the wider needs of the service and the service users. Where there was little to no evidence to support the claimant's asserted needs, this was a relevant factor for them to take into account in weighing up the priorities in the case. Furthermore, the chronology shows us that the problem that was initially identified was difficulties with wearing a uniform (i.e. a tunic type top.) Once this was raised with the respondent it offered an alternative solution, namely, a polo shirt with an NHS logo, in an appropriate colour. This would meet the respondent's requirement that NHS employees should be clearly identifiable (for all the reasons set out above), whilst avoiding the need for the claimant to wear a uniform, as such. Once the option of a polo shirt was raised with the claimant he rejected it out of hand. It was really at that point that the NHS logo became an issue. The respondent showed a willingness to compromise which was not matched by the claimant but without any real substantive explanation or justification from the claimant. All he did was to make a bare assertion that he suffered a traumatic response to association with the NHS. The Tribunal also took account of the fact that the NHS logo is all pervasive. It is everywhere within the organisation. It is difficult for anyone to be employed by the NHS without coming across the logo at some point during the working day, whether that be in buildings, on uniforms, or on letters and correspondence. Indeed, the claimant himself gave evidence to us that he had a trauma response to opening a letter (such as a P60) with the NHS logo at the top of it. In such circumstances we question the practicability of the claimant's proposed solution. Would removing the requirement to wear the logo actually remove the source of his alleged trauma? Even if the logo were removed from his polo shirt, he would still have to carry some form of identification with him whilst at work. He would need to prove who he was and who he worked for. Furthermore, he would doubtless come into contact with the NHS logo in the course of his work, whether on paperwork or otherwise. If accommodating the claimant's request (i.e. removing the logo from the polo shirt) was not going to achieve its stated aim, then this is a relevant factor suggesting that the balance of prejudice weighs in favour of retaining the NHS logo on the uniform. Removal of the logo would not provide the claimant with the comfort or solution that he was seeking. It would not remove the source of his trauma. By removing the logo neither of the party's needs or wishes would be fulfilled.

138. After the appeal hearing Angela Reynolds spoke to Alison Kitson on 24 of March via Microsoft teams [531] as requested by Salli Pilcher. She explained to Alison that the claimant had told them that she had witnessed a discussion during which Adele Peascod insisted that it was a good idea to mention nationality to patients in case they were scared of his accent. Alison Kitson had no recollection of this conversation. She accepted it had been a long time since she worked as a District Nurse Sister but she felt that she would have remembered if she had been present during such a conversation. Angela Reynolds made a note conversation and sent it to Ms Pilcher for her to consider as part of her appeal deliberations.

139. Following the appeal hearing Ms Pilcher obtained a copy of the timeline setting out the efforts made to redeploy the claimant covering the period

from when notice was issued [520]. She also obtained the job description for the endoscopy role [521]. In addition, she was provided with a copy of the job description for the role of Rehabilitation Assistant in which the claimant was employed [536]. She also had a copy of the job description for a Healthcare Assistant as this was the claimant's first role with the respondent before being appointed to the rehabilitation role in 2010. A copy of the earlier job description had been kept on his file [548]. Andrea Reid contacted Ms Pilcher to confirm that the job description provided to her for the rehabilitation role was a generic Band 3 job description produced in 2018 rather than the one placed on his file when he was appointed to the role in 2010. The job description for 2018 was at page 536 and the document which had been kept on the claimant's file since 2010 was at page 552 of the hearing bundle. The relevant job description stated that Rehabilitation Assistants would work with patients for periods of the day unaccompanied and that they would provide personal patient care on a daily basis, dealing with all types of bodily fluids within health and safety guidelines. This would include, among other duties, the emptying of patients' commodes.

140. Ms Pilcher reviewed the notes provided by Ms Reynolds after her discussion with Alison Kitson on 24 March [531]. The evidence was as set out above.

141. After completing further investigations Ms Pilcher wrote to the claimant on 31 March to provide him with the outcome to his appeal [563]. In her outcome she found that the respondent's procedures had been adhered to in terms of the support provided to the claimant whilst he was absent from work on sick leave. She noted seven invitations to occupational health assessments of which the claimant attended only four. She noted he was asked to complete a stress risk assessment four times but failed to do so. Meetings had taken place with managers where he was encouraged to discuss concerns he had with the work behaviours of the team (which might be impacting upon his health) but the claimant had not wished to escalate his concerns.

142. Ms Pilcher found that the final formal review of the claimant's long-term absence undertaken on 10 November was held in line with the respondent's attendance management policy. This was following receipt of advice from Occupational Health that a return to work in his substantive role was unlikely in the foreseeable future. The claimant had raised a formal grievance the day before the final hearing and this was explored during the final formal review meeting. Ms Pilcher was satisfied that this was appropriate as the issue raised in the grievance appeared to overlap with the reasons for the claimant's long-term absence. Ms Pilcher noted that, upon termination of employment, the claimant remained on the redeployment register for the duration of his notice and efforts were made by the respondent to find suitable work for him (subject to the limiting factors he had placed on the roles which he was willing to consider.) This had also been the case for eight months prior to the final formal review meeting. She concluded that efforts to find alternative employment were undoubtedly hampered by the very specific criteria that the claimant stipulated with regard to the roles that he would be prepared to consider.

143. Ms Pilcher found that the evidence showed that the grievance and the claimant's absence from work had been investigated thoroughly and fairly. She noted that, upon further investigation, Alison Kitson was unable to corroborate the claimant's account that Adele Peascod told him that patients might be scared of his accent and so should be informed of his nationality prior to meeting him. The notes of the discussion with Alison Kitson were enclosed with the appeal outcome letter when it was sent to the claimant. In relation to redeployment, Ms Pilcher concluded that whilst employees on the register are given prior consideration for vacancies which may arise, they do still need to meet the essential requirements of the role in order to be appointed. The feedback from the recruiting manager highlighted the requirements that the claimant did not meet. This included desirable criteria and essential criteria that were needed in order to shortlist the candidate. General areas in which the claimant lacked the essential criteria included general project management and leadership skills at the level required of the post. He also had limited experience of implementing SOPs and operational policies, of leading on NHS improvement projects and of analysing areas of activity in relation to current performance in order to drive forward opportunities for improvement. The claimant also had limited experience of endoscopy in general but more specifically his knowledge was limited in respect of the referral to treatment pathways (RTT) and endoscopy scheduling. The feedback included areas of good points but it was clear from the email and discussion that the claimant had with Ms Dixon, that his skills did not match large proportions of the essential and desirable criteria. Ms Pilcher also noted that the essential criteria for the role indicated that the post-holder would be expected to work across multiple sites and must have the ability to travel independently across Cumbria and nationally when required. The claimant had told Ms Pilcher that the advice of his psychotherapist was that he should work part-time hours in a role that was local to him. She concluded, therefore, that he was not qualified or suited to the post.

144. Ms Pilcher had looked at the job description for the claimant's substantive post as Rehabilitation Assistant. This role included a requirement to provide personal care to patients on a daily basis. Even with the introduction of the Home Care Practitioner role to community teams, she would still expect that community healthcare practitioners (of all disciplines) who visit a patient and identify personal care needs, would attend to those needs. She noted that that is a basic function of community care.

145. On reviewing the history of the claimant's case and absence from work Ms Pilcher concluded that it was clear that significant efforts had been made to find the claimant another role within the Trust when Occupational Health advised that it was unlikely he would be able to return to his substantive post. She was also made aware of the very specific criteria put in place by the claimant, which limited the roles that he was willing to consider. The efforts to redeploy claimant had continued for almost 12 months. If the claimant had relaxed his criteria there would have been a higher possibility of successful redeployment. Ms Pilcher further noted that even if the claimant worked in a role where he was not required to wear a uniform, it would be impossible for him to avoid the NHS logo. It is ubiquitous. It is impossible to conceive of an employee working for the NHS being able to avoid seeing, using or displaying it.

146. An investigation had been carried out into the allegations of discriminatory behaviour by members of the claimant's team. No evidence was found of any discriminatory behaviour towards the claimant. Whilst the claimant suggested that he had covert recordings of conversations with his former line managers (Ms Appleton and Ms Stewart), he did not share those recordings with the respondent at the grievance or appeal stage. He was also unable to explain to the appeal panel why he considered those recordings contained evidence of discriminatory or inappropriate behaviours. There was therefore no evidence presented to Ms Pilcher to cause her to disagree with the findings of the original investigation into this. Ms Pilcher was satisfied that the claimant had been given a fair and full opportunity to present his appeal to the panel. Based on all of the points reviewed and discussed, Ms Pilcher was satisfied that the decision reached by Ms Reynolds to terminate the claimant's employment on grounds of capability was fair, reasonable and commensurate with the evidence available. She saw no grounds to overturn the grievance outcome for the same reasons. In her letter she explained that the decision of the appeal panel was final and concluded the respondent's internal process.

147. The claimant expressed an interest in a trainee biomedical scientist role and also a fire safety adviser role during the redeployment process [282]. The claimant did not appear to disagree with respondent's position that he did not meet the essential criteria. The claimant also expressed an interest in a Clinical Effectiveness and Audit Facilitator role. Although the claimant suggested that he was qualified to carry out the role, we are satisfied that the evidence established that it was reasonable not to progress the application given that the respondent's Head of Quality Improvement and Effectiveness considered that the claimant did not meet the essential criteria [302]. The claimant also expressed an interest in an Endoscopy role for which he wasn't considered suitable (and the claimant did not refute that suggestion during cross examination.) The only other role that the claimant expressed an interest in was outside the respondent Trust and it is not clear whether or not he applied for it [282]. In addition to this, the respondent offered the claimant opportunity to express an interest in positions of Living Well coach and Facility Supervisor roles but the claimant was not interested in either role [283].

