EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR R KALETA	**V**	**THE ROYAL MARSDEN NHS FOUNDATION TRUST**

HELD AT: LONDON CENTRAL **ON: 14 - 18, 21 - 25, 28 FEBRUARY & 1 - 4 MARCH 2022**

EMPLOYMENT JUDGE EMERY
MEMBERS: MR G BISHOP
MR P MADELIN

REPRESENTATION:
For the claimant: In person
For the respondent: Mr Young (counsel)

JUDGMENT

All claims of disability discrimination, race discrimination and unfair dismissal fail and are dismissed.

REASONS

1. The claimant was employed firstly as a Receptionist/Administrator from June 2018 and following a disciplinary outcome was transferred to the role of Ward Administrator. He was dismissed in November 2020, on the ground of capability, During his employment the claimant raised various concerns in grievances of bulling behaviour and adverse conduct by his managers. Complaints were also made against him. He was off sick from April 18 2020 to the date of his dismissal. He claims disability discrimination, whistleblowing detriment and unfair dismissal. The respondent says that the claimant was fairly dismissed on grounds of capability and it denies all allegations of discrimination and whistleblowing detriment.

The Issues

2. Disability and R's Knowledge

    a. R accepts that C was disabled within the meaning of section 6 Equality Act 2010 ("EqA") at the relevant times with the following impairments:

        i. HIV
        R says knowledge from 3 January 2020;

        ii. Anxiety
        R says knowledge 14 March 2019;

        iii. Depression
        R says knowledge 14 March 2019;

        iv. Panic attacks
        R says knowledge May 2019;

        v. Psoriasis
        R accepts knowledge from outset of employment

    b. Regarding conditions (i) – (iv), was R aware or ought it reasonably to have been aware that C was disabled from an earlier date?

3. Direct Race Discrimination

    a. Did R treat C less favourably than it did or would have treated other persons, because of a protected characteristic? C relies on the protected characteristic of his Polish national origins.

b. C relies on the following acts or omissions as amounting to direct race discrimination (save where stated, references below are to C's Scott Schedule produced for the PH in August 2020):

   i. On or around 9 April 2019 - Ms Clarke refused permission C to take leave around Christmas 2019 (paragraph 43). B

   ii. 13 April 2019 - Ms Lightfoot and Ms Clark reprimanded C for not following a reasonable management request (paragraph 47). Claim withdrawn by C on the 3rd day.

   iii. 12-14 May, 20 and 24 May 2019 - Ms Page, Ms Colas, and Ms Perrin plotted against C and conspired to protect Ms Clark. Ms Page refused to meet with C. Ms Perrin's conduct during and after the meeting on 24 May 2019 (paragraph 49).

   iv. 25 June 2019 - Ms Singh, Mr Simmons, Ms Colas, Ms Page, Ms Perrin, and Ms Asoro conspired to render C's grievance a sham (paragraph 51).

   v. **25 June - 22 July** 2019 - Ms Perrin, Ms Uvieghara, Ms Clark, Ms Page, Ms Lightfoot and Ms Asoro's conduct during C's grievance process (paragraph 55).

c. The comparators in each alleged act of discrimination are Ms Wright, Ms Thomas, Ms Smith, Ms Haggerty and Ms Reynolds, all said to be white and British.

4. Discrimination Arising From Disability

a. Did R treat C unfavourably because of something arising in consequence of disability? C relies on the foilowing:

   i. 12 April 2019 - Ms Clarke harassed C by arriving in the GH3 ward and, in front of colleagues, requiring C to follow a reasonable management instruction, walking behind him and indicating that there would be consequences if he failed to follow that instruction, when C refused to cover GH1 ward. C says his refusal to follow the instruction arose in consequence of his mental health impairments and his skin disorder on that day (paragraph 45);

   ii. 2 November 2020 - Ms Waller adopting in her letter of dismissal evidence (said by the Claimant to be false as set out at paragraphs 37 (a) to (l) of the particulars of claim lodged on 17 January 2021), provided by Matron Asoro in the management statement of case.

b. Was any proven treatment "unfavourable"?

c. If so, was the reason for the treatment the "something" relied on by C?

d. If so, did the "something" relied on by C in fact arise in consequence of disability?

e. If so, was it the reason for the treatment of which he complains?

f. R argues that it had a legitimate aim – the requirement for sufficient cover on wards for operational purposes

5. Harassment

a. Did R engage in unwanted conduct relating to a protected characteristic? C relies on the following acts or omissions: a

i. 12 April 2019 - Ms Clarke harassed C when he refused to cover GH1 ward, ignoring his mental health and skin disorder on that day (see above) (protected characteristic - disability, paragraph 45). B

ii. 24 May 2019 - Ms Perrin's conduct during the grievance meeting (protected characteristic - race - paragraph 49).

b. If so, did it have the purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him (if it had that effect, taking into account C's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect)?

6. Victimisation

a. C alleges that he was subjected to the following detriments because he had done protected acts. The protected act and the detriment said to have been imposed as a result is set out in each case:

i. Paragraph 16 - C complained to Ms Sobande about being sexually harassed by Mr Rayner in July 2018. The detriment is that Ms Lucas gave C a final written warning on 15 November 2018. R says that C never made a complaint to Ms Sobande.

ii. Paragraph 48 - on 10 May 2019 C complained in an email to Ms Clark that she had not approved his request for holiday at Christmas 2019. The detriment is that she refused to approve his request. R says that this email contains no protected act.

iii. Paragraph 49 - between 12 - 14 and on 24 May 2019, C complained to Ms Page in email and to Ms Perrin in an informal meeting about being discriminated against at work. The detriment is the treatment of C by Ms Perrin at the meeting on 24th May 2019, namely, failing to take C's complaints seriously. R says this email contains no protected act.

iv. Paragraph 50 - C complained about Ms Clark between 12 - 14 May 2019. On 30 and 31 May 2019 Mr Simmons, Ms Singh, Ms Page, Ms Perrin, Ms Hefron, Ms Colas, "plotted against" C by: Ms Page asking Ms Asoro to take over C's line management; Ms Perrin choosing witnesses who did not directly work with C and thereafter deciding that management would not call any witnesses. The detriments are the delay in dealing with the matter, not taking C's complaints seriously and protecting Ms Clark and Ms Lightfoot at C's expense. R says that C's complaints contained no protected act.

v. Paragraph 51 - on 25 June 2019 C invoked a formal grievance to Ms Singh about being harassed and discriminated against by Ms Clark and Ms Lightfoot. Detriments relied on are:

    1. the "conspiring against" C to provide a "sham" grievance process, by Ms Perrin, Ms Page, Ms Colas, Ms Hefron, Mr Simmons, and Mr Singh.

    2. Conduct of Ms Perrin, Ms Hefron, Ms Uvieghara and Ms Lavall at the hearing on 1st August 2019.

    R accepts the grievance contains a protected act.

vi. Para 59 - 8 August 2019 - C complained to Ms Hefron and Ms Perrin that he was "bringing the matters to the attention of the Employment Tribunal". Detriment is said to be that Ms Hefron and Ms Lavall "sham the grievance process further" because instead of focussing on C's facts as presented in his grievance, Ms Hefron replied in the grievance outcome letter rejecting the allegations and making no findings to support the C's case. They scheduled the final grievance hearing on 15 August 2019 despite knowing the C was on annual leave. Ms Singh and Mr Simmons were also involved in the process and the decisions made in that they appointed the managers to hear the grievance and controlled the outcome. R says C's complaints contain no protected act.

vii. Para 72 - 13 May 2020 - protected act: C starting ET proceedings on 15 August 2019 (intention notified to R in an email from C to Ms Hefron on or around 8 August 2019). Detriment is Ms Singh delaying her reply to C's "whistleblowing letter" dated 6 August 2019, and stating that all matters and allegations were not upheld and that the matter was now resolved. R accepts C's email contains a protected act.

viii. 15 August 2019 - protected act: C lodged Employment Tribunal proceedings. C was dismissed on 2 November 2020. R accepts C's claim is a protected act.

b. In relation to each allegation:

i. Did C do a protected act within the meaning of section 27(2) of the EqA?

ii. If so, was the act or omission C complains of done because of the protected act?

iii. If so (save in relation to paragraph (viii), did it amount to a detriment?

7. Reasonable Adjustments

a. C relies on the following acts or omissions as amounting to a failure to make reasonable adjustments:

i. 9 April 2019 - Ms Clark refused to approve C's Christmas leave request (para 43) (the response was in or around May).

1. The PCP was the requirement to have only one member of staff off at a time. R accepts that this was the PCP.

2. The substantial disadvantage was the fact that his mental health disability made this particularly difficult for him because Christmas is the only time that C can be reunited with his family.

3. The reasonable adjustment would have been to have allowed more than one person off. B

ii. 11 April 2019 - Ms Smith complained to C via email for not doing the job at Marcus Ward as she did it (para 44).

1. The PCP was: to impose Ms Smith's way of working on C, R denies this was a PCP;

2. The substantial disadvantage was: to cause C stress because of his mental health disability/disabilities;

3. The reasonable adjustments would have been to have given C proper handover, training or information on how Marcus Ward was run.

iii. 12 April 2019 - Ms Clark "harassed" C for refusing to work on GH1 ward.

1. The PCP was the requirement for C to work on various additional wards; R accepts that this was a PCP.

2. The substantial disadvantage was that this was stressful for him, particularly as a result of his mental health impairment.

3. The reasonable adjustments would have been not to have asked him to work on GH1 ward in addition to others or to provide cover for C's duties on GH3.

iv. 12 - 14, 20 and 24 May 2019 - conduct of Ms Page, Ms Perrin, Ms Colas in relation to the meeting on 24 May 2019 (para 49).

1. The PCP was: the manner in which Ms Perrin conducted the meeting, namely the refusal for C to bring a companion or to record the meeting. R denies the manner in which the meeting was conducted can be a PCP; R does not accept that C was refused a companion (it did not say either way); R accepts that it has a PCP not to allow recordings of such meetings.

2. The substantial disadvantage was it caused stress, intimidation and confusion to C as a result of his mental health impairment(s);

3. The reasonable adjustments would have been allow a companion, permit a recording to be made.

v. 25 June 2019 - conduct of Ms Page, Ms Perrin, Ms Colas, Ms Hefron, Mr Simmons, Ms Singh in relation to the grievance process (para 51).

1. The PCP was: to appoint a number of different personnel to become involved in the grievance process. R does not accept this occurred.

2. The substantial disadvantage was: to cause C stress and to lose focus because of his mental impairments

3. The reasonable adjustments would have been to appoint a single manager who would be responsible for managing the process.

vi. 9 July 2019 - Mr Simmons informing Ms Asoro and Ms French to cover up "the incident'' (i.e. C suffering a panic attack at work because he believed there was going to be a visit from the CQC) and to make a referral to the occupational health department (para 53).

1. The PCP was: arranging a "staged" CQC visit by the Trust and requiring C to be present when it took place. R accepts that it had a mock CQC process; it accepts that

there was a requirement for staff to be present when working their shift.

2. The substantial disadvantage was: to cause C stress;

3. The reasonable adjustments would have been to introduce the visit and explain it to C in a non-stressful manner and/or to allow him not to participate.

vii. 30 July 2019 - Ms Clark denied any knowledge of C's GP letter during grievance process. C's grievance was not upheld. Conduct of Ms Perrin and Ms Lavall during C's grievance hearing, in particular not calling any witnesses at the adjourned hearing. Ms Hefron delayed the grievance process, and lied to C in an email dated 5 August 2019 (paras 56 and 57).

1. The PCP was not calling any witnesses from R at C's grievance hearing; not making copies of C's evidence in advance of the hearing on 1 August 2019; requiring C to rely on R's notes. R denies that these are or can be PCPs.

2. The substantial disadvantage was: these PCPs made the process harder for C, caused him distress and aggravated his mental health conditions;

3. The reasonable adjustments would have been to allow C to cross examine Ms Clark, Ms Lightfoot and Ms Page; and making copies of C's evidence in advance of or at the hearing on 1 August and allowing him to record the hearing,

b. In relation to each, did R apply the provision, criterion, or practice as alleged?

c. If so, did if (or did they) put C at a substantial disadvantage in comparison with persons who are not disabled?

d. If so, was R aware or should it reasonably have been aware of that fact?

e. If so, are the adjustments suggested reasonable and did R fail to make them?

8. Detriment Because of Protected Disclosures

a. Did C make a qualifying disclosure of information within the meaning of section 43B of the Employment Rights Act 1996? C relies on the letter he sent to Ms Palmer on 6 August 2019 (para 58) which set out that the Trust was failing to comply with a legal obligation to which it was subject, namely the requirement to provide a safe system of work. R accepts this letter amounts to a qualifying protected disclosure.

b. If so, was he subjected to detriment on the ground that he had made that protected disclosure? C relies on the fact that that Ms Singh (to whom C's letter had been forwarded) delayed her reply to the letter, and stated that all matters and allegations relating to C's grievance were not upheld and that the matter was now resolved.

9. Unfair Dismissal

a. What was the reason for C's dismissal? R asserts that it was a reason related to capability, which is a potentially fair reason for the purposes of section 98(2) Employment Rights Act 1996; C does not accept this and says it was because he started Employment Tribunal proceedings. R must prove that capability was the reason for dismissal.

b. Was the decision to dismiss (at the time when it did so) within the reasonable range of responses for a reasonable employer, taking into account R's size and administrative resources?

c. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? NB R accepts that the concept of "contributory fault" is not usually applied in cases of capability dismissal;

d. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event (Polkey)? And/or to what extent and when?

10. ACAS Code of Conduct

a. Did R fail to follow a relevant ACAS Code of Practice? C relies on the following allegation (para 76): Failure to provide written and digital transcripts during the grievance process or soon after, by Ms Hefron, Ms Laval! and/or Mr Simmons and Ms Singh

b. If so, should any compensation awarded to C as a result of his allegations be increased, and if so by what amount?

Additional claims

11. The above issues are from the List of Issues. On considering two claim forms, the Tribunal were concerned that there may be identifiable claims in the 2nd claim which are not identified within the List of Issues.

12. These issues were discussed at some length on days 1 and 2 of the Hearing, including whether these were claims clearly made, whether or not an amendment application was required, and if so how this would be dealt with.

14. On day 3 the claimant provided a written submission, and this was the subject of discussion. On a review of the claim forms, the arguments of the parties, the Tribunal unanimously decided to allow the following as additional issues, on the

basis they were clearly identifiable claims within the 2nd claim; taking into account the issue of time identified at the Preliminary Hearing, that claims pre 18 October 2020 only were allowed to proceed.

15. The Tribunal unanimously decided that the following claims were clearly made in the 2nd claim and can proceed:

    a. Reasonable adjustments:

        i. Paragraph 62 2nd claim: a failure to discount disability-related absences when invoking the Managing Long Term Absence Procedure

        ii. A failure to make adjustments to working pattern and environment when suffering an outbreak of psoriasis; adjustments contended for include working from home when the outbreak was severe.

        iii. A failure to offer homeworking opportunities, for example in the accounts department.

        iv. A failure to offer the claimant special leave for shielding during the Covid pandemic.

        v. A failure to take into account the claimant's medical conditions in the pandemic, when he was required to shield, when deciding to dismiss

Witnesses and Tribunal procedure

16. We heard from the claimant. For the respondent we heard from the following witnesses (the job titles are those at the time of the events in this claim):

    a. Ms Ana Garcia, Ward Manager
    b. Mr Andrew Rayner, Matron
    c. Ms Ann Heffron, Commercial Finance Manager
    d. Ms Ellen Mossman, Deputy Director of HR
    e. Mr Graham Simmons, Director of HR
    f. Ms Joanna Waller, Divisional Nurse Director
    g. Ms Jude Lucas, Deputy Divisional Director (Clinical Services)
    h. Mr Kieron French, Senior Staff Nurse
    i. Ms Lisa Page, Associate Director of Operations, Clinical Services, Private Care
    j. Ms Marguerite Meintjes, Service Manager, Medicine Management and Supporting Services
    k. Ms Maria Perrin, Patients Operations Manager
    l. Ms Nina Singh, Director of Workforce
    m. Ms Rosa Asoro, Matron
    n. Ms Samantha Mead (nee Smith), Guest Service Coordinator

o. Ms Sandra Smith, Ward Administrator

17. The Tribunal made the following adjustments to the process. The hearing was an 'in-person' tribunal hearing. The claimant was concerned that having the respondent's witnesses in the room would be distracting, and it would have a negative effect on his ability to deal with the hearing.

18. After discussion the following procedure was adopted: for most of the hearing, the Tribunal, the claimant and Mr Young were present at the Tribunal. The Respondent's witness gave evidence remotely, and could be seen in the Tribunal on a large screen. On two days the claimant and participated in the hearing remotely (as did the Judge on one day), because of weather-related travel difficulties.

19. No objections were raised during the hearing about this process, the Tribunal considered hat all witnesses were able to hear and answer questions, and the claimant was able to fully participate when in person and when remote.

20. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the claimant's employment.

21. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

Documents and disclosure

22. Throughout the hearing new documents were given to the Tribunal, and they were agreed by both parties. A significant issues was the bundle: this was a 10 volume bundle comprising over 500 pages. When an electronic coy was provided, it was by 10 separate pdfs. There was a huge duplication of documents in the bundle, also each and every piece of interlocutory correspondence was included – over 800 pages. This meant considering documents through the hearing was unwieldy and slow, and made matters more difficult than they should have been in the hearing and when preparing the judgment. Professional representatives are reminded of the various Practice directions on bundle preparation.

23. Another issue was the leave requests, and evidence that the claimant was treated unfairly. The claimant contended throughout the hearing that he had been supplied documents in the DSAR process which were not disclosed in the tribunal process. He was invited to reconsider the DSAR documents and provide any which were not included in the Tribunal bundle. In the the event and during the course of the hearing, the claimant looked but was unable to locate or provide additional documents on this subject.

24. The Tribunal also ordered disclosure of any documents relating to what happens to the electronic information when leave requests are made. No documents were provided, as the respondent says there are none, but it did provide an explanation, set out in the evidence.

The relevant facts

25. The claimant started work as a Receptionist Administrator in the respondent's Outpatients Department. He accepts that prior to starting he had made no disclosure of his medical conditions, apart from psoriasis which was discussed for uniform purposes. His main duties and responsibilities listed in his job description included liaising with staff, covering the reception and radiotherapy desks, to use initiative, to be flexible in relation to working hours and responsibilities i.e. covering for colleagues sickness absence for annual leave to be an excellent team player, and to ensure workload is managed and prioritised, frequently under pressure (838–839).

26. One issue that became of significance related to Grindr app messages sent to the claimant early on in his employment. The claimant says that Andrew Rayner sent these messages. In his evidence, Mr Rayner did not recall sending the messages. He accepts that his Grindr profile picture appears on these messages. He thinks they may have been added to a fake account. The messages show the claimant saying in response to 3 messages, *"I'm not interested thanks… Can you stop texting me please… I won't keep repeating myself"*. The Tribunal concluded that Mr Rayner genuinely does not recollect sending these messages to the claimant. The Tribunal also concluded that the claimant genuinely believed that Mr Rayner had done so. At this time the claimant was unaware Mr Rayner worked at the hospital.

27. On 13 July 2018 an incident occurred which led to Mr Rayner complaining about the claimant to Ms Sobande. In an account he wrote on 8 October 2018 (as relevant evidence in support of a disciplinary allegation made against the claimant by a Nurse), Mr Rayner says he says he saw the claimants leaning on the reception desk talking to the team members and eating a biscuit. He spoke to Ms Sobande that day because he had a *"slight concern"* that this was inappropriate. He was then called into a meeting with the claimant and Ms Sobande. At the meeting Mr Rayner says the claimant became *"very confrontational and verbally agitated"* calling him a liar. Mr Rayner says he went back to speak to the reception who could not recall whether the claimant was eating. He met again with the claimant and said that the outburst was unacceptable, the claimant apologised (996-7).

28. The claimant's account in his evidence at the Tribunal is that Ms Sobande called him in and asked *"what's it about…".* He was *"accusing me"* of eating cookies and drinking coffee, I said that this was *"not true, my manager was there, so why not ask her… I did get angry as this was happening one month into the job."* Mr Rayner's evidence, which we accepted was that the conversation *"did go badly… It was not a big deal, not to stand at a station eating, but this was taken out of proportion … I asked [Ms Sobande] to have a conversation with you…"*

29. The claimant also says he told Ms Sobande *"… its untrue what he was saying about me, and so I also told her that he was harassing me on Grindr, and until [that day] I did not know who it was..."* Mrs Sobande has no recollection of the claimant making any allegations against Mr Rayner.

30. We noted the context of the messages, on Grindr an app which PinkNews describes as 'a geo-located hook-up app'. We concluded that while the claimant rejected the approaches, he did not at any time feel harassed by the approaches, as the app is designed to facilitate such approaches. We also concluded that the claimant did not inform Ms Sobande that there a link between the messages and Mr Rayner's complaint to Ms Sobande, and we do not accept that he told her that he felt harassed by the messages. Had he done so, we felt that he would have put something in writing, as he did on the majority of occasions he had a complaint in the future. Also, he did not follow this up in any other way with Ms Sobande, again if he felt he was being harassed we consider he would have done so.

31. The claimant also feels that Ms Lucas, in disciplining him in December 2018, did so because of this complaint to Ms Sobande. Ms Lucas was not aware of it – we accepted her evidence on this point. In his evidence the claimant accepted that he had *"no idea"* how Ms Lucas became aware; he did not raise it at the disciplinary hearing.

32. On 19th September 2018 a Senior Staff Nurse Mrs Ali wrote a complaint about the claimants conduct. She said that's the claimant asked her if she was going to a work event and when she responded yes he *"took my hand and grabbed my waist, picked me up on his lap and said we're going to get you drunk… at the time it's make this make me feel very uncomfortable and disrespected, as I felt as though my personal space was invaded and my religious beliefs were disregarded. … The more I think about this look into it it makes me upset as I don't want to come to work and experience anything like this…".*

33. On the same day the claimant was spoken to by Ms Littlemore and was told not to contact Ms Ali, he did do on Facebook to apologise. Ms Littlemore reminded him in writing 20 September not to do so. On 20th of September 2018 the claimant was written to informing him that there was an investigation meeting and the allegations could potentially be considered to amount to gross misconduct (899-900).

34. Ms Littlemore interviewed several members of staff, and others volunteered written information to Ms Littlemore, including Ms Sobande wrote an account of events that happened from his first day at work 11th June to 21st of September 2018. She says that claimant would ask her for a hug, and also engaging in a talk of a sexual nature and engaging in other incidents that she considered inappropriate (910-11). The claimant says that these incidents did not happen.

35. The claimant accepted in his disciplinary interview that he swung the chair around and, as she said her leg was hurting, *"… so I put her on my lap",* and she laughed. He said that his intention was to and give her a hug because she was

tired. He denied saying he wanted to get her drunk. The claimant was given a copy of the notes of interview and he made a amendments to them (937-8).

36. Miss Littlemore's investigation report states that there was sufficient evidence to support the allegation that the claimant may have pulled Ms Ali onto his lap, which may constitute gross misconduct on grounds of harassment. She found insufficient evidence that he remarked he wanted to get her drunk. Ms Littlemore recommended that the matter proceed to a disciplinary hearing.

37. Other staff members also provided statements about the incident involving Ms Ali. Other staff members provided notes of other incidents, for example Mr Rayner on the event of 18 July 2018.

38. In October 2018 the claimant was told to provide cover for a member of staff who was off sick. The claimant asked for his hours to be changed, this was refused. His final email states that it is *"I do feel it is unfair that I have to do a clinic prep at the desk as it's makes me stressed out. I am unable to do it at the desk. It is simply too stressful for me. Can you let me know about solution to this problem please?"* (1023-5).

39. Several staff members provided statements in support of the claimant. An Assistant Practitioner said the claimant is a *"friendly individual and has a great sense of humour. He is kind helpful and energetic… very passionate about his work. Patients are so fond when he greets them with a big smile…".*

40. A Staff Nurse says that the claimant is *"openly gay, has an uplifting presence and greet with a hug and a smile, and affection that is true to his caring and friendly nature… He's always been helpful when I when I've needed support to my work stop it takes pride not only this work on the reception desk but also the appearance of the environment… The claimant is a great addition to have within the team…".*

41. Another Staff Nurse says *"… there is not a single bad word I can think of to say about him. He is friendly helpful and professional. …He is not a reserved character but bubbly and outgoing with a cheeky sense of humour.. He's openly gay and has grown up with women being known to him as close friends and sisters… He hugs people as a way of greeting as many people do…".* There were other positive references provided on behalf of the claimant.

42. The outcome of the disciplinary hearing was that the claimant was given a final written warning, to remain on his file for 18 months. In her outcome letter dated 15 November 2018, Ms Lucas considered that the allegation he had grabbed Ms Ali onto his lap was substantiated, that this took place in a public areas. She referred to allegations that he *had "consistently displayed inappropriate behaviour" at work*; however these were not taken into account in her decision as they had not been investigated. It was determined that the claimant would be redeployed into the role of Private Care Ward Administrator (1060-62).

43. The claimant's case is that the final written warning was to *"…to punish me from keeping quiet and stop being intimidated by Mr Rayner"*. We accepted Ms Lucas

evidence, that this was found to be gross misconduct, *"however the claimant had misread the situation with Ms Ali, had made a mistake and had shown remorse, so I decided a final written warning. However there was an ongoing impact for Ms Ali, and so he was redeployed. The outcome was proportionate to this incident.*

44. The claimant responded immediately saying *"I would like to thank you for the letter …. I confirm I accept the redeployment and the outcome of the hearing. I would like to take this opportunity and thank you for believing in me."* (1058)

45. On 26 November 2018 Miss Lucas wrote to the claimant saying he could not visit the OPD staff room, where Ms Ali would be. In response he said that he would appeal the final written warning (1065-6).