148. During the course of the Tribunal hearing the claimant provided some further details of his unauthorised deduction from wages claim. Ms Pilcher prepared a supplemental witness statement in this respect. She confirmed that the salary owed to the claimant in relation to his contractual 11 week notice period was £1,718.48. The salary owed to the claimant in relation to his outstanding holidays of 64.5 hours was £697.40. Both figures were offset against the overpayments made to the claimant.

<u>The deductions from the claimant's salary.</u>

149. The first task for the Tribunal was to clarify exactly what the claimant's claim for unauthorised deductions from wages consisted of. It was not addressed in the claimant's witness statement and had not been clarified

prior to the start of the hearing. The claimant answered questions about this portion of his case as part of evidence in chief before he answered questions in cross examination from the respondent's barrister. In evidence in chief the claimant clarified that his claim related to deductions that were made in his final pay slip which resulted in him receiving no pay at the end of his employment. The respondent had purported to deduct various overpayments from his salary payments at the end of his employment.

150. The claimant referred the Tribunal to the pay slip at page 582 of the bundle. The pay slip was dated 26 February 2020. The net sum paid to the claimant on that occasion was £235.05. On the left-hand side of the pay slip the entries set out the basic pay statutory sick pay and various adjustments to the same. In addition, there was an entry entitled "*gross overpayment*" alongside which there was a reference to a payment of £7324.01. Further down the column there was a further entry entitled "basic pay arrs" for an identical amount of £7324.01 but with a minus sign alongside it. This seems to have been shorthand for "basic pay arrears". The column for deductions was on the right-hand side of the pay slip. This included deductions for a lease car plus VAT on a lease car in the sums of £393.17 and £78.63 respectively. At the bottom of the pay slip was a box entitled "*Messages from employer".* The following text appeared in the box: "*Gross Overpayment: Loan End Date has been reached. Gross Overpayment Outstanding = £0 Loan Amount Paid = £-7324.01. Gross Overpayment Outstanding = £0 Loan Amount Paid = £-42.75 the cash equivalent of GB BIK Car and Car Fuel is 233.84."* The claimant referred to the apparent deduction of £7324.01 which was made against his pay and which, in his view meant that the respondent had not paid holiday pay, notice pay or mileage payments.

151. He went on to explain that after this date the respondent re-claimed more money from him. The tribunal was referred to the correspondence at page 499-498 of the bundle. On 26 February 2021 the claimant sent an email to Alison Smith copying in his trade union representative and Angela Reynolds. In that email he asserted that, as of that day's date, wages and holiday entitlement were still owed to him. He confirmed that he had informed Andrea Reid about the fact that he did not receive his wages (email of 1 February 2021) but she replied to say that the overpayment was made and needed to be recovered. The claimant maintains that nobody had discussed anything with him. He requested information about his holiday entitlement but nobody got back to him. He also asserted that he informed Andrea Reid, Mrs Harmer and Mrs Stewart (23 September 2020) about his temporary contract amendments and asked for clarification. He asserted that nobody had got back to him and now an unauthorised payment was taken from his wages/holiday entitlements. He requested that payment be made in full in five business days from the date the email. If it was not made by the due date he would take legal action.

152. Alison Smith responded to this message at [498] on 12 March 2021. She provided an explanation. She confirmed that in relation to the annual leave and notice period of 11 weeks, the respondent notified the claimant in a letter of 21 December that it would be netted off against any overpayments made by the Trust and that that is in respect of failure to make the correct amount of lease car payments between April and November 2021. She

confirmed that those sums were not recovered, as they ought to have been, from the claimant's salary at source. Therefore, the respondent was deducting those sums from the claimant's notice pay and annual leave instead by virtue of the contractual agreement in place between the parties. She enclosed a copy of the car lease contract (which we can see was signed by the claimant in 2016 [573]) and referred the claimant to clause 24 which expressly permitted the respondent to recover the sums from the claimant. She confirmed that she had been told that the matter of lease car payments was discussed with the claimant on 10 September and this was followed up in writing on 16 September 2021. The letter of 16 September stated, *"your lease car agreement expired at the end of April 2020 and you arranged with Knowles Associates to extend your agreement on a monthly basis whilst on the redeployment register. The Trust have been unable to deduct your monthly fee for your salary due to you being in new after exhausting your sick pay entitlement. Finance confirms the outstanding amount of April 2022 September 2020 is £2710.22, which will be added to your repayment plan if the balance is not paid."* Alison Smith continued that, in respect of the claimant's holiday entitlement, Andrea had responded to him on 19 February. The email in question was enclosed for the claimant's reference. The email continued: *"in relation to your email to Andrea Reid, Mrs Harmer and C Stewart (23/09/2020) about your temporary contract amendments, I apologise that you never received a reply to this. I have been in contact with Andrea and she advised that she made contact with your line manager about this at the time and your line manager confirmed that you continued to work 14 hours throughout, commencing from the initial change in hours in 2018. She also confirmed that you had asked to reduce your hours to 6 hours which was declined. She concluded by advising that at no point did you return 21 hours."*

153. The claimant explained in evidence in chief that the respondent continued to claim even more money from him. He maintains that no explanation had been provided. Not only did the respondent deduct the overpayment from his pay slip but it took County Court action in two separate court cases. The claimant maintained that he did not receive any last payment and received no communications as to why this was. He maintained that everything had been dealt with in the County Court claims in Carlisle. He maintained that those claims had been dismissed. He asserted that the respondent had claimed £1060 in addition to the sums deducted from his wages. The claimant maintained that he still thought he was entitled mileage, holiday pay and notice pay. The amount he was claiming amounted to 7324.01. He maintained that the amount claimed by the respondent in the County Court proceedings increased from £5800 to £6000.

154. The claimant conceded, in cross examination, that he had exhausted his sick pay entitlement by October 2020. He also accepted that he could not have accrued mileage entitlement whilst he was absent from work on sick leave. He conceded that any claim for mileage expenses pre-dated October 2019. He also accepted that he had been unable to provide details of the mileage he was claiming and could not specify a particular amount. When challenged about the deduction of £7324.01 the claimant maintained that there was no overpayment and, therefore, the respondent was not entitled to reclaim one. He said that the respondent argues that

he was entitled to sick pay based on a 14 hour working week. He maintained, however, that his sick pay should have been calculated based on a 21 hour week. He said that the respondent was not entitled to deduct the difference between sick pay for a 14 hour contract and sick pay for a 21 hour contract. He went on to claim that the respondent claimed £6000 in relation to wages which were overpaid and £1000 in relation to the lease charges. He accepted that he had retained his lease car during sick leave and past the expiry of the lease contract. He asserted that he felt unable to arrange for return of the car because he was off sick. He maintained that it was the employer's responsibility to arrange return of the car. When it was put to him that the respondent incurred £2710.22 of lease charges that it could not recover at source from the claimant's pay, he was unable to challenge that, save to say that it was Alison Smith's calculation.

155. The claimant was also taken to the email at page 491 in relation to his holiday entitlement. The email explained that the annual leave calculation covered the years 2019/20 and 2020/21, contracted to a 14 hour week and that the claimant had 10 years or more of service. The email pointed out that in 2019/20 he had already taken more than his allocated amount of annual leave. As the claimant was on long-term sick he would normally have been entitled to carry over into 2020/2120 any accrued days (pro rata) minus what he had already taken in 2019/20. As the claimant had already taken more leave than he was entitled to in 2019/20, there was nothing to carry over and, in fact, he owed the Trust 20 hours. In 2020/21 the claimant was entitled to leave for 11 months of the year. This equated to 84.5 hours. The 20 hours that he owed the respondent was deducted from his outstanding annual leave entitlement. This meant he was entitled to pay for the equivalent of 64.5 hours of holidays which was owed at the effective date of termination. The claimant disagreed. The respondent argued that at termination the claimant was entitled to 11 weeks of notice pay plus 64.5 hours of holiday pay. The claimant was unable to contradict this calculation. Ms Pilcher gave her supplemental evidence to show what this meant in financial terms as set out above.

156. The respondent put to the claimant that his entitlement to notice pay and holiday pay up to termination of employment was considerably less than the sum which he owed to the respondent. The respondent maintained that pay for 64.5 hours (holiday) plus 11 weeks (notice) would not be worth £7000.

157. Having considered all the evidence it appears, that the respondent made deductions from the claimant's final salary and holiday payment to reflect two different types of money which the claimant owed to the respondent upon termination of employment. First, there was an overpayment in respect of sick pay over a number of months. He had been paid sick pay based on a 21 hour week rather than a 14 hour week. He should have received pay based on the 14 hour working week. Second, the claimant had incurred hire car charges which could not be deducted from the claimant's pay at source when he went on to a nil sick pay entitlement. The respondent was still liable to pay the hire company for the claimant's hire car even though they had not received payment for this from the claimant. The claimant's contract of employment entitled the respondent to claw such sums back from the claimant's pay. It appears that the claimant is claiming the sum of £7324.01 but cannot state exactly what this sum

represents or consists of.