46. The claimant appealed on 1 December 2018 saying that he did not want to *"undermine or disregarded anyway the substance of the accusation or the impact on Ms Ali".* His concern was the nature of the disciplinary action which he considered was not proportionate to the offence (1069-70).

47. The appeal was outside the 14 day time limit specified in the outcome letter and a decision was taken by Mr Simmons not to allow APL outside of this timeframe; the reason was the claimant was able to communicate clearly and effectively in the meantime. He says that there was no evidence that either the claimants nationality or ill-health contributed to a delay in the appeal (1075).

48. On 11 December 2018 the claimant asked to be referred to OH *"because of my ongoing stress levels and physical symptoms especially on my skin and face…"* and this was agreed (1099). On 20 December 2018 he emailed Ms Lightfoot to say he was signed off work, and that he was unable to focus on role. (1109).

49. In an email to his union rep on 15 December, the claimant complains about being bullied and discriminated against by Ms Sobande, that he had told Ms Lucas he was suffering from depression and taking medication (1107).

50. The claimant sent an email to his union rep on 21 December 2018 saying that there had been a series of incidents involving his new LM, Ms Clark. He says that on 3rd of December 2018 he commented on Ms Clark's badge being inside her collar, she grabbed his hands and pushed him away saying "don't touch me". He expresses *"outrage"* that confidential information had been disseminated by Ms Lightfoot. He says Ms Clark commented that he would not have next year off for Christmas *"I found that upsetting as spending Christmas with my family is very important to me…"*. He says Ms Clark criticised him for calling her on her mobile to report absence, having previously said to do so. He complains about events in meetings, her conduct in interacting with him, that she tried to *"verbally force"* him to agree with her *"…I find this abuse of power totally disgusting! I don't feel comfortable to be working with someone who has this attitude towards me and feel I won't be able to trust my Line manager again…"* (1110-13).

51. In a meeting with Ms Clark on 20 December 2018, the claimant in his account to his union rep says he got upset when Ms Clark refused to tell him who had made

a complaint about filing; Ms Clark's account was that he was so loud that a there was a witness who was next door who overheard him.

52. The claimant met with Ms Lightfoot and Ms Clark, a note of the meeting was provided and in his response to Ms Lightfoot he says Ms Clark's behaviour was "disgusting, , that he felt bullied by her, that she used *"a nasty and malicious management practice"* in having a witness next door (1114-5).

53. The next significant incident involved booking annual leave. There was an informal policy in place that only one Private Care Ward Administrator could be off at one time, to enable cover and to take into account sickness etc. This policy was made clearer in an email dated xxx.

54. The claimant's early practice was to email Ms Clark asking for leave, which was usually granted with Ms Clark sometimes adding the leave to the health roster. For example on 19 March 2019 he emailed her with a holiday request as the *"health roster / won't let me.."* (1187). He asked to book two days off in April via emails to Ms Clark, which she added to the leave roster (1191). On 26 March he asked by email for leave amendments Ms Lightfoot says *"I've made all the changes…";* on this occasion he asked for a day off to move house and he was told no, because two members of the team were off, in the end this leave was given with Ms Clark covering (1210-1)

55. If the leave request was made on the leave rota, no notification was sent to Ms Clark, and it was not clear on the evidence who rota notifications were sent to. We accepted that Ms Clark did not receive notifications. We also accepted that after a request had been made and accepted, it was usually for the staff member to add to the rota; if not another member of staff could see a space and book the leave.

56. In response to the claimant's subsequent grievance on the issue, the respondent accepted that the leaving booking system was open to criticism, as it was not always clear to staff. An example is in May 2019, when the claimant sought booking for 23-27 September; he was given only 3 of these days as a member of staff was on leave; the claimant said he had sent his request by email but had not added this to the rota.

57. Ms Clarke emailed all Inpatient Administrators on 8 April 2019, title 'annual leave', saying *"… Only one member of staff will be allowed off on annual lave at any one time…:,* the reason was the impact if there were other unexpected absence e.g. sickness. It said 2 weeks' notice of leave should be given. It said appointments outside of working hours should be avoided. The claimant responded by email saying he had submitted *"sent a new request"* for leave, which was agreed by Ms Clark (1218-9). The Tribunal concluded that *the "new request"* was sent via the health roster.

58. The claimant also asked for annual leave over Christmas 2019. Ms Clark responded on 9 April 2119 saying he could not have 26 and 27 December off *"as a number of staff have booked that off already".* The claimant said in return that

only one person from Markus ward was off *"I am very upset about this and I'd like to speak to HR about it"* (1220).

59. On 11 April Ms Clark emailed saying that on 23-24 December there are two members of staff off, and 27 December 3 members of staff off. The email says that the claimant had explained his reasons, but that he had requested Easter or Christmas, that Easter had been *approved "I think it would be extremely unfair to the team for you to have both especially as you had Christmas off last year. So I will have to decline your request.."* (1231).

60. The claimant's evidence was that he did not have an issue with the policy, but that he saw on the roster that there were sometimes two to three colleagues off at a time; his screenshots of this evidence are in the bundle. He said that *"no one had told me I could verbally request leave"*, he believed it could only be accepted once showing on the roster. He says that the decision did not take into accounts his circumstances with family abroad, that he was disadvantaged also because of his mental health issues, and spending Christmas on his own made his mental health worse.

61. The claimant argued that two comparators – Ms Thomas and Ms Smith - were both off at Christmas 2018 and 2019. The respondent's position is that Ms Thomas is not an Ward Admin team member, instead she works in the Surgical Unit, which was always closed on public holidays ,she never works in Private care. She is therefore not on the claimant's team, and Ms Thomas has caring duties. The claimant disputes that she is not on the same team, he says that the same leave rule applied to her.

62. In his evidence the claimant accepted that if Ms Thomas had booked her leave in advance of his *"I accept that there was nothing I could do"*. He says that the verbal request said to have been made was *"invented by Ms Clark, I had been told not getting 2019 Christmas off in 2018"*. He said that wards were closed over Christmas with patients transferred to other wards to reduce staff needs; he said the *"policy should be applied fairly to everyone".*

63. An incident occurred on 11th April 2019. The claimant was working on a different ward; the Ward Administrator Ms Smith emailed him to *"… please to remember to write the notes you have ordered in our book as it gets very confusing for me and the medical records…",* in this case some records had been ordered twice. The claimant responded saying *"the record books you're using for your wards are very confusing sorry. Perhaps it would be easier if you could update your record system a bit. I will leave you to decide…".* In her response Ms Smith referred to the ward's system saying *"it is what we use and I would appreciate it if you could to whilst working on this walls as I would obviously work to your system if I was covering your ward…";*. The claimant suggested that this should be discussed at the monthly staff meeting ((1232-4).

64. The claimant's evidence is that the email was an *"attack"* that it made him upset, *"…and who is Mrs Smith to give me lessons on how she works, and she is putting it in writing. …. It should not be by email, there Should be a discussion, how should she expect me to do things her way if I do not know about it."*

65. Ms Smith's evidence, which we accepted, was that the Trust has to pay for access to medical records from storage, that it was not the claimant's fault that he had not been shown how different wards worked, that this happened when people called in sick, there is no one to show how the ward works. She said that the claimant was told *"how that ward works, so you will know next time how to work the system, and this is the point of my email"*. The tribunal accepted that this was the reason Ms Smith sent the email.

66. On 12 April 2019 the claimant was asked to cover GH1 Ward as a member of staff was off work. He suggested another member of staff should do, and in a further response he said *"I'd like to stay on GH3 ward as I'm not feeling well today.."*. Ms Clark sought advice from HR and clinical managers who said he claimant would need to be spoken to; Ms Clark asked for a member of HR to accompany her, *"…as he's not the easiest to talk to..."* (1235).

67. The claimant says that he was reprimanded because of this incident. He said that he did not have to mention disability for the reason he could not cover, as his psoriasis was so severe it was visible *"…she could see me - I said I can't go in this state. And she put in management referral form to OH…".* He said he was threatened, being told that this was a *"reasonable management request … and that that 'I would not say no to Matron…'"*.

68. The claimant had asked for an appeal out of time from the misconduct decision in December 2018; on 16 April 2019 Ms Singh responded apologising for the delay, saying that she confirmed the decision to appeal was made out of time and would therefore not be considered (1240). In her evidence, Ms Song said she had personal issues and time off, this was the predominant reason for the delay. We accepted this evidence.

69. By April 2019 the claimant had been referred to OH on 3 occasions because of his absences. He had not attended, on one occasion he said there was little point as he was receiving specialist treatment. OH advised the respondent that because he was not attending, the claimant should be managed without OH advice, as *"…there is no benefit in repeated referrals and non-attendance if he won't attend…"* (1252).

70. The claimant attended OH on 9 May 2019 and the OH report says that the claimant has a *"medical condition for which the equality act applies… he is under care of GOP and consultants and takes medication to treat anxiety and depression…".* The respondent was told that there was *"no clinical reason why he would not be able to undertake his full duties …he is currently fit to undertake his full duties. However I would suggest that he remain on one ward rather than transfer … at short notice. Clearly this makes him very anxious"*)1262-3).

71. On 10 May 2019 the claimant responded to another request for leave, the claimant highlighted a rota at end August showing two people off on the same days, and he asked for a meeting to be arranged with HR *"to discuss my concerns of being discriminated"* (1223).

72. In May 2019 the claimant sought leave, emailing on 10 *May "could you please get back to me..".* Ms Clark responded saying that she did not get notification when leave requ*ests were made, that she checked the roster a couple of times a month, and that "you will need to email me to inform you have requested [leave]* (1266-7); that it was for the claimant to *"input your annual leave.."* on the health roster, *"…and then inform me it's done"* (1224-5).

73. On 12 May 2019 the claimant submitted a grievance letter. The issues were (i) the statement only one member of staff allowed at one time, and he highlighted the issues that had arisen with him booking leave, including over Christmas 2019; (ii) arbitrary leave allocation - he argued he was being discriminated against, he was *"not treated the same"* as other team members. He said he felt *"bullied and discriminated against. And this has impacted on my anxiety and depression and has aggravated my symptoms.."* (1269-70).

74. The claimant triggered the sickness absence procedure because of his absences, and on 21 May 2019 HR gave Ms Clark a template for an *"informal sickness advisory discussion"* (1276-7). The advice given by Ms Lisa Page, Service Manager Private Care was *"to try and mange this informally.."*. Ms Lightfoot said she *was "actually not comfortable speaking to [the claimant] about this by myself. He is extremely defensive and aggressive and gets very angry in meetings".* There was email discussion about the benefits of dealing with the meeting informally as opposed to *"getting HR involved"* as this formalises the process and he would be entitled to a union rep present (1289-93).

75. It was agreed that Maria Perrin, Patient Operations Manager would accompany Miss Lightfoot to the meeting with the claimant. Ms Page asked for further details of the claimant being aggressive and angry as she was concerned about these comments.

76. The outcome of the rtw meeting was that the trigger of 3 or more absences in 6 months had been exceeded – total absences over the last 12 months were 48 days and the letter recorded the informal warning of concern, that a further trigger within 12 months would normally be escalated to the formal stage (1317). .

77. The claimant met with Ms Perrin on 24 May. In her email that day to the claimant she said *"… I was trying to feedback to you the details from the investigation into your grievance. Whilst I tried to listen to your concerns and manage the grievance informally, your behaviours during our meeting were cause for concern and were not in line with Trust values. You spoke over me when I was trying to explain… You raised your voice to me on a number of occasions… And were not prepared to listen to my explanations…"* The claimant responded saying he was calm and on his best behaviour, he did not *"accept this type of accusations…".* (1332-3).

78. The same day the claimant said *"I would like to make a serious complaint about false allegations with regards to my alleged bad behaviour…".* He said that witnesses overheard two adults talking loudly but there was no raising voices or talking over each other (1339).

79. The claimant made a complaint about Ms Lightfoot overriding Trust policy and requiring him to report to her and not Ms Clark; and he complained further about Ms Perrin and he asked for another manager to undertake the grievance. HR advice was sought and Ms Page was told that his complaint was not a proper grievance, which needed to be submitted via trust processes (1353-7).

80. In response he was told that as Ms Lightfoot was off work, his temporary LM would be Ms Asoro. The claimant accepted this, saying he had spoken to Ms Asoro about his return to work on 10 June.

81. A pharmacist who had overheard the conversation between the claimant and Miss Karen provided a statement on 31st May 2019. She said she had both voices that the female voice was disputing all allegations in *"an aggressive tone"* which was *"very unprofessional"* (1376).

82. We concluded on the evidence we saw and heard that Ms Perrin was raising her voice in this meeting, however this was in response to the claimant raising his voice and challenging her. We accepted the contents of her email to him did accurately set out the claimant's behaviour. We accepted that it did not set out Ms Perrin's own behaviour, that she also raised his voice, but we concluded that the fault lay with the claimant in refusing to accept or hear what Ms Perrin was saying.