158. Neither party was able to provide a full and complete set of documents in relation to the respondent's two County Court claims against the claimant. We had only limited County Court documentation to refer to.

The law

Unfair dismissal

159. The relevant part of the Employment Rights Act 1996 is section 98 which states (so far as relevant):

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show-*
> *(a) the reason (or if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.*
>
> *….*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

160. In line with the Employment Rights Act it is for the respondent to prove the reason or principal reason for the dismissal. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' *(Abernethy v Mott, Hay and Anderson 1974 ICR 323)*.Thereafter the burden of proof is neutral as to the fairness of the dismissal (*Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT).*

161. Dismissal for capability can include dismissal on grounds of the employee's ill health.

162. If it is established that the reason for the employee's dismissal was ill health, the second limb of the test under s98(4) ERA comes into play: did

the employer act reasonably in treating ill health as a sufficient ground for dismissal? Where there has been a long term absence from work on sickness grounds the Tribunal should consider whether, in all the circumstances, the employer can be expected to wait any longer for the employee to return to work (Spencer v Paragon Wallpapers Ltd 1977 ICR 301). The Tribunal must balance the relevant factors in all the circumstances of the individual case. Such factors may include: whether other staff are available to carry out the claimant's work; the nature of the claimant's illness; the likely length of the claimant's absence; the cost of continuing to employ the employee; the size of the employing organisation; and the unsatisfactory situation of having an employee on very lengthy sick leave.

163. A fair procedure is required. This necessitates consultation with the employee, a medical investigation (to establish the nature of the illness and its prognosis), and consideration of other options, such as alternative employment within the respondent organisation.

164. Even if an employer does not have a written policy which provides for trigger points, after which the continuing absence will be dealt with formally, the employer should still hold formal meetings with the employee in order to establish the reasons for the absence and when the employee is likely to return to work. This usually involves consulting with the employee and obtaining medical evidence.

165. In deciding whether dismissal on account of ill health absence falls within the band of reasonable responses the Tribunal has to consider whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice (Monmouthshire County Council v Harris EAT 0332/14). The employer will be expected to adhere to the provisions of its long term sickness or attendance management policy in order to ensure procedural fairness. However, inconsequential departures from the policy will not necessarily be fatal to the fairness of the dismissal.

166. The consultation process in a long term absence process fulfils a number of different functions including establishing the true medical position, keeping the employer updated on the employee's progress and keeping the employee up to date with the employer's position, particularly if dismissal is being considered. East Lindsey District Council v Daubney 1977 ICR 566 highlights the central importance of consultation and obtaining proper medical evidence. Consultation may include discussions at the start of the illness and periodically throughout its duration and also informing the employee if the stage at which dismissal is being considered is approaching. It will include personal contact with the employee, consideration of medical evidence (and of the employee's opinion on their condition) and consideration of what can be done to get the employee back to work. Consultation will also often include considering offers of alternative employment within the business and, where appropriate, consideration of the employee's entitlement to enhanced ill-health

benefits. Failure to properly consult an employee may result in a finding of unfair dismissal.

167. In the case of an ill health capability dismissal the Tribunal shall decide the case on the facts taking into account the 'whole history' and whole picture. The Tribunal should consider all the relevant facts and circumstances in the case which will often include the nature of the illness, the likelihood of it recurring or some other illness arising, the length of the various absences and the spaces of good health between them. They will also include the need of the employer for the work done by the particular employee, the impact of the absences on others who work with the employee, the adoption and carrying out of the policy with an emphasis on a personal assessment in the case. The Tribunal will also consider the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the 'point of no return' may be approaching (Lynock v Cereal Packaging Ltd [1988] IRLR 510).

168. Employers have a duty to consider redeploying or transferring an employee who is not able to carry out some or all of their former duties due to ill health where alternative work exists that the employee may be able to do. There is no onus on employers to create a special job for the employee where none exists in order to avoid liability for unfair dismissal. A suitable vacancy may include a demotion, lower pay, or lower status, depending on the circumstances of the case. Alternative employment which arises during the notice period should also be considered.

169. If the employer was in any way responsible for the employee's illness that led to the dismissal (or for exacerbating such an illness) this may be a factor that is taken into account by a Tribunal when deciding on the fairness of the dismissal (Royal Bank of Scotland v McAdie 2008 ICR 1087). However, such responsibility or culpability on the part of the employer does not mean that the employer can never fairly dismiss that employee. It is not determinative of the fairness of the dismissal.

170. The effect of continued absence or illness on other employees may be relevant to the question of fairness. The same is true of the impact of the absence on output/level of service etc within the employer organisation. The Tribunal should also take into account of the size and administrative resources of the employer's undertaking in assessing reasonableness. This may help to show whether there are resources to cover the employee's absence and, if so, how long for. The nature of the job and of the employment may also have relevance to fairness.

171. In considering the so-called 'band of reasonable responses' the Tribunal must not substitute its own view for that of the reasonable employer (*Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT; Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA)*. 'The band of reasonable responses applies to the question of the procedural fairness of the dismissal as well as the substantive fairness of

the dismissal. (*J Sainsbury plc v Hitt 2003 ICR 111, CA; Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699, CA.*)

172. The reasonableness test is based on the facts or beliefs known to the employer *at the time of the dismissal*. A dismissal will not be made reasonable by events which occur after the dismissal has taken place *(W Devis and Sons Ltd v Atkins 1977 ICR 662, HL.)*

Section 26: harassment

173. Section 26 states:

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

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

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

176. The harassment has to be "related to" a particular protected characteristic. The Tribunal is required to identify the reason for the harassment with a particular focus on the context of the particular case. In Unite v Naillard [2017] ICR 121 the EAT indicated that section 26 requires the Tribunal to focus upon the conduct of the individual(s) concerned and ask whether their conduct is associated with the protected characteristic. In that case it was not enough that an individual had failed to deal with sexual harassment by a third party unless there was something about the individual's own conduct which was related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction. So long as the Tribunal focuses on the conduct of the

alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic. (See also Court of Appeal judgment in Naillard at [2019 ICR 28)

177. 'Related to' is not necessarily the same as 'because of,' the wording which is found in direct discrimination claims. It can import a looser connection or association (Hartley v Foreign and Commonwealth Office Services [2016] ICR D17. Whether the conduct relates to the protected characteristic requires an evaluation of the evidence in the round. The perception of the person who made the remark is not decisive.

178. As stated in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, *"...the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic, which is the connector used in the definition of direction discrimination found in section 13(1) of the 2010 Act. Put shortly, it is a broader, and, therefore, more easily satisfied test. However, of course, it does have its own limits…. whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative. These propositions, we think, derive from a pure consideration of the language of the statute, and have been articulated in previous authorities, including Hartley, O'Brien, and Nailard. It is important to note that much of the discussion in Nailard concerned whether there was harassment related to sex, by virtue of what is called the motivation of the particular individuals concerned, because that was the focus of the particular issue in that case. The Tribunal in that case, it was said, needed to focus on the motivation for the conduct of the employed officials, as opposed to that of the lay officials, about whose alleged conduct complaint had been made to the employed officials. 24. However, as the passages in Nailard that we have cited make clear, the broad nature of the "related to" concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute. 25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."*

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

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

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

As stated in Dhaliwal:

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

Section 27 victimisation.

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

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act…
>
> (2) Each of the following is a protected act –
>
> …
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

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

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

Burden of Proof

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

186. The wording of section 136 of the Act should remain the touchstone.

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

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

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

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

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

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

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

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

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

195. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The Employment Tribunal should examine whether or not the issue of less

favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the Tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the Tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

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

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

Unauthorised deductions from wages.

198. The provisions providing for protection against unauthorised deductions from wages are to be found in the Employment Rights Act 1996. Section 13 provides (so far as is relevant):

> *(1) An employer shall not make a deduction from wages of a worker employed by him unless-*
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised-
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

199. Section 14 provides (so far as relevant):

(1) Section 13 does not apply to a deduction from a worker's wages made by the employer where the purpose of the deduction is the reimbursement of the employer in respect of-
a. an overpayment of wages, or
b. an overpayment in respect of expenses incurred by the worker in carrying out his employment,
made (for any reason) by the employer to the worker.

…

(4) Section 13 does not apply to a deduction from a worker's wages made by this employer in pursuance of any arrangements which have been established-

(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has previously signified his agreement or consent in writing, or

(b) otherwise with the prior agreement or consent of the worker signified in writing,

and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.

200. The notion of 'wages' for the purposes of such a claim is defined in section 27 of the Act an including any sums payable to the worker in connection with his employment. This includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment' (s.27(1)(a).) These may be payable under the contract 'or otherwise.' Certain payments by employers to workers are specifically excluded from the definition of wages by section 27(2) and (5), meaning that a worker cannot seek recovery of such payments by bringing an unlawful deduction from wages claim under section 13. Any payment in respect of expenses incurred by the worker in carrying out his or her employment is excluded from the definition of wages (section 27(2)(b).)

201. If what was paid by the employer to the worker on the relevant occasion was less than the amount properly payable (applying common law and contractual principles), then there has been a deduction for the purposes of section 13(3). It is important to be aware that a 'deduction' under section 13(3) does not include deductions that are the result of an error of computation. This is because section13(4) states that section13(3) 'does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion'.