83. On 18th June 2019 the claimant sent an email to ER stating that he had been complaining about discriminatory treatment of bullying and harassment about Ms Clark, that she had visited GH3 while he was on duty, walking behind him, speaking to staff members, following him, and making comments about him to new team members. He asked for this to be stopped immediately; he acknowledged Ms Clark was part of the team and would need to check GH3, but he asked for this to be outside his working hours (1387).

84. On 25 June 2019 the claimant sent a formal grievance to Ms Singh. It argued that H&S at work provisions had not been complied with, there had been a breach of the implied term of trust and confidence, that he had been discriminated against. He alleged work-related stress in breach of H&SAW Regs 1999; he had been harassed and discriminated against, by Ms Clark (quoting the Equality Act provisions, alleging that this was a *"systematic campaign of bullying"* by Ms Clark. He referred to the issues with leave booking, that verbal requests for leave had been accepted, and arbitrary leave allocation. He said he was being discriminated against on grounds of depression, anxiety, insomnia, severe stress-related skin problems "as well as a well manged clinical condition". He argued that the hospital had "constructive knowledge" of his impairment he said that the trust was made aware of his anxiety and depression before he started in the job. (1760-73).

85. The claimant had a return to work meeting with Ms Asoro on 5 July 2019. The claimant agreed that because of staffing issues he would help with certain tasks off his ward which she characterised as, *"these are things that will affect patient care and cannot wait".* The claimant emailed her saying *"Thank you for the*

meeting and for listening to my concerns", and that he would help out as agreed on GH1 and 2. (1518-9).

86. Ms Perrin provided a statement of the 24 May 2019 meeting, saying that *"… he started talking over me…"* that he did not meet the expectations of Trust behaviours (1520).

87. Ms Lisa Page had initially been appointed as investigating manager. The claimant complained about her appointment and Ms Perrin was appointed to investigate in late May 2019. There were some difficulties in diarising the grievance hearing; it was scheduled for 19 July but Ms Perrin had not completed her investigation, and was subsequently on leave. This date was postponed, and those attending were emailed; their next availability was 30 July 2019 (1540 and 2114).

88. On 10 June 2019 the claimant's line manager was changed – this was as part of a plan to move all Ward Clerks under the management of ward managers. The line manager should have been Mr French, who was away, so the claimant's temporary manager was Matron Asoro.

89. On 9 July 2019, the hospital conducted a 'mock CQC inspection', - a test for preparedness for the real thing. Staff were given no notice. However, as he accepts in his witness statement (159) and in his 'note to self' written at the time of this incident (1552), he was told that a CQC inspection was going to happen soon.

90. The claimant left the ward, he was asked by a Nurse, who was panicking herself, to return as *"you are needed…"*. His evidence was that *"… she didn't understand I am scared of facing CQC in my state.. it made my anxiety and panic attack … I felt so embarrassed and humiliated I left the ward…*" .

91. In an email later that day Ms Asoro he said *"I had a panic attack earlier and as we discussed, I left the ward to have a walk… I must go home and rest… The workload and the CQC visit at work today are just too much for me to cope with. I am going home to take care of my health and well-being"* (1546-7). Ms Asoro sent an email hoping he feels better soon, and cc'ing Mr French as the claimant's immediate line manager (1545-6). The claimant saw his GP and was signed off work until 28 July 2019.

92. The claimant argued in evidence was that it would be an adjustment for people with mental health difficulties to be prepared for an inspection in advance, so as to enable him to have a calm manner, or to allow someone who is not feeling well not to participate. He accepted that it was reasonable for the Nurse to ask him to go back on to the ward, but that she *"should have considered my state of mind …"*.

93. Because of the claimant's absences and his reference to stress, HR recommended an OH case conference to be attended by OH, the claimant and Ms Asoro *"… so you can discuss and fully explore any reasonable adjustments*

required to support [C] in the workplace and agree an action plan … regarding panic attacks etc." (1558).

94. On his grievance, staff were interviewed and / or asked written questions as part of the management response –Ms Clark, Ms Page, Ms Lightfoot and Ms Asoro. Ms Perrin, despite being the report's author, was also a witness regarding the 24 May 2019.

95. The Management Statement of Case written by Ms Perrin dated 19 July 2019 was a detailed response, addressing the claimant's 63 allegations and statements. On the main issues of relevance. Ms Perrin did not accept that the claimant had been put under excessive workload, saying it was essentially the same for all Ward Clerks; she concluded that the had not been bullied and harassed by Ms Clark. It went through the annual leave issue in detail, setting out the chronology of different leave requests by different staff members, showing that the claimant's leave had been rejected because others had booked leave before him.

96. The Statement of Case dealt with the chronology of leave requests for Christmas 2019, accepting that a member of staff had verbally requested time off and this had been agreed without it being added to the rota. It pointed out that mangers are "*not necessarily alerted"* to leave requests on the system – it has to be looked for, that the line manger should be alerted a request has been made. She concluded that *"Further clarity on the process of booking annual leave would be beneficial…".* The report disputed that Ms Perrin had been aggressive to the claimant, instead saying the claimant had been talking over her, leading to Ms Perrin terminating the meeting (1738-59).

97. On 22 July 2019 the claimant mailed HR to say a meeting in person would be too stressful and he asked for the meeting to be conducted "via written form" as a reasonable adjustment. The respondent produced a response to his questions – some of which were detailed, and others unanswered, for example questions about Ms Clark deemed to be personal data. He asked details of why Ms Clark could not attend on the 19th, and asked for proof of the reasons. Ms Page asked for answers to more questions from Ms Lightfoot (1973-4) and Ms Clark (1990-2).

98. The rearranged grievance meeting took place on 30-31 July 2019. The grievance hearing manager was Ms Heffron, Commercial Finance Manager. The claimant attended with a union rep. Ms Clark and Ms Lightfoot were called as witnesses for the management case, and the claimant asked for Ms Page to attend.

99. The claimant complained about the timetable, including being given only 2-3 days to prepare after being given the Management Case. He made various allegations of breach of the Equality Act. In anticipation of the hearing, the claimant had prepared 209 written questions for Ms Clark, 151 for Ms Lightfoot, and 50 for Ms Page. He asked specific questions, including for example about Ms Clark's work and training history.

100. The grievance was adjourned after 2 days 'part-heard'. He had only got a 1/3rd of the way through Ms Clark's questions. The hearing was recorded, and transcripts were provided to the claimant but only after some delay and repeated requests.

101. On 1 August the claimant sent an email of complaint , stating that the trust was still failing in his duty of care; he asked whether Ms Lightfoot was resigning said that *"withholding this information from me"* would be an issue. He said that Ms Clark had visited GH3 recently when he was on duty *"It is unacceptable and provocative … she is not welcomed in my presence"* (2103-4) . The next day he sent a very terse email *" I am writing to you for a SECOND time.. about Ms Lightfoot's position"*. In response Ms Heffron said she was looking into his questions, that the hearing would be reconvened 14 or 15 August. In response the claimant said that he had asked for the hearing *"this week … therefore I have no option but to bring a claim …"* (2111).

102. On 5 August - *"I am writing to you for a THIRD time …"*, asking a lot of detailed questions, and quoting Tribunal case law and CIPD bulletins (2112).

103. Ms Heffron's further response on 7 August 2019 acknowledged the claimant's emails and stated that the respondent was not going to call witness evidence at the new hearing, because Ms Perrin had now interviewed the witnesses again, and there was no need for oral evidence. While the Tribunal accepted that this reason was given, we also noted that Md Lightfoot and Ms Clark were very reluctant to attend the reconvened hearing.

104. The claimant's disputed this, asking for the grounds on which witnesses were no longer called. He also said , *"Are you saying that you acknowledge the email from 2 August just today? Can you confirm when/what date you have read the email…? Can you explain why you have failed to provide me with the recordings…?"* (2120).

105. The Tribunal concluded that there was no legal or contractual right for the claimant to cross-examine witnesses at his grievance hearing. We noted the number of questions the claimant had prepared. We concluded that while the respondent can be criticised for changing its process half-way through, that Ms Perrin's investigation was thorough and that there was no prospect of any answers to his questions, had the claimant been allowed to ask them, changing the outcome of this process.

106. The additional Management Statement of Case contains Ms Perrin's summary of the additional questions and their responses; it addresses all of the additional questions asked by the claimant in a 28 page response (2445 – 2473) plus 63 appendices (2474 – 2585). As an example, Ms Clark's answer about the 'lanyard' incident was that it was a *'"misunderstanding … an instinctive reaction…"* as she believed he was reaching towards her.

107. On 6 August the claimant submitted a written complaint to Ms Cally Palmer, the respondent's Chief Executive entitled 'whistleblowing', alleging breaches of H&SAW 1974, not proving a safe place of work on grounds of Ms Clark's

attendance in his ward on 29 July – 1 August 2019. This was forwarded to Ms Singh as the whistleblowing lead to register on the whistleblowing register (2302-5).

108. One issue was that the claimant had said that he was on leave 15 August. Ms Heffron's evidence, which we accepted, was that he did not give a date for his leave and he also said he could cancel. Ms Hefron gave an option to reschedule the hearing for his return, that the claimant did not reply, so she decided to go ahead (2156-8).

109. The claimant did not attend grievance hearing on 15 August and it proceeded in his absence.

110. On 15 August Ms Singh responded saying that his concerns had been registered on the whistleblowing register, but that his concerns were related to his grievance. She asked Ms Mossman to *"review the approach the ER team have taken in light of your additional concerns… I will also arrange for another member of the SMT .. to work alongside to have two independent managers address concerns* (2601). The delay in providing the conclusions to this complaint is an allegation of victimisation.

111. The grievance hearing outcome was sent to C on 21 August 2019. The first issue – the 'breach of health and safety' requirements causing work related stress – was *"partially upheld"*, as the claimant had *"inadequate"* initial training and that *"your supervision and support .. .was not as regular as it should have been and that there were management failings in not setting your objectives or completing your annual appraisal."*

112. The report concludes that the other Ward Clarks had the same duties, that he was moved to the *"least busy wards"* in March 2019 and *"the expectation of cover to other wards removed"*. It said that Ms Clark and Ms Lightfoot were not aware of his underlying medical conditions until they received a Dr's letter on 20 December 2018.

113. The 2nd allegation – bullying and harassment by Ms Clark – was not upheld. Ms Heffron stated that there *"was no evidence"* to support this claim, *"no evidence had been provided nor found"* during the investigation.

114. The report's conclusion on annual leave refusals – Ms Heffron concluded that the evidence showed leave had been booked on a first-come-first-served basis, and the claimant's leave was refused because others had booked leave first. There was *"no evidence"* that leave had been declined because of discrimination. The report acknowledged that the process was not clear, Ms Heffron made a management recommendation for all Christmas leave requests to be reviewed.

115. The claimant was told that his requested resolutions on the upheld allegations had been implemented, he had been moved to a less busy ward and was no longer required to cover other wards, and arrangements made for a stress risk assessment. Regular 1-1s were in place. Ms Heffron recommended more formal initial training for Ward Clerks. The claimant as told that it was not

unreasonable for Ms Clark to visit GH3 in her role, *"the expectations of both parties is to be professional".* The claimant was given a right of appeal (2610-14).

116. The claimant had been off work since 19 August 2019, and he was referred to OH by Ms Asoro on 2 September , the recorded issues are skin issues and panic attacks, and because he was signed off with work related stress and depression – (2617). An appointment was available for 3 September, Mr French could not reach the claimant by phone or email and the claimant did not attend (2639).

117. On 5 September 2019 Ms Asoro emailed the claimant for a "welfare check" and that she needed to hear from him otherwise under trust procedure she would have to contact his next of kin or ask the police to attend his address for a welfare check (2644).

118. The claimant failed to attend a further OH appointment on 10 September 2019. On 30 September 2019 he emailed a sick note saying *"as you can see my health deteriorated very much and I would like to be left in peace until I recover fully"* (2656).

119. On 3 October the claimant sent a grievance appeal letter to Ms Singh, arguing that the respondent had acted in a *"capricious manner"*, had not dealt with his grievance in good faith, had ignored his protected characteristics in the process adopted. He quoted extensively from the statutory code of practice on employment; he made detailed arguments on the findings of fact and he quoted extensively from case law (2662 – 91).

120. Mr Simmons responded saying that the outcome letter was on 21 August, he had 10 working days to appeal, which was made on 3 October, so his appeal could not be considered. The claimant replied saying he received the outcome on 26 September, arguing that his personal email account was hacked in August, he regained access to this on 23 September.

121. Mr Simmons in response accepted his appeal, he was asked to provide summary grounds of appeal as it is *"not presented in an way that enables it to be easily understood".* The claimant refused to do so *"I won't be wasting any more of my precious recovery time..",* he said he would not attend the appeal hearing and he had lost confidence in the respondent. In the too and fro Mr Simmons suggested this meant the claimant was withdrawing his appeal, the claimant responded *"If you really think … I will allow you to bully me into taking part in a sham appeal process, think twice.."* saying that it was for the respondent to prepare its response, and that he wanted answers to his questions. In further correspondence he said he did not want to be contacted by HR as his questions had not been addressed (2700).