202. The phrase 'properly payable' suggests that some legal, but not necessarily contractual, entitlement to the sum in question is required. Deciding whether a worker has a legal entitlement to the payment in question will involve analysing the factual basis of the worker's claim. Determining what wages are 'properly payable' requires consideration of all the relevant terms of the contract, including any implied terms. The payment in question must be capable of quantification in order to constitute wages properly payable under section 13(3).

203. Section 13(2)(a) applies to written terms authorising deductions which have been entered into before the deduction has been made. The provision is satisfied if the employer gives a copy of the contract containing the relevant term to the worker. There would, however, appear to be no requirement under section 13(2)(a) that the worker's attention is drawn to the specific contractual provision(s) authorising the deduction. This can be contrasted with section 13(2)(b), which provides that the employer must notify the worker about the existence and effect of the specific term(s). So, for example, where there is a written term authorising a deduction contained in a staff handbook, the employer must ensure that, prior to the deduction, the worker has either received a copy of the handbook (section

13(2)(a) or been notified in writing about the existence and effect of the term (section 13(2)(b).

204. Section 13(2)(b) permits deductions authorised by a contractual term (or terms) whose existence and effect the employer has notified to the worker. Unlike section 13(2)(a), there is no need for the contractual term itself to be in writing. Such terms may be express or implied. However, the existence and effect of the relevant term must have been notified to the worker in writing prior to the deduction. Thus, an oral agreement to a deduction will satisfy section 13(2)(b) (and hence section 13(1)(a)) so long as the worker is given written notification before the deduction is made.

205. The final way that a deduction may be permitted under section 13 is where the worker has signified agreement in writing in advance of the deduction (section 13(1)(b)). There is a certain amount of overlap between section 13(1)(b) and the second limb of S.13(1)(a). If a worker has signified agreement in advance to a deduction, this would, as a rule, form a 'relevant provision' of the contract. It would seem that S.13(1)(b) was intended to cover situations where such an arrangement is clearly not a term (either oral or written) of the main employment contract and arises in a separate way (for example, a collateral agreement in respect of a loan that the worker agrees to pay back via deductions from wages.) It can also cover the situation where workers signify in correspondence that they consent to particular deductions.

206. By virtue of section 13(5) and (6), authorisation of, or consent to, a deduction cannot have retrospective effect, at least where that authorisation is brought about by a contractual variation or a worker's written consent. Section 13(5) states that where a worker's contract is varied to include a provision authorising a deduction, that provision cannot authorise the making of a deduction on account of any event or conduct that occurred before the variation took place. Section 13(6) makes more or less identical provision in respect of a worker's written consent to a deduction. This means that an employer cannot gain authorisation for a deduction after the event which gave rise to the deduction has taken place, whether the event is the worker's conduct or anything else. A contractual variation or a worker's written consent can only lawfully provide for deductions in respect of conduct or events happening in the future. However, in respect of contractual provisions, although the provision must be agreed prior to the event giving rise to the deduction, the copy (section 13(2)(a)) or written notification (section 13(2)(b)) of that provision need only be given to the worker prior to the actual deduction being made.

207. There is a further exception to section 13 where an employer deducts and pays over to a third-party sums which that third party has notified the employer as being due to it from the worker (section 14(4).) For this exception to apply, the arrangements for making such deductions must have been set up: in accordance with a relevant provision of the worker's contract to the inclusion of which in the contract the worker has signified consent in writing; or otherwise with the prior agreement of the worker in writing.

Res judicata

208. In this case the claimant's claim for unauthorised deductions from wages raised potential issues of res judicata because of the existence of prior County Court proceedings. These related to the respondent employer pursuing the claimant in the County Court for repayment of sums outstanding in respect of overpayment of wages and outstanding lease car payments. Respondent's counsel provided the Tribunal with a section from Practical Law on the issue of res judicata/estoppel. The salient points are summarised in the following paragraphs.

209. Res judicata has two main branches: cause of action estoppel and issue estoppel. The doctrine of abuse of process is a separate concept which sometimes arises in similar circumstances or overlaps with res judicata in a particular set of circumstances. Res judicata should be considered prior to any arguments about abuse of process/*Henderson v Henderson* principles. If res judicata arises it will provide an absolute bar to a matter being raised in the subsequent litigation unless fraud or (for issue estoppel only) fresh evidence or change in the law can be shown.

210. The main definition of res judicata is:

"A res judicata is a decision, pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter(s) so decided, so that except on appeal it cannot be relitigated between the parties or their privies"(from Res Judicata, 4th edition, (Spencer-Bower & Handley, 2009).

211. In Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd) [2013] UKSC 46, Lord Sumption gave guidance on the meaning of res judicata (although his guidance merged various principles. The following points can be noted:

- Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins.
- The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is cause of action estoppel. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. So a party may not bring subsequent proceedings to challenge an earlier outcome.
- The second principle is that where the claimant succeeded in the first action and did not challenge the outcome, they may not bring a second action on the same cause of action, for example to recover further damages.
- Thirdly, a cause of action is treated as extinguished once judgment has been given upon it, and the claimant's sole right is then a right upon the judgment: this is the doctrine of merger. The cause of action is extinguished, and the claimant is prevented from bringing another set of proceedings to enforce that cause of action. It is effectively res judicata. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action.

- Fourthly, even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both and which had been decided on the earlier occasion may be binding on the parties. This is issue estoppel. It means that a party may not bring subsequent proceedings on an issue that has already been determined.
- Fifthly, a party is precluded from raising in subsequent proceedings matters which were not, but could and should have been raised in earlier proceedings. This is the principle of *Henderson v Henderson.*
- Finally, there is a general procedural rule against abusive proceedings which could be regarded as the policy underlying all of the above principles, with the possible exception of the doctrine of merger.

212. A party may be bound by an earlier decision affecting another party where there is a sufficient degree of identification, or privity, between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party (per Megarry VC in Gleeson v J Wippell & Co Limited [1977] 1 WLR 510, at 515). Megarry VC went on to comment that for privity with a party to proceedings to take effect, it must take effect whether that party wins or loses.

213. In *Gleeson at* [515], Megarry VC formulated the test for a "privy in interest" as follows:

> *"Privy … is not established merely by having 'some interest in the outcome of the litigation.' … [T]he doctrine of privity for this purpose is somewhat narrow and has to be considered in relation to the fundamental principle nemo debet bis vexari pro eadem causa …. I do not think that in the phrase 'privity of interest' the word 'interest' can be used in the sense of mere curiosity or concern …. I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party".*

This category of privies has been called "*Gleeson privies*".

214. In Arnold v National Westminster Bank plc [1991] 2 AC 93, Lord Keith said:

> *"Issue estoppel may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."*

He also said that:

"Cause of action estoppel applies where a cause of action in a second action is identical to a cause of action in the first, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, the bar is absolute in relation to all points decided, unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in earlier proceedings does not permit the matter to be re-opened".

215. Cause of action estoppel and issue estoppel continue to operate even if one of the parties later states that the original decision was wrong. If they consider it was wrong, it should be challenged on appeal, or not at all.

216. *Arnold* indicates that an issue (but not a cause of action) which has been decided (or ought to have been decided) in previous litigation can be reopened if there is fresh evidence, but only if that evidence:

- Entirely changes that aspect of the case.
- Could not by reasonable diligence have been discovered previously by the party wishing to put that evidence before the court.

An issue (but not an entire cause of action) may also be reopened in the event of a change in the law subsequent to the original decision indicating that the earlier decision was wrong. Otherwise, there is a bar on the subsequent proceedings unless fraud or collusion in relation to the original proceedings is alleged. There is an absolute bar to advancing an identical cause of action unless it can be shown that the original judgment was obtained by fraud.

217. Cause of action estoppel arises when the court has determined a claim by judgment. Issue estoppel applies whenever a judgment has been made in litigation that determines an issue. A default judgment creates cause of action estoppel but *not* issue estoppel since no issue has been determined.

218. It can be difficult to ascertain precisely what was involved in an earlier decision for the purposes of issue estoppel (for the requirement that the issue was a necessary ingredient in the cause of action being advanced). In Carl Zeiss Stiftung v Rayner and Keeler Limited (No 2) [1967] 1 AC 853, Lord Wilberforce suggested that one way of answering this was to say that any determination is involved in a decision if it is a "necessary step" to the decision or a "matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision". It follows that one needs to consider not merely the record of the judgment relied on, but the reasons for it, the pleadings, the evidence, and if necessary, other material, to show what was the issue decided. The fact that the pleadings and the evidence may be referred to, suggest that the task of the court in subsequent proceedings must include that of satisfying itself that the party against whom the estoppel is set up did actually raise the critical issue, or possibly, that they had a fair opportunity, or that they ought, to have raised

it. Aldous LJ in Kirin- Amgen Inc v Boehringer Mannheim GmbH [1997] FSR 289, 303 suggested that the justification which underlies the way in which issue estoppel is confined is that a party should not be bound to a finding of fact where that party had no need to produce evidence to contradict that fact, and he confirmed that the issue estoppel rule is that *"only determinations which are necessary to the decision which are fundamental to it, and without which it cannot stand, will found issue estoppel. Other determinations without which it would still be possible for the decision to stand, however definite the language in which they are expressed, cannot support an issue estoppel.*

219. For both types of estoppel, it does not generally matter whether the judgment was made by consent or after argument (Lennon v Birmingham City Council [2001] EWCA Civ 435). (However, settlement brings up certain other considerations.)

220. In Nopporn Suppipat and others v Nop Narongdej and others [2023] EWHC 1988 (Comm) (31 July 2023), the court agreed that an issue estoppel did not arise as a result of a tribunal's award (and the defendants could only therefore rely on abuse of process). At 1064, the court confirmed that, to establish an issue estoppel, it would be necessary to prove the following:

- The determination of the issue must be necessary for the decision. In other words, was the issue an essential step in the reasoning of the first tribunal or was the determination so fundamental that the decision cannot stand without it? (See *Spencer Bower & Handley, paragraphs 8.01 and 8.24*.)
- That the determination of that ultimate issue was clear. That requirement is even more important when the original determination is said to have been made by an arbitration award. Consistent with the distinct roles of the court and the arbitral tribunal, and the policy expressed in s.1(c) of the Arbitration Act 1996, as Gross J noted in *Norsk Hydro ASA v State Property Fund of Ukraine [2002] EWHC 2120 (Comm)*, [17]-[18] the court will not second-guess the intentions of the arbitration tribunal or "stray into the arena of the substantive reasoning and intentions of the arbitration tribunal" where the relevant issue is not crystal clear on the face of the award".
- That the issue is substantially the same in both sets of proceedings (see *Carpatsky Petroleum Corp v PJSC Ukrnafta [2020] Bus LR 1284* at para 122 per Butcher J).

In this case, the court was being asked to determine an issue which, in the event, the tribunal decided not to determine, namely whether a fraudulent representation was made. The issue determined by the tribunal was a different issue to that which fells for determination before the court.

Conclusions

Unauthorised deductions from wages

221. As set out above, the claimant says that he is owed £7324.01 in respect of deductions from final salary, although he cannot state how that sum is calculated or what elements it is comprised of. The respondent says it was entitled to make the deductions that it did because the claimant had been overpaid in respect of his sick pay entitlement and because the respondent was entitled to claw back the outstanding unpaid charges incurred in relation to the claimant's lease car.

222. Before the Tribunal addresses whether the deduction was lawfully made, there is a further legal argument to consider. The claimant, in essence, relied on some form of res judicata doctrine. He asserted that both of the respondent's County Court claims have failed in relation to the same subject matter. He asserted that the County Court had already ruled on whether the respondent was entitled to claim back overpayments of sick pay and outstanding lease car charges. He maintained that because the respondent's County Court claims had been dismissed, this Tribunal was bound by the County Court outcomes such that we could not find, contrary to those County Court decisions, that the respondent was entitled to make the deductions in question. He argued that the outcome in the Employment Tribunal could not contradict the earlier outcome in the County Court. In such circumstances, he argued, the Tribunal was not permitted to find that the deductions from salary were lawfully made. Consequently, he argued, he was entitled to an order from the Tribunal requiring the respondent to repay those sums already deducted. In essence, the respondent either had to succeed in both the County Court and the Employment Tribunal or fail in both jurisdictions. He argued that the respondent could not be permitted to fail in one and succeed in the other.

223. During the course of the hearing we asked the parties to provide us with any relevant documentation or evidence in relation to the County Court claims so that we could examine whether any doctrine of res judicata could apply in this case. As the respondent had engaged a separate firm of solicitors to deal with the County Court litigation, counsel did not have access to the full file of papers in relation to that County Court litigation. However, some papers were provided by the parties and we have considered them to see what impact they have on this Employment Tribunal case.

224. We had regard to documents in relation to a County Court claim under claim number H4AH468J. The documentation seemed to suggest that the amount claimed was £6607.36. The content of the evidence suggested that the amount related to overpayment wages on the basis of incorrect weekly hours (i.e. the sick pay based on a 21 hour week as opposed to a 14 hour week.) We were presented with a "General Form of Judgement or Order" from Carlisle County Court dated 5 September 2022 referring to

proceedings before a Deputy District Judge on 25 August 2022. It appeared that the solicitor's agent for the NHS Trust (the respondent in the Tribunal case) and the claimant, Mr Waluk, had attended court in person. The order simply read that the claim was dismissed. No reasons or judgment were provided. There was nothing to indicate that there had been a trial or that the substance of the claim or the defence had been considered by the court prior to entry of the judgment.

225. The other County Court proceedings were registered under claim number H6AH8D3M. These proceedings seem to have been a claim in the sum of £1056.51, being the monies due under the hire agreement for the lease car and which had not been deducted from the claimant's salary at source. Those proceedings came to a conclusion according to a further General Form of Judgment or Order from Carlisle County Court, this time dated 2 August 2022. The order was issued without a hearing by the District Judge and the document stated "Upon the Court considering the file and noting that the Claimant [*in this case the NHS trust*] failed to comply with paragraph 2 of the Order dated 12 July 2022 (but made on 27 June 2022) it is ordered that: 1 . The claim is struck out. 2. The DRH listed on 12 August 2022 is vacated. 3. This order has been made by the Court of its own motion under CPR 3.3."

The Order concluded with the usual paragraph permitting parties affected to apply to have the Order set aside varied or stayed by making an application within seven days. Again, therefore, those proceedings came to a conclusion without a trial or the provision of a fully reasoned judgement on the merits of the claim or defence.

226. In determining this issue the Tribunal had regard to the case law guidance and applicable legal principles in relation to cause of action estoppel and issue estoppel, as set out above. This indicates that a default judgement or administrative judgement results a *cause of action estoppel* but does not lead to an *issue estoppel*. This is because the earlier judgment does not address the merits of the case. It just brings the proceedings to a conclusion without consideration of the merits. No findings of fact are made and no issues are adjudicated upon by the prior court. There are, therefore, no findings or conclusions from the earlier court which can operate to bind the successor court (in this case the Employment Tribunal).

227. So where does this leave the current proceedings? The County Court claim regarding overpayment of sick pay was dismissed. This created a cause of action estoppel between those two parties (the current claimant and respondent) in relation to *that* cause of action. Those parties would not be able to re-litigate a claim for breach of contract/repayment of debt brought by the Trust against its former employee. However, the unauthorised deductions from wages claim in these Employment Tribunal proceedings is a *different cause of action* albeit one which arises out of the same factual chronology. It is a statutory cause of action arising from the Employment Rights Act 1996 rather than a common law claim. The correct legal forum for this statutory claim is the Employment Tribunal and not the County Court. The current claim in the Tribunal for unauthorised deduction from wages in relation to deductions of sick pay therefore does not engage cause of action estoppel arising out of the County Court proceedings. The two sets of proceedings relate to two different causes of action and two different jurisdictions. The Tribunal claims are not determined by the

doctrine of cause of action estoppel. Cause of action estoppel is not offended by the Tribunal claims. The Employment Tribunal is not precluded from rejecting or upholding an unauthorised deduction from wages claim brought by the employee against the employer, merely because the employer's claim for breach of contract/debt has been dismissed in the County Court. We are entitled to decide the case on the evidence and its merits.

228. Furthermore, the County Court claims *did not create an issue estoppel* because no findings of fact were made and no disputes or issues were resolved on the merits in the County Court. There is no judicial reasoning to bind the Tribunal. There is nothing to bind this Employment Tribunal on the issues in these proceedings. If issue estoppel does not arise, then the Tribunal claims must be determined on the evidence and their own merits.

229. We therefore conclude that we are not prevented from adjudicating on the merits of the unauthorised deduction from wages claim or forced to uphold the claimant's claim on this issue because of those earlier County Court proceedings.

230. Likewise, the judgment in the County Court claim relating to payments for the lease car creates a cause of action estoppel in a debt or breach of contract claim but not in relation to a claim for unauthorised deductions from wages in the Employment Tribunal. The parties to the two cases are the same but the legal cause of action is different in the two sets of proceedings. Likewise, there is *no issue estoppel* as no judgment or findings were made on the merits of the County Court claim. There is nothing to tie the hands of this Tribunal in that regard.

231. Having satisfied ourselves that we are not fettered by any estoppel from the County Court proceedings, we can consider the unauthorised deduction from wages claim on its merits. We struggled to be satisfied that the claimant had, in fact, demonstrated an entitlement to the circa £7000 that he claims. He has he has not been able to provide a breakdown of what the sum claimed represents. However, we have to assume, given that the respondent apparently makes the payment and then deducts it in the same pay slip (see above), that the respondent understood that (in the absence of a deduction from wages) the £7000 reflected an entitlement to salary on the claimant's part.

232. We therefore considered whether the respondent was entitled to make the deduction that it in fact did. The evidence is clear in this regard. Taking the lease first, all of the evidence shows that the claimant retained his lease car throughout the relevant period and obtained the benefits of that lease car without paying his portion of the applicable lease charges. In the normal course of events, those sums would have been picked up and deducted, at source, from the claimant's monthly pay slip. The sums outstanding would not have been able to accumulate. The lease contract and the employment contract, when taken together, entitled the respondent to recover those sums from the claimant. He agreed to the charges being deducted from his wages when he signed the hire contract. The respondent was not bound to incur the liability to the lease company without recovering those sums from the employee. In the absence of

deductions at source over a period of months, the last opportunity for the respondent to claw back the relevant sums came at the end of the claimant's employment (i.e. the final pay slip.) We are satisfied, therefore, that the respondent was entitled to claw back the lease payments and that deduction was properly made under the contract and the written agreement (section 13(1)(b) and further/alternatively section 14(4).) This portion of the claim by the claimant must therefore fail.