122. The claimant did not attend an OH appointment on 9 October 2019

123. Ms Heffron prepared the Management Statement of Case for Appeal, which was heard on 7 November 2019. Ms Marguerite Meintjes was the appeal manager. Ms Heffron summarised the grounds of appeal (accurately the Tribunal

considered): his grievance had not been investigated thoroughly, with no due diligence or good faith; the process and the hearing were discriminatory with no reasonable adjustments put in place; the decision was misconceived and based on a misapplication of the facts.

124. An exchange between the claimant and Mr French in December 2019: the claimant provided a sick note signing him off until 29 February 2020, *"I require to know who from ER is pressuring you to make so many OH appointments for me… Please explain what an OH appointment is going to change … In relation to your statement 'you are there for me', I think it's too late to use this type of sub tricks to convince me… Please note that I do not wish to receive this type of communication and imposed OH appointments from you…";*

125. In response Mr French said *"…My aim has been to help you return to work…"*; the claimant's response, *"I don't think it was a genuine move…"*, that Mr French had *"lied"* to him regarding a call on 26 September, and stated that keeping Ms Clarke away from him at work was a reasonable adjustment. In further exchanges he reiterated he did not want *"any type of communication"* from Mr French while off sick (2801-5).

126. On 3 December 2019 the claimant wrote to Ms Sobande saying she had spread false accusations around the Trust, by writing to HR saying she was *"harassed and humiliated"* by the claimant's actions. He threated a defamation claim against her (2814-5).

127. In his grievance, the claimant had alleged sexual harassment by Mr Rayner and Ms Asoro refusing to investigate when he complained. A separate investigator was appointed to address this issue on 30 December 2019 (2817).

128. All relevant documents including the Management case and appendices were sent to claimant by email on 31 January 2020.

129. The appeal outcome prepared by Ms Meintjes dated 14 February 2020 is thorough and detailed. Her report upholds none of the appeal grounds. She concludes that the informal and formal grievances were undertaken carefully and in good faith, all relevant employees were interviewed, the claimant was given an opportunity to state his case, all issues were addressed including those in his additional statement, trust policies were complied with.

130. On the allegation of discrimination and a failure to make adjustments in the grievance process, the report concluded that there had been several adjournments and an opportunity to provide additional evidence; that as the claimant had access to the audio recordings there was no necessity to provide written transcripts; alternative dates had been offered. The report made recommendations for the claimant's return to work including a stress risk assessment, regular 1-1s, a review of training and additional training required. (2862-79)

131. The claimant was understood to be returning to work on 9 March, and on 3 March Mr Simmons sent the appeal outcome letter to Ms Asoro and Mr French, he states because of the recommendations to consider on his return to work 2966).

132. The claimant applied to change roles and in an email to Mr French on 4 March 2020 he said *"I believe I have made it clear… that I do not wish to return to GH3 Ward and work under your management …"* (2964). Mr French reiterated the need for an OH appointment to get their advice on whether the claimant was fit to return, saying his request for a transfer was being considered. He was told it was not reasonable to adjust Ms Clark's role to keep her away from any wards, but that her role had changed and per presence would be *"minimal".*

133. The claimant reiterated he considered the trust was refusing a reasonable adjustment for Ms Clark not to visit his workplace; Mr French reiterated the need for an OH appointment, the claimant's response was *"I'm revoking the permission to contact me on my personal email"* (2969-71).

134. Ms Sofia Colas the Divisional Director of Clinical Services dealt with the additional issue raised in the grievance, the allegations against Mr Rayner / Ms Sobande, as it was felt a more senior manager was required to consider this issue due to the sensitivity of the allegation. In rejecting the claimant's allegations, the report dated 6 March 2020 details an interview with Ms Sobande, the report accepts that Ms Sobande did not recollect the claimant raising any issue of sexual harassment by Mr Rayner *"at any stage"*.

135. On the allegation that the claimant was discriminated against regarding the CQC mock inspection, Ms Colas summarised the events, concluding that the claimant had left the ward and gone home, that there was agreement from Ms Asoro to do; there was *"no evidence"* to support this allegation (2975-7). The report was sent with appendices, including interview notes with Ms Sobande.

136. Following an OH appointment a report was prepared by an OH Consultant Occupational Physician, addressed to Ms Asoro dated 9 March 2020. This referred to work related stress and anxiety and depression and says that the *"key reason"* for the absence was work related stress. The report states that *"you are already aware that he has been diagnosed as HIV positive … the side effects of the medication can include fatigue, general malaise and skin disorders. … in my view [the claimant] does not have an underlying medical condition which automatically precludes him from undertaking his substantive post safely… the core issues in this case are managerial rather than medical and will only be resolved by managerial rather than medical intervention."* One suggested adjustment was transfer to another Ward (2986-7).

137. The claimant objected to this report and made extensive suggested amendments. An amended report was sent to Ms Asoro on 11 March 2020 with reference to HIV+ status removed and an *"underlying medical condition"* added.

138. On 11 March the claimant said he would return to work on 16 March, with *"applied reasonable adjustments...".* He asked to move to Markus Ward.

139. In the chain of emails that followed about returning to work, Ms Asoro stated that given the onset of what became the Covid pandemic, it was difficult to transfer, that there were steps to take and issues to discuss – for example that Ms Clark would visit Markus and other wards and departments, there was a need for a return to work interview, the need to address line management, and stress risk assessment; *"in order to consider your transfer request and support your return to work, I need to discuss these matters with you … I cannot move you or look into redeployment … until we have met and addressed"* these issues. The claimant responded with questions and said he would meet *"to have a digitally recorded face to face discussion…"* (3001-4).

140. The claimant returned to work on a phased return 4 hours a day for 2 days the first week to enable planning and risk assessment. The rtw meeting was recorded, Ms Asoro said she would look into the claimant transferring to Markus, but one issue was that only 15 hours were funded for this ward.

141. On 17 April 2020, when at work, Ms Clark entered his ward. The claimant's account of this is at 3037, written on 17 April to various including Ms Simmonds and Ms Asoro. He referred to Ms Clark coming close and pretending to need something, *"I believe management instructed [Ms Clark] to keep vising my work place to keep to intimidate and severely upset me..."* (3033). Ms Asoro's account (provided on 8 July 2020 to HR) stated that Ms Clark attended Markus *"to discuss items required…"* she did not interact with the claimant, during a discussion in the staff office the claimant entered *"… and said he was going home with no warning or explanation…"*. (3085-8).

142. The claimant was signed off work on 17 April for 3 months with work related anxiety, stress and panic attacks (3034).

143. Ms Asoro gave evidence on the claimant's working conditions on his return to work in April 2020. She said that PPE was worn throughout the hospital, in Markus ward only face masks were worn as there were no patients and usually a maximum of two staff members on the ward. She outlined the social distancing guidelines, 'red' pathways for patients who tested positive, and green pathways, that the claimant was not working in a red zone. The hospital was a care centre for cancer patients at this stage of the pandemic, and Ms Asoro considered that the green areas were Covid safe and secure.

144. A significant issue arose in the evidence of the date the respondent's management became aware of the claimant's HIV+ status, as it was apparent in the evidence that none of the managers, including Ms Waller who dismissed the claimant on grounds of capability was aware of this condition. This meant that issues of shielding, whether the claimant's conditions meant he was unable to work during the Covid pandemic because of health vulnerabilities, and should instead have been told to shield and be put on furlough.

145. In his ET proceedings, the claimant stated at a Hearing on 3 January 2020 that he was HIV+, a disability he was relying on in his claim. On 14 February 2020 he sent to the respondent's solicitors a Disability Impact Statement which sets out his medical conditions including HIV+ status. In his answers to questions on

this, Mr Simmons initial evidence was that the Trust was aware of his condition, but management was not. We discussed the concept of the Trusts actual 'knowledge' in his evidence. At no time did he say he had been given the Disability Impact Statement.

146. Mr Simmons was recalled to give evidence by the respondent on this issue. When recalled he accepted that he had been given the statement and was aware of the claimant's HIV+ status from early 2020, but he did not inform any of the managers dealing with the issues. His explanation was that he felt the claimant did not want his managers to know, that he believed the claimant would complain if he provided this information. His evidence was that this knowledge did not change anything, because he was unfit for work and on sick leave, and OH had not mentioned any adjustments for his HIV+ status. He accepted that it would be a *"better course of action"* to have informed mangers.

147. We were significantly concerned about the apparent evasiveness in his first evidence. However we also accepted that there was force in Mr Simmons view that the claimant would have objected to this information being disseminated, as he had asked for the same information to be removed from the 9 March 2020 report. While Mr Simmons should have asked for the claimant for permission for this information to be given to appropriate managers, we also accepted that the claimant would have refused to allow this information to be disseminated. Accordingly, Mr Simmons failure to ask this question, as he should have done, in fact made no difference to the eventual outcome.

148. The claimant complained about Ms Clark's presence, and Ms Asoro was asked to look into why Ms Clark needed to go to the ward, and her behaviour on the ward. In the response, Ms Asoro stated that Ms Clark had attended the department because *"she was contacted and asked to attend the department by the ward manager.."*. Ms Asoro said there were no roles in private care at the present time (3050). Working in MDU was mentioned, the claimant criticised this as the role which everyone leaves.

149. On 12 May 2020 Ms Singh provided her response to the whistleblowing complaint. Ms Mossman had undertaken an investigation which had concluded in October 2019. The delay in producing the outcome was explained by Ms Singh; her mother was very ill and died in this period and Ms Singh had time off work as a consequence; the Covid pandemic hit, meaning all her focus had to be on significant operational and staffing issues from February 2020. We accepted that these were the reasons for the delay.

150. Ms Singh concluded that the grievance process was *"comprehensive";* that given no bullying allegations had been upheld against Ms Clark it was reasonable for her to continue in her role; that a risk assessment would be undertaken on the claimant's return to work. The report concluded that the necessary policies were in place to tackle bullying and harassment (3072-4).

151. Ms Garcia, the claimant's new manager tried to arrange a sickness review absence meeting, the claimant's response on 12 June 2020 was that his transfer to Markus Ward was a *"mistake"* that he had lost trust and confidence in her

because she had been heard speaking to Ms Clark, that he would now only communicate with the trust's Chief Executive Ms Palmer (3080-1).

152. On 2 July Ms Garcia offered a meeting via teams or phone (3083), he was told that as he had not attended a sickness review meeting or provided an update on his health *"… I will have to decide what action should be taken going forward without your input. Since the advice from OH states that the core issues are managerial… which cannot be resolved if you will not engage with your managers, this absence is likely to continue for the foreseeable future. … If I do not hear from you there may be no choice but to move to the next stage of the Managing Long Term Sickness Absence Police & Procedure and hold a final sickness review meeting…"* (3084-5). The claimant responded, again saying that Ms Garcia should not send him emails.

153. Ms Garcia's evidence was that if she had known about the claimant's HIV+ status, she would have asked OH for advice and would have put in place appropriate measures, given in particular the changing nature of the Covid pandemic. She accepted that if it was established he was extremely vulnerable but he was otherwise fit for work he would have been placed on special furlough leave or given other work instead of sick leave. But, she said that "*engagement is a condition*" of taking such steps, and the claimant never did engage.

154. On 10 July 2020 Ms Asoro wrote to the claimant invited to a sickness management meeting on 3 August via teams or zoom (3092). The claimant replied with a sick note on 16 July saying that he was "*not satisfied"* with the Trust's infection control measures, *"…50% of the staff have caught [Covid]".* He said that there was no social distancing, and he was *"confident"* he would get the virus at work. He disputed the truthfulness of Ms Garcia's statement (3100).

155. On 17 July 2020 the claimant emailed a fit note signing him off for 13 weeks for work related stress, anxiety and panic attacks. He also sent a GP letter dated 14 July 2020, which states that the claimant *"… remains vulnerable if he catches Coronavirus, this is because he has an underlying health condition and significantly weakened immune system due to stress. That means if he catches the virus, he is more likely to be admitted to hospital than others. I strongly advise that he continues to shield and the safest course of action is for him to stay at home … avoid meeting people and to strictly follow social distancing rules to protect himself…"* (3100-2).

156. On 23 July 2020 the claimant was invited to a final formal sickness review meeting, on 18 August 2020. The claimant was sent a management case setting out his history of absences and their cause, his non-attendance at sickness review meetings and some OH appointments, and the chronology of correspondence and events. The total absences were 230 days over 5 occasions, with almost continuous absence since August 2019. It detailed the effect of these absences on the service*, "…attempts to assist and support …. have been futile as he refused to engage or communicate with his assigned managers".* It details adjustments made. It attached all the correspondence and OH reports received.

157. The claimant did not attend. He was written to, stating that a final formal sickness review meeting had been rearranged for 8 September via Teams, he was invited to attend with a union rep or work colleague. (3193-6). He was told that the outcome could be dismissal (3193-6).

158. The claimant informed HR he could not attend because of treatment/therapy. He was asked to supply evidence to clarify he was not medically fit to engage with the process, and the letter referred to OH's statement that he did not have a condition which precluded him from doing his role. He was told without this information, the meeting could go ahead in his absence (3196.1-.3).

159. The review was undertaken by Ms Joanna Waller Divisional Nurse Director. The outcome was sent to the claimant on 2 November 2020, saying that the claimant had not attended any of the meetings and had not given a reason for failure to do. The letter set out a chronology of events*; "I have considered the effect of your continued absence upon the service and department and consider that he negative impact can no longer be sustained."* The outcome referred to the OH advice that there was no condition precluding him from undertaking his role. There was little prospect of him returning and *"…it is not possible to keep your post open indefinitely. Therefore with regret I have decided that it is necessary to give notice to terminate your contact of employment on the grounds of a lack of capability due to ill health."* The claimant was paid 4 weeks in lieu of notice. His contract was terminated that day (3208-13).

160. The claimant's case is that he was dismissed because he had brought ET proceedings, that this is mentioned in her letter of dismissal, that even through Ms Waller knew he must shield, he was dismissed in spite of this.

161. The respondent's case is that it was made aware that the claimant was shielding from 15 – 31 July 2020; the date it received his GP's letter to the date that the guidance on shielding for 'clinically vulnerable' people ceased and shielding was no longer required. The respondent does not accept that the claimant was extremely clinical vulnerable, pointing to guidance that says people who are HIV+ are treated as being clinically vulnerable. The respondent also argues that the claimant was signed off work during this whole period, so that shielding provisions were inappropriate.

162. Both Mr Simmons, when recalled, and Ms Waller accepted that knowledge of HIV+ status would have led to an OH referral to determine whether the claimant was clinically vulnerable and needed to continue to shield and potentially to consider for redeployment; or an adjustment to working hours, or potentially facilitate to a safer area of work. Ms Waller said there would still have been a process – a conversation with the claimant to ensure that all the recommendations by GP and OH in place, and risk-assessments appropriate and regularly reviewed to make sure fit for purpose. But she argued that the claimant never engaged in the process, and the claimant never told her he was HIV+, and for these reasons shielding as an option was not considered.

163. The claimant argued that even he was off sick, he did not accept that there was no prospect of him being able to return. He argued he was not able to return

because of the pandemic, as well as the fact that the trust had created the stress at work. He accepts that he did not ask to work from home, he also accepts that his role as Ward Administrator was an in-person role. He says he did not know of availability of a remote role, but he would have accepted one, that it was for the respondent to propose something even though he was not engaging in any process.

Closing Submissions

164. Mr Young handed up a 73 page submission, which we read before and after his oral submission. The claimant provided a 23 page submission, again we considered this before and after oral submissions.

165. Mr Young apologised on behalf of the respondent if some of Mr Simmons's "initial evidence potentially misleading", that this error had now been corrected. He argued that who in the Trust did or did not know about the claimant's HIV+ status makes no difference to the legal analysis, that *"it's difficult to say whether outcome would be different"*.

166. In short, there were three issues:

    a. C left work in April 2020 and did not return was not because of social distancing, but because Ms Clark had come into contact with C – as had been the case since his grievance in June 2019 (1766), since February 2020 (3131). (oi) C's grievance (June 2019) - 1766 - he said he no longer wished to work for Ms C. So even though his 13 April 2020 letter does refer to social distancing, *"… his real complaint is that he came into contact with her at all."* It was "*his previous and long-standing complaints"* which are the core reasons for him leaving work in April.
    b. Also after April 2020 he has been certified as medically unfit, not because of concerns about social distancing; he is off with the same medical conditions before the pandemic as during it. *"He comes back to work briefly in April 2020 and is then signed off for the same reasons"*.
    c. Even if there was a legitimate social distancing concern, there was C's total failure to engage with sickness policy, and it was impractical to do something without engaging. Nothing was done to address these as the respondent *"did not get to the point to consider adjustments… wfh etc. could have been considered, but this is part of consultation process"*.

167. Mr Young argued that the claimant is not able to show that any PCP placed him at a substantial disadvantage, that while there may be an argument that depression and anxiety are linked to HIV+ status, but that there is no medical evidence or expert evidence to show this; for example the fit notes does not mention HIV+ status as a reason for being off work.

168. Mr Young argued that claims are out of time: he argued that if a reasonable adjustment claim has been made out of time, this must be 'anchored' to dismissal to be in time. A one off isolated act can't be a PCP, for example each annual leave request. And a delay in responding on one occasion (April – May 2019) is not capable of being a PCP as it's a one off act.

169. Mr Kaleta argued that Ms Sobande created a negative impression of him, that he was "resented from the beginning…" leading to a "critical issue" on 16 July 2018; a "false accusation" was made against him, that standing, drinking and eating. There were no witnesses, which there would have been if this was true. So I was "angry and frustrated", and he told Ms Sobande that *"false accusations"* had been made when he had blocked Mr Rayner on Grindr. "This is the point that Ms Sobande turns", and she started making notification of date of incident/interactions *"which is inappropriate"*, and it's all *"inconsequential incidents"* which she gives to her line manager Ms Littlemore.

170. Mr Kaleta argued that the transfer was *"One big nightmare … I was so distressed …and stress at work and also depression from the hurt inside that someone like Mrs Sobande was stabbing me in back"*. He transferred to a department with no training, and was referred to OH when he was told that he would not have Christmas 2019 off in December 2018 (1111). He argued he was given a verbal warning on 21 January 2019 leading to work related stress and sick leave.

171. The Christmas 2019 refusal of leave. He argued that Ms Clark "… knew I was Polish and my tradition of family spending Christmas together … and she knew that Christmas is important to me … it was conscious - deliberate…". He argued that some British staff can have leave the same dates but he was rejected.

172. He argued that the respondent's management did not want to believe/listen to explanations, and dismissed what was said/written.

173. Mr Kaleta argued about the knowledge of HIV+ status and his impact statement, that Mr Simmons decided that he was not going to tell anyone.

174. He argues that he was communicating with trust management during grievance and appeal – even though he had medical issues. Also from 17 April - 16 July - see 3058-9, he was in touch, and the trust disregarded the issue of safety and going to work in pandemic. He wanted to go back to work early July 2020.

175. PCP - not calling witnesses - this is not one off decision - Trust are using this strategy to provide false accusations against problematic employee; SM decides not to call to hearing, as they gather evidence in writing prior to hearing. And the claimant did not have opportunity to challenge issue. And disciplinary hearing I could not challenge witnesses; this was a strategy used twice.

176. Pandemic status: I was automatically classified as clinically vulnerable - but also immune system is attacking my body and this was showing as psoriasis, also prednisolone is a steroid to regulate immunise system so it stops attacking body; stress was affecting my immune system, and this was showing as psoriasis.

177. So "I am in extremely vulnerable group - not one condition - I have two other factors - immunise system disorder - psoriasis which is immunise system and steroids. So I had three factors which make me high risk."

178. He argued that senior managers and HR “have conspired against me, making false accusations”.

The Law

179. Equality Act 2010

s.13 Direct discrimination

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

s.15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

s.20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) ...
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

s.21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

s.23 Comparison by reference to circumstances

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

(2) The circumstances relating to a case include a person's abilities if—

a. on a comparison for the purposes of section 13, the protected characteristic is disability;

s.26 Harassment

(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.

…

(2) 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.

s.27 Victimisation

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

a. B does a protected act, or

b. A believes that B has done, or may do, a protected act.

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

a. …
b. …
c. doing any other thing for the purposes of or in connection with this Act;
d. making an allegation (whether or not express) that A or another person has contravened this Act.

s.136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Schedule 8 – Duty to Make reasonable Adjustments; Part 3 Limitations on the Duty - *Lack of knowledge of disability, etc.* Reg 20

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

a. …
b. than an employee has a disability and is likely to be placed at the disadvantage…

180. Employment Rights Act 1996 – Dismissal

s.94 The right

1. An employee has the right not to be unfairly dismissed by his employer

s.98 General

(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,

….

(3) In subsection (2)(a)-

a. 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
b. 'qualifications', in relation to an employee, means … technical … qualification relevant to the position which he held.

(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 a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the issue

Relevant case law

181. Direct Discrimination

a. Has the claimant been treated less favourably than a comparator would have been treated on the ground of his disability and (in relation to one allegation) on the ground of his race? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the disability / race (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *"reason why"* the claimant was treated as he was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

d. Was the claimant treated the way he was because of his disability, or because of his race? It is enough that his disability (or race) had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [disability] / [race]? Or was it for some other reason..?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL*. "What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

e. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

> (1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for

some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

(7) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

f. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it

was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

182. Discrimination arising from disability

1. There are two steps, *"both of which are causal, though the causative relationship is differently expressed in respect of each of them"*:

    i. did A treat B unfavourably because of an (identified) something? and
    ii. did that something arise in consequence of B's disability?

    "The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence." (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305).

2. If the employer knows (or has constructive knowledge) of disability, it need not to be aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (*City of York Council v Grosset [2018] EWCA Civ 1105*). In this case a lack of judgment by a teacher was contributed to by stress, which was significantly contributed to by cystic fibrosis; the Court of Appeal found that it did not matter that the school was unaware that the lack of judgment had arisen in consequence of his disability when s.15(10(a) is applied. If the employer knows of the disability, it would *"be wise to look into the matter more carefully before taking the unfavourable treatment"*.

3. There must be some connection between the "something" and the claimant's disability; the test is an objective test, and the connection could arise from a series of links (*iForce Ltd v Wood UKEAT/0167/18)* – but there must be some connection between the "something" and the claimant's disability.

4. The test was refined in *Pnaiser v NHS England [2016] IRLR 170, EAT*:

    i. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question

of comparison arises. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A, and there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

ii. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant.

iii. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. - it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

iv. "It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

5. The fact that an employer has a mistaken belief in misconduct as a motivation for a particular act is not relevant in considering s.15 discrimination, in a case where the employer had a genuine but mistaken belief the claimant had been working elsewhere during sickness absence: it is sufficient for disability to be *'a significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment'.' (Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT)*.

6. Justification: *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*: three elements of the test: *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?".* When assessing proportionality, an ET's judgment must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. *Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014]).* The test of justification is an

objective one to be applied by the tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning. The test under s 15(1)(b) EqA is an objective one according to which the tribunal must make its own assessment" (*City of York Council v Grosset UKEAT/0015/16).* Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. *Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18:* this objective balancing exercise requires that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so.

183. Reasonable adjustments

a. A failure to make reasonable adjustment involves considering:
   i. the provision, criteria or practice applied by or on behalf of an employer;
   ii. the identity of non-disabled comparators (where appropriate); and
   iii. the nature and extent of the substantial disadvantage suffered by the claimant.

   Environment Agency v Rowan [2008] IRLR 20, *[2008] ICR 218*

   "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'. *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*.

b. *Provision, criterion or practice:* It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported)*, 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'.

c. Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council [2004] UKHL 32*, *[2004] IRLR 651*, *[2004] ICR 954*: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

d. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (Tarbuck v Sainsburys Supermarkets Ltd), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc [2018] IRLR 1015)*

e. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. *Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10*, *[2011] EqLR 1075:* when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'.

f. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar)*: it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

g. *Employer's knowledge: Gallop v Newport City Council [2013] EWCA Civ 1583*, *[2014] IRLR 211* – a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*, *[2013] EqLR 326*,) Also, 'if a wrong label is attached to a mental impairment a later re-labelling of that condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name'. *Donelien v Liberata UK Ltd UKEAT/0297/14:* when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

184. Harassment

a. *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged

harassment constitutes discrimination 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. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case. *Pemberton v Inwood [2018] EWCA Civ 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

b. *Dhaliwal*: "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

c. 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts of harassment; in this case the lack of forethought on the part of the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

d. Purpose or effect: Harassment will be unlawful if the conduct 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. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that

the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

e. Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'*

f. *Land Registry v Grant* [2011] EWCA Civ 769: the tribunal must be careful not to cheapen the significance of the statutory wording; is must consider carefully whether the matters above can violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

185. Victimisation

a. The parties accept that the claimant made two protected acts.

b. Detriment: *MOD v Jeremiah [1979] IRLR 436*, *[1980] ICR 13, CA:* a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. A detriment must be capable of being objectively regarded as such- *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*, *[2003] IRLR 285*, *[2003] ICR 337,* 'an unjustified sense of grievance cannot amount to 'detriment'. *Deer v University of Oxford[2015] EWCA Civ 52* - the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

c. Reason for the treatment: **T**he detriment must be 'because' of the protected act. *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - it remains the case as under the pre-EqA legislation that this is an issue of the "reason why" the treatment occurred. Once the existence of the protected act, and the 'detriment' have been established, in examining the reason for that treatment, the issue of the respondent's state of mind is likely to be critical. However there is no need to show that the doing of the protected act was the legal cause of the victimisation, nor that the alleged discriminator was consciously motivated by a wish to treat someone badly they had engaged in protected conduct. A respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist. *Woods v Pasab Ltd (T/a Jones Pharmacy) [2012] EWCA Civ 1578:* 'the real reason, the core reason, for the treatment must be identified'

d. Where there is more than one motive in play, all that is needed is that the discriminatory reason should be 'of sufficient weight' *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615, CA*

e. A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful - *Garrett v Lidl Ltd UKEAT/0541/08*