233. Likewise, the Tribunal is satisfied that the claimant's hours of work reduced from 21 hours per week to 14 hours per week. Whatever the original intention as to whether they should be temporary, this state of affairs never changed. The claimant continued to work according to a 14 hour contract and did not protest. In fact he sought to reduce his hours still further to 6 hours per week. His pay and benefits therefore should have been calculated in line with a 14 hour week. That was his entitled under the contract of employment. To the extent that he received pay and benefits based on a 21 hour week he was overpaid (section 14(1) Employment Rights Act 1996). In those circumstances the respondent was entitled to make the deduction to reflect that overpayment and in fact did so. The claimant has no right to claim repayment as section 13 does not apply in such cases. On that basis, the claimant's claim for unauthorised deductions from wages must fail.

Unfair dismissal

234. In relation to the claimants claim of unfair dismissal, the Tribunal is satisfied that the reason for dismissal was the claimant's ill health capability. The claimant had clearly been absent from work for a considerable period of time as set out in the documents and correspondence produced by the decision-makers at the respondent Trust. Furthermore, both the claimant's own evidence that the from the occupational health practitioners, indicated that the claimant would not be able to return to his substantive post. By the end of the chronology the claimant had had 511 days of continuous absence plus an earlier period of absence. We are satisfied that the decision to dismiss was not premature and there was no obligation on the respondent to wait for a further period of time in order to see if there might be any material changes which might make it appropriate to retain the claimant in his employment.

235. The respondent went through a thorough, detailed, and protracted process in order to give the claimant every opportunity to return to work. It sought the claimant's views and consulted with him. It followed the advice that was presented to it by Occupational Health in so far as it was able to.

236. The claimant emphasised the fact that there were initially no review meetings with him the in the early weeks of his *first* sickness absence. The Tribunal has reviewed this in the context of the process as a whole and has concluded that this does not render the dismissal unfair. The period of time that the claimant is referring to is relatively early in the chronology and relates to an earlier period of sickness absence, not the one which immediately preceded his dismissal. By the time the respondent decided to terminate the claimant's employment, this period of time is of less

relevance. The earlier gap in communication has been effectively superseded by the procedure deployed in relation to the later absence and in the run up to the dismissal itself. Any earlier defect had been effectively rectified by the full procedure used by the respondent later in the chronology in relation to the later, extended period of absence. The respondent complied fully with its policies and processes during the later period of absence (which is most relevant for the purposes of the unfair dismissal claim.)

237. On the claimant's own case, the only alternative to dismissal was redeployment. The claimant was put through a lengthy redeployment process. His entitlement (pursuant to the respondent's own policies or procedures) was to be placed on the redeployment register for 12 weeks. In the event, he was on the redeployment register for considerably longer than this entitlement. During the redeployment period the respondent did all that it could to identify potential suitable alternative employment for the claimant. Those efforts were hampered by the narrow search parameters stipulated by the claimant. Rather than maximising his chances of success, those parameters minimised his prospects of redeployment. The respondent asked him to reconsider his parameters to relax them in order to help his chances of redeployment but he refused to do so. The respondent was not in a position to go behind the claimant's own stated parameters and enforce some of form of employment on him.

238. During cross examination the claimant would not accept his redeployment requirements and parameters were narrow. He stated that the requirements were recommended by his psychotherapist but he did not provide evidence to substantiate that assertion. There was no such evidence available, either during the redeployment process or during the Tribunal hearing.

239. The claimant expressed an interest in a trainee biomedical scientist role and also a fire safety adviser role during the redeployment process [282]. The claimant did not appear to disagree with respondent's position that he did not meet the essential criteria. The claimant also expressed an interest in a Clinical Effectiveness and Audit Facilitator role. Although the claimant suggested that he was qualified to carry out the role, we are satisfied that the evidence established that it was reasonable not to progress the application given that the respondent's Head of Quality Improvement and Effectiveness considered that the claimant did not meet the essential criteria [302]. The claimant also expressed an interest in an Endoscopy role for which he wasn't considered suitable (and the claimant did not refute that suggestion during cross examination.) The only other role that the claimant expressed an interest in was outside the respondent Trust and it is not clear whether or not he applied [282]. In addition to this, the respondent offered the claimant the opportunity to express an interest in positions of Living Well Coach and Facility Supervisor but the claimant was not interested in either role [283].

240. Having reviewed the available evidence the Tribunal finds that the respondent was entitled to conclude that the claimant did not meet the minimum essential criteria of the two jobs he wanted. The respondent was entitled to rely on the evidence of the recruiting manager, who would be best placed to comment regarding the essential criteria. If the claimant is

seeking to suggest that the respondent did not want to redeploy him, the Tribunal has to question why the respondent would bother asking the claimant to be more flexible in his redeployment criteria. Why would the respondent do this (and thereby seek to increase the chances of the claimant being retained in employment) if the managers were not genuinely trying to redeploy the claimant? Likewise, they gave him more than twelve weeks on the redeployment register. If they did not wish to retain him in employment this would be a strange thing to do as it would improve the prospects for successful redeployment and retention. At most stages of the process the claimant received more than the formal entitlement under the respondent's internal procedures.

241. There was a continuing obligation on the claimant to keep a look out for new alternative employment during the redeployment period. He did make some searches but his efforts were not sustained during the entirety of the period. The claimant located three jobs that he was interested in. However, we are satisfied that one of those three jobs was not within the respondent Trust and therefore could not be provided to him as suitable alternative employment. In relation to the other posts, the respondent was entitled to test whether the claimant met the essential requirements of the role before slotting him preferentially into position. The best available evidence came from the recruiting manager and the evidence of the job descriptions. We are satisfied that the claimant did not meet the essential requirements and therefore the respondent was entitled not to redeploy him into those roles.

242. In light of our findings of fact, we conclude that the respondent undertook a full, fair, detailed, and thorough process leading to termination of employment. It addressed all the issues raised by the claimant in a fair manner. He was given manifold opportunities to put forward his case in order to avoid dismissal.

243. The claimant was also given the opportunity to appeal the decision to dismiss and we are satisfied that the appeal process was similarly fair and thorough and that the appeal decisionmaker came to a decision which was reasonably open to them.

244. The respondent followed its own procedures and general principles of fairness. In the circumstances the respondent could not be expected to retain the claimant in his substantive post given the circumstances and the fact that he would not be able to return to that job at all within a reasonable period of time. The claimant's protracted absence from work would doubtless have had an adverse impact on the rest of the workforce and upon the respondent's ability to maintain appropriate levels of service to patients.

245. The claimant also took the opportunity to raise a grievance prior to the final absence review meeting. We find that the respondent acted fairly and within the range of reasonable responses in deciding to address the grievance as part of the sickness absence review process, as there was a large degree of overlap between two issues. It would not have been practical or reasonable to hold a separate grievance process in the circumstances.

246. We are further satisfied that the respondent approached the grievance in a fair way. The claimant was given every opportunity to put forward his grievance points and these were thoroughly investigated and adjudicated upon (particularly given the potential problems posed by the passage of time since the events about which he complained.) The respondent carried out a reasonable investigation and sought to consider all available relevant evidence. The respondent came to a conclusion that it was entitled to reach based on the available evidence. It was entitled to conclude that the grievance should not be upheld and that it was not substantiated.

247. In particular, in addressing some of the factual assertions and allegations made by the claimant, the Tribunal was satisfied that the respondent was in the process of deploying HCPs within the service and that such employees would undertake the majority of the care work tasks, leaving Rehabilitation Assistants free to focus more on the rehabilitation elements of their roles. Even so, the Tribunal did not accept that the claimant was doing personal care work (such as emptying commodes) for all or the majority of his working time. He was carrying out the role of Rehabilitation Assistant according to the job description and job banding. He would sometimes have been required to carry out personal care tasks ancillary to his primary role. This would be true of all staff carrying out such roles and was an element of the overall job role which could not reasonably be removed entirely from the post. The Tribunal also noted that the claimant was absent from the workplace for a considerable period of time and so would not have observed the changes that had taken place within the workplace during that time. For example, he would not have seen HCPs undertaking personal care tasks. He might, therefore, have been sceptical about whether HCPs would actually carry out these tasks as he would not be present to observe this personally. However, we are able to accept the respondent's evidence on this and to accept that the Rehabilitation Assistants would have less personal care work to do once the HCPs were deployed (although we heard evidence and accept that the claimant's team was one of the last to receive the assistance of HCPs.) In any event, the Tribunal accepts that the needs of the patient cohort would fluctuate over time. Sometimes there would be a higher demand for personal care tasks. This does not mean that the claimant was being asked to do something other than his Band 3 Rehabilitation Assistant role.

248. We also accepted the respondent's evidence regarding the cleaning of the pool car. There was no evidence to suggest that the claimant was being treated unfairly or singled out for extra tasks which others in his job were not required to complete. He main job role would always take priority. The cleaning of the pool car was a shared task to be undertaken as and when time allowed.

249. In relation to the need to wear a uniform or NHS logo the Tribunal noted that the claimant never gave factual specifics about the treatment he says he received from colleagues which he says was linked to his need to avoid the logo. He made repeated references to 'behaviours' in the team but he gave no evidence of specifics as to who had done what, where, and when. The claimant made no clear factual allegations either to the respondent or to the Tribunal. It is therefore difficult for the Tribunal to accept, in the absence of evidence, that there was actually a de facto link between the requirement to wear a logo and the re-triggering of old traumas from the

workplace. The claimant says there is such a link but he never provided any evidence to support this to the respondent or the Tribunal. We never heard from the claimant's therapist to confirm the link.