186. Public Interest Disclosure

a. *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT* it is not sufficient that the claimant has simply made *allegations* about the wrongdoer: "… the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information."

b. *Smith v London Metropolitan University [2011] IRLR 884, EAT:* the raising of grievances about the claimant's workload is not a 'disclosure'.

c. *Western Union Payment Services UK Ltd v Anastasiou UKEAT/0135/13:* - applying *Cavendish* distinction between information on the one hand and the making of an allegation or statement of position on the other: 'the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive.'

d. *Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436*, *[2018] IRLR 846*. Per Cavandish, what it decided was that whatever is claimed to be a protected disclosure must contain *"sufficient factual content and specificity"* to qualify under the ERA 1996 s 43B(1). The position is that in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (*Cavendish*), a disclosure may contain sufficient information even if it also includes allegations. Moreover, the very term 'information' must grammatically be construed within the overall phraseology which continues 'which tends to show …'. Ultimately, this will be a question of fact for the ET, which must take into account the context and background.

e. *Darnton v University of Surrey [2003] IRLR 133, EAT*. The test is whether or not the employee had a reasonable belief at the time of making the relevant allegations that they were true. Although it was

recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

f. *Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979*, *[2017] IRLR 837*, *[2017] ICR 731*: In a case of mixed interests (personal contractual and public), it is for the tribunal to rule as a matter of fact as to whether there was *sufficient* public interest to qualify under the legislation. "The statutory criterion of what is “in the public interest” does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion … In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case…” The CA adopted as a “useful tool” the following submission: (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest. Additionally, 3 points of guidance: (1) the very term 'public interest' is deliberately not defined by Parliament, leaving it to be applied by tribunals; (2) the mental element imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing - 'the necessary belief is simply that the disclosure was in the public interest' and 'the particular reasons why the worker believes it be so are not of the essence'. (3) the necessary reasonable belief in that public interest may (in an atypical case) arise on later contemplation by the employee and need not have been present at the time of making the disclosure (though as an evidential matter, the

longer any temporal gap, the more difficult it may be to show the reasonable belief).

g. *Parsons v Airplus International Ltd UKEAT/0111/17 (13 October 2017, unreported)*the EAT pointed out that the determination that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest does *not* prevent a tribunal from finding on the facts that it was actually only one of them. Thus, where the claimant made a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a disciplinary dispute with the employer which eventually led to her dismissal for other reasons, the tribunal was held entitled to rule that they were made *only* in her own self-interest and so her claim of whistleblowing dismissal was rejected. The judgment of the EAT makes two subsidiary points of interest in a case such as this: (1) the fact that in these circumstances a claimant *could* have believed in a public interest element is not relevant; and (2) a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination.

h. *Bolton School v Evans [2006] IRLR 500, EAT* : ''It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise *to a potential legal liability.*' (emphasis added)'

i. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT*, Judge Serota said that, outside that category, 'the source of the obligation should be identified and capable of certification by reference for example to statute or regulation'.

j. *Arjomand-Sissan v East Sussex Healthcare NHS TrustUKEAT/0122/17 (17 April 2019, unreported)* where Soole J held that it depends on the stage of the complaint/action that is involved.

k. *Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06 (3 May 2006, unreported)* ''As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following: (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on. (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.''

l. *Babula v Waltham Forest College [2007] EWCA Civ 174*, *[2007] IRLR 346*, ''Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief

turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute."

m. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT* "a. Each disclosure should be separately identified by reference to date and content. b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified. c. The basis upon which each disclosure is said to be protected and qualifying should be addressed. d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures. e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, … whether it was made in the public interest. f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act. g. The Employment Tribunal … should then determine … whether the disclosure was made in the public interest."

n. *Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73*, *[2020] IRLR 374*. "In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. *There is a detriment if a reasonable employee might*

consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. The employer stated that *all* the claimant surgeon's allegations against the hospital had been dismissed by the relevant professional bodies, whereas in fact some had not been. The Court of Appeal held that this sort of half-truth is capable of qualifying as a detriment; but the motivation of the employer was to defend the hospital and had not been because of the whistleblowing: ''In short, the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.

o. T*imis v Osipov [2018] EWCA Civ 2321*: ''(1) It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). All that section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal. (2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, section 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply.''

p. *Harrow London Borough v Knight[2003] IRLR 140, EAT: The* act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial

Conclusions on the law and the evidence

Disability and R's Knowledge

Was C disabled within the meaning of section 6 Equality Act 2010 ("EqA") at the relevant times, and if so, from what date? Was R aware or ought it reasonably to have been aware that C was disabled by reason of the aforementioned conditions, and if so, from what date?

187. The respondent accepts that the claimant was disabled throughout the period of the claim with all conditions. It therefore accepts that the claimant had long-term

condition which had a substantial adverse effect on his ability to undertake day to day activities.

188. The issue to be determined is when the respondent became actually aware, or when should it have reasonably been aware the claimant had the conditions.

189. We accepted the claimant's evidence that he had a conversation about his psoriasis at the outset of his employment, a discussion related to work uniform and the materials used and the adverse effect wearing non-natural materials would have on him. We also concluded that he was quite open at work referring to the adverse effects of this condition, without necessarily naming it. The respondent witnesses accepted he had a visible skin condition which would flare up from early in his employment. We concluded that the respondent was aware of his condition of psoriasis from the outset of his employment.

190. On 12 December 2018 the respondent was provided with a medical report saying that he suffers from depression, anxiety and insomnia, and was prescribed promethanzine. We accepted that the respondent had actual knowledge of these conditions from the date it was given the report, on 20 December 2018 (1109). Given it accepts that the claimant was disabled with these conditions, it must accept that it had actual or constructive knowledge that these conditions were, or were likely to be, long-term.

191. The claimant was reticent to disclose his HIV+ condition at work – as was his absolute right. OH was asked to remove reference, instead stating he had a long-term condition for which he received treatment. The tribunal accepted that it would be very difficult to read into this that the claimant was HIV+. His claim form refers to him having an autoimmune condition. Again, we considered that it would be difficult to read into this constructive knowledge he was HIV+, this could relate to a multiplicity of conditions.

192. The respondent accepts it had knowledge of HIV+ status on 3 January 2020; this is when the claimant provided this information at a Tribunal Preliminary Hearing. We accepted that this was the date of its actual knowledge of this condition.

Direct Race Discrimination

Did R treat C less favourably than it did or would have treated other persons, because of his Polish national origins?

<u>On or around 9th April 2019 - Ms Clarke refused permission C to take leave around Christmas 2019 (paragraph 43).</u>

193. We considered all of the documents supplied by the claimant which showed that more than one Ward Administrator off at a time. For example w/c 27 May 2019, the bank holiday week show 7 staff off on the bank holiday Monday, 2 on Tuesday, 3 on Wednesday and 2 on Thursday; w/c 3 June two members of staff were off Monday and Thursday; w/c 30 September: 2 people off Thursday and Friday. On the Christmas week, Ms Thomas was off work the whole week, Ms Smith off on 27 December.

194. We concluded that on the claimant's best case, on 3 weeks over the year there were days when more than one Ward Administrator was off work. There was never two people off together for a week. We accepted that there could be reasons for this – special leave, exam leave, emergencies – as the claimant had when he moved house and was given leave when another member of staff was off.

195. We also accepted that the policy which was in force, which was set out clearly in writing in April 2019 (1215), that only one member of staff could be on annual leave at a time, was a genuine policy. We concluded that the respondent's actions thereafter were genuine attempts to apply this policy consistently.

196. We also concluded that the comparator would have been a UK born Private Care Ward Administrator who wanted to travel for the Christmas period for a week to visit family, who booked leave at the same time and by the same method as the claimant. These are the same or similar circumstances which are required for a comparator.

197. We concluded that the comparator's Christmas leave would also have been denied, for the same reasons, that it was dependent in part on who had put in their booking first. We accepted that it was inevitable that in any 24/7 operation whether a hospital or otherwise, this will inevitably leave some staff very disappointed, as leave requests need to be balanced against the demands of the hospital.

198. This is an issue which should be handled sensitively, with some understanding of the impact such a decision can have on employees. We did not think that the claimant's request was handled sensitively, also there was confusion over who had booked leave first, which appeared to suggest favouritism.

199. But, the test is whether the hypothetical UK-born comparator would have been treated any differently. We concluded that the comparator who applied for leave at the same time and in the same way would have had their leave requests rejected for the same reason. There is no evidence that the leave was rejected because of his Polish origins, the leave was rejected because he applied too late, when leave requests needed to be balanced against the demands of the hospital.

200. We also concluded that Ms Thomas was not an appropriate comparator as she worked on a different team – the Surgical Unit – and was not rostered onto the Private Care wards. Even if this is wrong, this would not have affected the decision, as she asked for leave earlier than the claimant, in a first-come first-served leave policy.

<u>13th April 2019 - Ms Lightfoot and Ms Clark reprimanded C for not following a reasonable management request (paragraph 47).</u>

331. This claim was withdrawn as a claim of race discrimination during the hearing.

12-14 May, 20 and 24 May 2019 - Ms Page, Ms Colas, and Ms Perrin plotted against C and conspired to protect Ms Clark. Ms Page refused to meet with C. Ms Perrin's conduct during and after the meeting on 24th May 2019 (paragraph 49).

201. The claimant made a complaint over Ms Clark's refusal of the December 2019 leave and requested a meeting with HR. HE decided that this was should be treated as an informal grievance and the issue was passed to Ms Lightfoot, who did not want to meet the claimant on her own. Ms Page asked Ms Perrin to attend with Ms Lightfoot. The Tribunal concluded that this was as normal management response to an informal grievance. The only issue was that Ms Lightfoot did not want to meet with the claimant alone, and then pulled out of the meeting. None of this involved plotting against the claimant or conspiring to protect Ms Clark.

202. Ms Perrin then looked into the issue of leave. She was clear that there had been no error. She took this information into the meeting with the claimant to discuss what had happened and why. Ms Perrin's clear view was that the claimant would not accept what she was saying and was talking over her, which we accepted.

203. The claimant's only evidence that there was a conspiracy to protect Ms Clark is that his complaint was not found in his favour. In his evidence he accepted that the policy was one person off at a time on leave, and that Ms Clark had booked a day off before him.

204. The clear picture therefore is that there was no need to conspire to protect Ms Clark. The claimant's request for Christmas 2919 followed the leave policy email, Ms Clark had applied this policy. To conspire to protect would necessarily involve engineering a smokescreen or falsehood. But Ms Perrin simply attempted to outline the policy to the claimant. This allegation therefore fails on its facts, as there was no conspiracy, no attempt to protect Ms Clark.

205. We accepted that Ms Perrin raised her voice at the 24 May meeting, she said so, we accepted that this was in response to the claimant speaking over her. We accepted that there was a heated disagreement with the claimant refusing to accept and arguing over Ms Perrin, who attempted to continue to make her point. There were two raised voices. The reason why was that the claimant was not accepting what Ms Perrin was telling him, was objecting and got angry.

206. A comparator would be another employee who was complained, the complaint has been dealt with under the informal procedure, and where the grievance finding was adverse, and who then raised their voice and did not accept the outcome. We accept that Mrs Perrin would have treated this comparator the same, there was no difference in treatment.

25th June 2019 - Ms Singh, Mr Simmons, Ms Colas, Ms Page, Ms Perrin, and Ms Asoro conspired to render C's grievance a sham

207. This was a wide ranging allegation made against several participants. We considered it best to deal with this allegation by considering the grievance process, why the grievance was not upheld, and how a similar grievance would

have been dealt with had it been brought by a UK-born employee, a hypothetical comparator.

208. For the reasons set out in our findings of fact, we consider that the grievance was considered carefully and witnesses were properly questioned. There was no evidence whatsoever of a conspiracy between the above-named.

209. In his statement, the claimant's main complaint is the fact that he was not allowed to cross-examine witnesses. The grievance policy gives him the right to call witnesses. We concluded that the policy is usually designed for the claimant to call witnesses in support of his case, and not to challenge the management witnesses. The respondent decided not to recall its witnesses. The claimant did not seek to call them himself, and had he done so, we consider that these members of staff would have refused to attend.

210. We heard no evidence of a comparator who had been treated differently in a similar situation. Accordingly, the comparator is a UK-born staff member who has raised a wide ranging grievance, where a hearing was adjourned, fresh evidence gained, and a decision not to call these witnesses to the reconvened hearing. This is in the context where two days have been spent in the hearting and only 50 of 300 questions had been asked

211. We concluded that such a comparator would have been treated the same, there was no evidence whatsoever that this comparator would have been allowed to continue their detailed cross-examination of employer witnesses. The respondent was entitled to manage the grievance process to keep it proportionate in length, and it would have done the same with a comparator.