250. In any event, even if there was a link between trauma and logo, the respondent has given clear and persuasive evidence to explain why it was important that all employees wear the logo so that they were clearly identifiable as NHS employees when they visited patients in their own homes. We were satisfied that the respondent was permitted to prioritise this identification need over the claimant's stated (but unsubstantiated) need to avoid the trauma of contact with the NHS logo.

251. We also find that the respondent was entitled to conclude that clients were never asked about the nationality of carers. The only question which might arise related to the sex of the person providing care. Given the personal and potentially intimate care which is referred to, there is a logical reason why such questions might be asked. There is no real evidence to suggest that patients were asked about nationality preferences. Nor is there any sensible reason why such questions would be asked.

252. The claimant led a good deal of evidence about the respondent's failure to facilitate his job shadowing with the Occupational Therapists. There was no evidence that the respondent had failed to facilitate this. The onus was on the claimant to approach the Occupational Therapists in order to make appropriate arrangements. They had no reason to refuse him the opportunity to shadow them and there is no evidence of any such refusal. If the shadowing did not take place, it is because the claimant did not take up the offer and make the necessary arrangements.

253. Overall, when looking at the fairness of the dismissal the Tribunal concluded that the respondent could not be required to wait longer for the claimant to return to work. The respondent was entitled to take account of the adverse impact of his absence on service delivery and his remaining colleagues. Even a flexible and patient employer is entitled to bring such a sickness absence process to a conclusion eventually. The respondent obtained as much occupational health evidence as it could. The claimant never filled in his stress risk assessment. The respondent took reasonable steps to obtain suitable alternative employment for the claimant. Indeed we note that the claimant gave evidence that he actually wanted promotion to a higher band as part of the redeployment. This gives some indication that the claimant had unreasonable expectations of the process.

254. In light of all the foregoing the Tribunal is satisfied that the decision to dismiss the claimant fell squarely within the range of reasonable responses for the purposes of section 98(4) of the Employment Rights Act 1996. The decision to dismiss was both procedurally and substantively fair. The claim of unfair dismissal therefore fails and is dismissed.

<u>Victimisation</u>

255. For the purposes of the claimant's victimisation claim he asserted that the

did a 'protected act' in that he reported to management that staff had unlawfully administered medication. The Tribunal was not satisfied that the claimant in fact did a protected act. There was no real evidence to support his case in this regard (whether oral or written.) The facts underlying the assertion of the protected act are not proven. We are mindful of the fact that section 27 of the Equality Act defines what constitutes a protected act. Looking at the protected act (as set out in the list of issues) it does not appear to be a protected act even on the basis of the claimant's pleaded case. Even if the claimant had proven the factual assertion, a report that staff had unlawfully administered medication is not, without more, a protected act. It does not intrinsically make reference to the Equality Act or allege a form of discrimination so as to bring it within the statutory definition (e.g. section 27(2)(d).) Indeed, we have no evidence that he had made such a report. The highest we could place the evidence was in relation to the medication audit which the claimant carried out. It was accepted by the respondent's witnesses that he had carried out such an audit although they were not aware of what had happened to it once it was completed. We were referred to a number of PowerPoint slides within bundle. These appeared to be from the presentation setting out some of the observed shortcomings in the medication administration protocol that the claimant identified. However, on reviewing them there is nothing within the slides themselves which constitutes a protected act for the purposes of the Equality Act. We remind ourselves, that this is not an allegation of protected disclosures (i.e. a whistleblowing claim). We must be careful to apply the correct legal test to the case because the fact that an audit may suggest a breach of a legal obligation (or that health and safety measures could be improved, or that the respondent's protocols should be improved) does not mean that a protected act has been done by the claimant according to the definitions within the Equality Act at section 27.

256. As the claimant failed to prove a protected act, his claim for victimisation has to fail and be dismissed. Issues of the shifting burden of proof do not arise in such circumstances.

257. Further, the claimant relied on two alleged detriments in his victimisation claim. The first of these was the respondent requiring him to wear a uniform with an NHS logo. The second was the respondent refusing to make a permanent reduction to the claimant's hours. We pause to note that the allegation regarding the uniform does not sit comfortably with the evidence which we have heard. The claimant was not, in fact, required to wear a uniform. He was required to wear an NHS logo (on a polo shirt) in order to return to work in the roles that he was considering. We have already set out above what we made of the arguments in this regard.

258. Even if the claimant had succeeded in establishing that he had done a protected act, we would not have been satisfied that he was subjected to the "detriment" regarding the NHS logo because he had done a protected act. It is clear and evident from the evidence before us that there were other sound organisational reasons why an NHS logo was required. These had nothing to do with the claimant's individual circumstances, still less any protected act he had committed. We would have been able to make a direct finding about this based on the evidence before us. This aspect of his victimisation claim would therefore have failed for lack of causation in any event. The alleged detriment was nothing to do with any asserted

protected act by the claimant.

259. The second alleged detriment (i.e. the refusal to make permanent reduction to the claimant's hours) is also at odds with the evidence we have heard. The claimant has presented his case on the basis that he was opposing a permanent reduction in his hours. He did not want to have his hours permanently reduced to 14 hours per week. On the other hand, the detriment, as pleaded, (i.e. using the word 'refuse') suggests that, in fact, the claimant *wanted* a reduction in his hours. These two positions are inconsistent and contradictory. In any event, based on our findings of fact it is apparent that the respondent did *not* refuse to make a permanent reduction in the claimant's hours. Rather, it did permanently reduce his working week to 14 hours. To the extent that the claimant wanted a further reduction to 6 hours per week the respondent's rationale for refusing this was clearly set out at the time. In essence, six hours was insufficient time for the claimant to make a meaningful contribution to the requirements of his role. That is to say, a six hour working week was not operationally viable for the respondent. The respondent had good reasons for the claimant's hours which had nothing whatsoever to do with any alleged protected act. Therefore, the alleged detriment would not have been causally related to any protected act (if such had been proved) and so this aspect of the victimisation claim would also fail.

260. In light of the foregoing the claimant's claim for victimisation fails and is dismissed.

Harassment

261. In determining the complaint of harassment the Tribunal first tried to identify the unwanted conduct relied upon by the claimant in relation to the complaint of harassment. In the list of issues, the 'unwanted conduct' was said to be the respondent writing to the claimant in relation to overpayment of salary. However, during the course of the hearing the claimant did not clearly refer to the documents or matters on which he relied in this regard. During our deliberations we sought, with some difficulty, to identify the correspondence which he may or may not be referring to. Paragraph 19 of the claimant's witness statement said: *"Despite my several requests, while of sick, NHS demanded me to pay back money which I never owed. They have referred me to Debt Collection Agency. I was crying and begged them for not contacting me until I will get mentally better, but they didn't listen. Finally, the NHS applied to the Court and created two cases against me. One case was struck out and the other was dismissed. In the meantime NHS deducted money from my final wages. I never recover those funds back."* As the unwanted conduct is said (in the list of issues) to be the *respondent* writing to the claimant in relation to overpayment of salary, it appears that correspondence from the third party debt recovery company is not the correspondence he relies upon. It also appears that he was not relying on the County Court claims themselves (or the County Court claim forms etc) as the unwanted correspondence. We looked at the

conversation that the claimant had with Christine Stewart on 3 July 2020 [569.] However that is not 'correspondence': it is not a letter from the respondent to the claimant. Furthermore, when one examines the content of the conversation, it did not reflect the respondent writing to the claimant regarding the overpayment of salary. Rather, the claimant raised the issue with Ms Stewart who counselled him not to ignore the correspondence he was receiving from the debt recovery agency. This conversation happened *after* the issue had been raised with the claimant by a third party. The substance of the conversation appears to have been supportive towards the claimant rather than being 'unwanted conduct.' For all those reasons we were not satisfied that this was the unwanted conduct relied upon by the claimant for the purposes of the harassment claim.

262. The Tribunal also considered page 216 in the bundle. This was the outcome letter from Kerry Harmer after the long-term absence review meeting on 10 September. That correspondence provided an explanation for the sums claimed by the respondent. Aside from the fact that it was not telling the claimant what he wanted to hear, there was nothing intrinsically objectionable about the manner in which Ms Harmer wrote to the claimant. It is possible that this is the 'unwanted conduct' (or part of it) that the claimant is relying for the purposes of his harassment claim, although it is not clear that he took the respondent's witnesses to it and put it in these terms during the Tribunal hearing.

263. The other potentially relevant document is the email page 498 regarding overpayment to which we have already referred. Again there was nothing particularly objectionable in the terminology and language used. It is an explanatory email.

264. In order for the claim of harassment to succeed, the Tribunal must find that the unwanted conduct was related to disability. We have taken full account of the current state of the case law as set out above. We are aware that it is a matter for us to determine as a finding of fact, drawing on all of the evidence available to us. We recognise that we do not need to consider whether the unwanted conduct is "because of" the disability. That would be to import the causation test from direct discrimination (section 13). The test to be applied in a complaint of harassment requires only a loose connection. But there must nevertheless *be* a connection. It is more of a "connection with" or "association with" the disability. We must be able to establish the features of the factual matrix that properly lead us to a conclusion that the conduct is related to the disability. We have reminded ourselves that the fact that the claimant thinks there is a link is not determinative. We have also reminded ourselves that we are not making a finding about the motives or motivations of the alleged harasser.

265. We have asked ourselves, on the facts of this case, whether the disability is relevant to the alleged unwanted conduct. Is it a relevant part of the factual matrix in this case or is it a coincidence that the issue arose during sick leave where the claimant was absent from work for reasons connected to his disability? We are satisfied that it was certainly not the respondent's motivation. The respondent acted to claw back monies to which it was entitled. It was a purely mechanistic, practical financial reconciliation of the accounts at the end of an employment relationship. We were concerned that to make the connection between the unwanted conduct and disability

bordered on accepting an argument that anything done to a disabled person which is unwanted, must be "relating to' the disability. However, the mere fact that the recipient of the conduct is disabled does not make the conduct itself 'related to' the disability. We need to look at the conduct and the actions of the alleged 'harasser.'

266. The Tribunal has looked for the evidence in this case to support relevant link between the unwanted conduct and the disability. Bluntly put, the fact that the claimant is disabled is actually irrelevant to the decision by the respondent to reclaim the monies from his final pay slip. In the case of the lease car, the employer has incurred a liability to a third party which it cannot waive. It must reimburse the hire company for the relevant charges. That liability to a third party has nothing at all to do with the claimant's disability (his personal characteristic and individual circumstances) but is very much the reason why the sums are reclaimed. The various contractual documents entitle the respondent to recoup that money from the employee. In the normal course of events this would be deducted at source from the pay packet. It might be argued that it is only because the claimant is on sick leave (due to a disability) that the sums were not deducted from pay and now have to be clawed back in the final pay slip. However, that is not automatically the case. It is possible to think of various alternative factual scenarios (where there is no disability or sick leave) where the sums might still be deducted from the final pay slip. There might have been a failure to deduct at an earlier point in time. Or the employee might well be on nil pay at an earlier stage in the employment for other reasons which have nothing to do with disability, so that the sum could not be deducted in the usual way. The only thing that differs between this case and what would usually have happened (according to the contract) is the timing of the deduction. In normal circumstances it would have been deducted earlier in a pay slip issued closer in time to the hire charge being incurred. In the claimant's case it was being deducted in the final 'reconciliation' pay slip. That does not mean that the deduction itself is 'related to' the disability.

267. Likewise, the deductions to reflect the overpayment based on a 21 hour week are the correction of an error in calculation and payment. They are effectively an overpayment and therefore not an unauthorised deduction. All that is happening in the claimant's case, is that a rectification and reconciliation takes place in the final pay slip. Even if the claimant had not been absent on sick leave, he could well have been he could well have been overpaid on the basis of a 21 hour contract rather than a 14 hour contract. This overpayment would then be deducted and reclaimed in the last pay slip. That is the normal and standard operation of such a claw back provision within the contract of employment. It is simply the case that the last pay slip is the respondent's last opportunity to reconcile the accounts before the employment relationship terminates.

268. In short, the respondent's actions in making the deductions are more mechanistic and automatic than the claimant alleges. The respondent is purely trying to bring the employment relationship to a conclusion. It is rectifying the accounts. This happens in the case of any termination of employment irrespective of the disability status or sick leave record of the individual employee. It is a reconciliation of accounts which is a semi-automated process. The fact that the claimant had exhausted his sick pay

was irrelevant. If he had been overpaid at some point the overpayment could be clawed back from last pay slip even if the claimant had not been on sick pay (e.g. over payment of holiday pay.) This was a dispassionate, detached, calculation and the normal operation of the terms of the contract.

269. We also looked at the terms used in the respondent's correspondence on the subject to see if they added any fuel to the claimant's argument and we concluded that they did not. There was nothing offensive or inappropriate about the language used. The correspondence is matter of fact and explains the situation in neutral terms so that the claimant understands what is happening, and why. There is nothing in the terms of the correspondence to make any link, however tangential, to the claimant's disability.

270. On that basis we are satisfied that the conduct of writing to the claimant about the overpayments was not related to the disability. He just happened to be a disabled employee who had received an overpayment. That is context to the actions but it is not a connection between the respondent's actions and the disability. The distinction is important.

271. Even if the claimant was found to have shifted the burden of proof to the respondent under section 136, we were satisfied that the respondent discharged the burden of proof on the facts of this case. Any unwanted conduct was not related to disability.

272. Nor would we have been satisfied that the respondent's correspondence would have had the necessary 'purpose or effect' (section 26(1)(b).) Clearly, the correspondence was unwelcome because the claimant did not want to have the money deducted from his pay. However, the claimant did not give any clear evidence about the purpose or effect of the correspondence. It is overstating matters somewhat to say that it violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant given that it was purely a financial explanation of the deductions. Any anxiety the claimant may have experienced is more likely to have been related to the subsequent County Court proceedings taken against him to obtain further payments from him. However, that is not the unwanted conduct relied upon for the purposes of the harassment claim. We are not examining the purpose or effect of the County Court proceedings, just the correspondence coming from the respondent to the claimant before those proceedings took place. Furthermore, section 26(4) requires us to examine not only the claimant's perception but also the other circumstances of the case and whether it was reasonable for the conduct to have the relevant effect on the claimant. Looking at the other circumstances of the case and taking into account objective considerations, we cannot accept that the conduct could reasonably be found to have the relevant effect on the claimant. It was unwanted conduct but that does not automatically mean that it had the necessary purpose or effect within the meaning of the Act when viewed in its proper context.

273. In light of the foregoing the claim for harassment fails and is dismissed.

274. In light of our conclusions on the merits of all the claims, the issue of time

limits and jurisdiction no longer arises for consideration. All the claimant's claims in these proceedings are dismissed.

Employment Judge Eeley
Date: 15 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
19 February 2024

FOR EMPLOYMENT TRIBUNALS

ANNEX 1 Amended list of issues

Background

1. The claimant's claims of discrimination on the grounds of race, sex and religion/belief have been withdrawn.

2. The issues for the tribunal to determine are as follows:

Jurisdiction

3. Are any of the acts relied upon by the claimant time-barred because they occurred more than three months before the presentation of the claim form/ET1 (taking into account any period of ACAS Early Conciliation)?

4. Are the allegations part of an act extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010?

5. Would it be just and equitable for the tribunal to extend time for presentation of the claims pursuant to section 123(1)(b) of the Equality Act 2010?

Unfair dismissal

6. What was the reason for dismissal? Was it a potentially fair reason within the meaning of the Employment Rights Act 1996? The respondent contends that the reason for dismissal was ill health capability.

7. In the circumstances, did the respondent act reasonably within the meaning of section 98(4) Employment Rights Act 1996 in deciding to dismiss the claimant?

8. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

    i. The respondent genuinely believed the claimant was no longer capable of performing their duties;

    ii. The respondent adequately consulted the claimant;

    iii. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

    iv. The respondent could reasonably be expected to wait longer before dismissing the claimant;

    v. Dismissal was within the range of reasonable responses.

Disability

9. The respondent concedes that the claimant was disabled within the meaning of section 6 of the Equality Act 2010 at all material times for the purposes of his claim. The claimant suffered from anxiety and depression.

10. Insofar as it is necessary to consider the matter, the respondent has not conceded that it knew or out to have known of the disability or that any PCP put or would put the claimant at the alleged substantial disadvantage.

Direct disability discrimination (section 13)

11. *The claimant withdrew his claims of direct disability discrimination during the course of the Tribunal hearing.*

Section 15 discrimination

12. The Employment Tribunal set a deadline for the claimant to make any application to amend his claim to add a claim of section 15 discrimination. The claimant did not make any such application to amend and so the proceedings do not contain a section 15 claim. Section 15 will not be considered further within these proceedings.

Indirect discrimination

13. The claimant has confirmed that his section 19 claim was not an indirect *disability* discrimination claim but relied on the other protected characteristics. The claims relating to sex, race and religion/belief have now been withdrawn and so there is no existing/outstanding indirect discrimination claim in this case. Section 19 will not be considered further within these proceedings.

Harassment related to disability (section 26)

14. Did the respondent write to the claimant in relation to overpayment of salary?

15. Was that unwanted conducted?

16. Was the unwanted conduct 'related to' disability?

17. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

18. If not, did it have that effect? The tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (section 27)

19. Did the claimant do a protected act as follows:

i. Reporting to management that staff had unlawfully administered medication?

20. Did the respondent do the following things:

    i. Require the claimant to wear a uniform with an NHS logo?
    ii. Refuse to make a permanent reduction to the claimant's hours?

21. By doing so, did it subject the claimant to detriment?

22. If so, has the claimant proven facts from which the tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

23. If so, has the respondent shown that there was no contravention of section 27?

Unauthorised deductions from wages (as clarified during the course of the final hearing.)

24. Do the outcomes from the separate County Court proceedings mean that the respondent's defence to the claim for unauthorised deductions from wages should automatically fail and the claimant's claims should automatically succeed?

25. Did the respondent make deductions from the claimant's final salary so that he did not receive notice pay, holiday pay or other pay entitlements?

26. Did the claimant suffer unauthorised deductions from wages within the meaning of section 13 of the Employment Rights Act 1996?

27. Did any of the deductions made constitute 'excepted deductions' within section 14 Employment Rights Act 1996?