<u>10 -22 July 2019 - Ms Perrin, Ms Uvieghara, Ms Clark, Ms Page, Ms Lightfoot and Ms Asoro's conduct during C's grievance process (paragraph 55)</u>

212. From the Scott schedule, this relates to allegations 51-55 and the grievance outcome.

213. As set out above our conclusion was that the grievance was properly considered, appropriate evidence sought, and the conclusions were reasonable. We again asked ourselves how a UK-born comparator would have been treated on the same facts, with the same grievance allegations. We concluded that they would be treated the same.

214. The claimant alleges that the management statement of case was false, without foundation or real evidence. We considered the management and additional statement of case. All allegations made by the claimant were considered in detail, with statements taken, the chronology of leave requests considered. We concluded that the Management Statements of Case would have concluded the same had they related to a UK born comparator.

215. The claimant alleges that employees involved including Ms Clark and Ms Perrin lied during the process. We did not accept that they did lie during the process; we also accepted that the evidence they gave in the grievance process would

have been similar evidence would have said the same with a UK born comparator.

216. **Accordingly, all claims of direct race discrimination fail and are dismissed.**

Discrimination Arising From Disability

Did R treat C unfavourably because of something arising in consequence of disability?
Was any proven treatment "unfavourable"?
If so, was the reason for the treatment the "something" relied on by C?
If so, did the "something" relied on by C in fact arise in consequence of disability?
If so, was it the reason for the treatment of which he complains?

12th April 2019 - Ms Clarke harassed C by arriving in the GH3 ward and, in front of colleagues, requiring C to follow a reasonable management instruction, walking behind him and indicating that there would be consequences if he failed to follow that instruction, when C refused to cover GH1 ward.

217. The claimant says that Ms Clark accepts she asked him to cover GH1, and the claimant accepts he refused to do so, he says his refusal arose in consequence of his mental health impairments and his skin disorder on that day.

218. The claimant's witness statement paragraph 119 says that he was not feeling well, that this is the reason he wanted to stay on GH3, it was not that he was unable to work, or that he had to leave work.

219. We accepted the claimant's evidence that he was very stressed, that this makes his psoriasis worse, that he was not having much sleep and he was finding his role stressful and exhausting.

220. We therefore accepted that this refusal to work was disability–related, and the respondent concedes that this was something that arose in consequence of disability (paragraph 56 respondent's closing).

221. The claimant being informed that he must change wards at short notice and threatened with consequences when he refused was, we accepted, unfavourable treatment. It stressed him out, at a time when his psoriasis was flaring, this exacerbated his ill health.

222. The legitimate aim of the respondent is the need to ensure ward cover. We noted that although Ms Clark sought advice after this incident and was told it could amount to misconduct, she did not speak to him about it again, "I did not say anything to him…" (1235).

223. Accordingly, the act complained of is that the request was made, and the manner in which it was made. We accept that the claimant was told it was an instruction, that he was needed on GH1 and that she would take it further if he did not do so. In context, in a busy hospital and where it was part of the claimant's contract to work on different wards, this was a reasonable request. The claimant had not

previously indicated he could not work on GH1. While he then said he was too ill to do so, he was not forced to work on GH1.

224. We concluded that the request was, in a hospital environment which requires flexibility to ensure important roles are undertaken, a reasonable instruction to make, and it was reasonable to follow this up with potential consequences when he refused to do so. We accepted that there were no consequences, that it was accepted that the claimant felt too ill to change wards.

225. This was, we concluded, a proportionate means of achieving this legitimate aim – it is difficult to think of what else Ms Clark could have done, when a member of staff at work is saying that they are not prepared to change wards when on duty and are otherwise fit to attend work.

2 November 2020 - Ms Waller adopting in her letter of dismissal evidence (said by the Claimant to be false as set out at paragraphs 37 (a) to (I) of the particulars of claim lodged on 17 January 2021), provided by Matron Asoro in the management statement of case.

226. At paragraph 37 of the 2nd claim, the claimant takes issue with several statements made by the respondent; saying that they are false. The tribunal accepted that there may have been some factual minor inaccuracies in the statements, as set out below, but we did not accept that this renders them 'false'.

227. The statements the claimant says are false:
    a. Offered other positions: at least one position had been suggested and he had dismissed out of hand – MDU.
    b. He refused to be transferred to Sutton: we heard no evidence on this point, it was not put to witnesses that the claimant had not been offered this role.
    c. he was assigned to GH wards on 12 September 2019: we accepted that this was an inaccurate date, he had been transferred in 2018.
    d. he had been provided with management support (see (e)
    e. he had been provided with support by Matron Asoro: while the claimant may disagree, we did not accept that this statement was factually inaccurate, Ms Asoro spent time with the claimant, and was supportive, for example over the CQC mock inspection.
    f. he expressed a wish not to work at Sutton: again we heard no evidence on this point.
    g. he walked out of his shift with Sister Garcia during a stress risk assessment: the claimant accepts that he left work but it was "for totally different reasons"
    h. that he had walked out because Ms Clark breached his health and safety: the claimant says this is inaccurate as the reason he walked out was because he was being put in imminent danger;
    i. there was a reference to a grievance about Ms Clark in August 2019: the claimant had submitted a wide ranging grievance about Ms Clark.
    j. that Ms Asoro had discussed with C other roles outside Private Care: the tribunal accepted that Ms Asoro had discussed other roles, but that the claimant's ill health then precluded any further discussion.

k. That all reasonable actions had been taken to support the claimant during his sickness: the tribunal considered this statement in light of Mr Simmons evidence that he had not mentioned the claimant's HIV+ condition to, for example Ms Waller. But the claimant was refusing to engage with management at all in his absence from April 2020, he stated that he would not do so. Given this lack of engagement, it is difficult to see what other actions could be taken, and this statement cannot be said to be false.
l. Ms Waller had considered the effect of his continued absence: In fact Ms Waller did consider the effect of his absence on the team and hospital: this statement is not false.

228. It follows that the claimant was not treated unfavourably as none of the statements in the dismissal letter were false.

229. We also concluded that these statements were not made in consequence of the claimant's disability: Ms Waller made her findings because the evidence supported these findings.

230. **Accordingly, all claims of discrimination arising from disability fail and are dismissed.**

Harassment

Did R engage in unwanted conduct relating to a protected characteristic?

If so, did it have the purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him (if it had that effect, taking into account C's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect)?

12th April 2019 - Ms Clark harassed C when he refused to cover GH1 ward, ignoring his mental health and skin disorder on that day (protected characteristic – disability).

231. The claimant says that Ms Clark did not care about his disorder, that she told him it's his job and he is not doing it (358). Was asking him to work on the ward conduct related to his disability? We concluded no, that it was a work-related request which would have been asked of any Ward Administrator working on GH3 in this situation where cover was required for GH1.

232. We considered that the claimant's refusal to undertake the role was for a disability-related reason. Did this make the continued exchange, after he had said no, harassment? We concluded not, that Ms Clark was entitled to say that there could be consequences, but this was not related to his disability, it was because the claimant had refused a management request. Also, we noted that Ms Clark's email of 17 April, cc'd to Ms Lightfoot does not suggest that the claimant had committed misconduct.

233. We accepted that this was unwanted conduct; we do not accept it related in any way to the claimant's disability.

234. To conclude the legal test, while we accepted that the treatment was unwanted, we did not consider that its purpose was to harass him. We did accept that it had the effect of humiliating him and creating a hostile environment for him. But we did not consider that it was reasonable for the conduct to have that effect.

235. In saying that it was not reasonable for the conduct to have that effect, we accepted that the claimant is very sensitive to poor treatment, and this in part is related to his disabilities. But in context we considered that Ms Clark was making a reasonable request, and was pointing out to him the consequences of refusing to do so. It would not objectively be reasonable for this treatment to humiliate or create a hostile environment for an employee in this context.

24th May 2019 - Ms Perrin's conduct during the grievance meeting (protected characteristic – race)

236. The claimant alleges that accusations were made not in good faith and the treatment towards him as unreasonable. Our findings of fact are that the claimant refused to accept what Ms Perrin was saying, that both talked over each other as Ms Perrin tried to make her point. She ended the meeting early.

237. The reason why this meeting was had was in no way connected to the claimant's race. It was had because the claimant had raised an informal grievance. The conduct in this meeting was in no way connected to the claimant's race, it was because he had raised his voice and was refusing to listen.

238. Also, we did not accept that the claimant's dignity was violated at this meeting: both were raising their voices, but Ms Perrin's voice was raised only in response to the claimant refusing to listen and speaking over her. If it was violated, it was not objectively reasonable because it as the claimant's conduct in refusing to listen and speaking over Ms Perrin which caused his negative feelings.

239. **Accordingly, all claims of harassment fail and are dismissed.**

Victimisation

C alleges that he was subjected to the following detriments because he had done protected acts.

Did C do protected acts within the meaning of section 27(2) of the EqA?

If so, was the act or omission C complains of done because of the protected act?

If so (save in relation to dismissal), did it amount to a detriment?

C complained to Ms Sobande about being sexually harassed by Mr Rayner in July 2018.

The detriment is that Ms Lucas gave C a final written warning on 15th November 2018.

240. The claimant's case is that he was portrayed as a troublemaker, and his reputation was destroyed, and that this led to the final written warning, that he was set up to fail by Ms Sobande.

241. We did not accept that the claimant made a protected act in July 2018. We accept he may have made reference to Mr Rayner messaging him on Grindr, but he did not say he was being harassed to Ms Sobande as a consequence of these messages. We concluded that he did not think we was being sexually harassed when the messages were sent, and he did not say so to Ms Sobande.

242. In any event, we concluded that here was no link whatsoever between any protected act and the final written warning. The reason the claimant received the final written warning was that there was actual evidence, in part based on his own admissions, that he had harassed Ms Ali by his own conduct, Ms Ali raised a genuine issue of concern, and that this was investigated appropriately. We concluded that Ms Lucas was unaware of the claimant's views on Mr Rayner and Grindr messages he had received, that this played no part whatsoever in her decision.

10 May 2019 C complained in an email to Ms Clark that she had not approved his request for holiday at Christmas 2019.

The detriment is that she refused to approve his request for September/October leave.

243. The email does say the claimant wanted to *"discuss my concerns about being discriminated against"* in respect of leave allocation. There is no suggestion that this relates to the claimant's race or disability. We concluded that this was seen as a complaint about poor treatment, that this does not in any way make this complaint a protected act.

244. We considered the context of this email was a complaint about leave allocation, not that the claimant was suggesting in any way that this was unlawful race or disability discrimination.

245. Also, the reason why the leave was refused is because Ms Clark as applying the policy that only one Ward Administrator could be off work on pre-planned leave. We concluded that the claimant's leave was refused for this reason – other Ward Administrators had booked off leave that week.

Between 12 - 14 and on 24 May 2019, C complained to Ms Page in email and to Ms Perrin in an informal meeting about being discriminated against at work.

The detriment is the treatment of C by Ms Perrin at the meeting on 24th May 2019, namely, failing to take C's complaints seriously.

246. The 12 May 2019 grievance letter states that the claimant was being *"bullied and discriminated against"* and that he was being *"singled out"* for unfair treatment. *"…… I should be treated the same, and I am not, I feel that I can reasonably assume that I am being discriminated against".*

247. The Tribunal accepted that this grievance letter constituted a protected act, that there was enough reference in this email to conclude that the claimant was not being treated the same as other staff members, that this amounted to discrimination. There is also a reference to family in Poland, and his symptoms of anxiety and depression. We concluded that there was enough being said for this to amount to a protected act.

248. But, we concluded, that the detriment – being shouted at – was in no way connected to the protected act. The conversation was difficult because of the claimant's reaction to being told Ms Clark's actions had been in accordance with the policy. Had the claimant not raised his voice, the conversation would have been different.

249. Also, we concluded that the issue was taken seriously, which is why Ms Perrin found out what had happened and arranged a meeting to discuss it with the claimant. Nothing she said was inaccurate. There was no detriment because he had made a protected act.

C complained about Ms Clark between 12 - 14th May 2019. On 30th and 31st May 2019 Mr Simmons, Ms Singh, Ms Page, Ms Perrin, Ms Hefron, Ms Colas, "plotted against" C by: Ms Page asking Ms Asoro to take over C's line management; Ms Perrin choosing witnesses who did not directly work with C and thereafter deciding that management would not call any witnesses.

Detriments are the delay in dealing with the matter, not taking C's complaints seriously and protecting Ms Clark and Ms Lightfoot at C's expense.

250. We accept that the claimant's grievance of 12 May is a protected act.

251. The reason why Ms Asoro took over his line management was a policy decision to change the line management of Ward Administrators to nursing staff. This affected all Ward Administrators. This was not because of his protected act. Also, we concluded that it could not amount to a detriment, in circumcentres where the claimant had fallen out with his current manager. He also accepted this change gratefully

252. The claimant could have called witnesses. He does not say who should have been called. Instead he chose to prepare 500+ questions for the management witnesses.

253. We deal with the reasons why Ms Clark, Ms Page and Ms Lightfoot were not recalled at the reconvened hearing above, because Ms Perrin had asked them additional questions and these included questions the claimant wanted asking.

254. The delay in dealing: we deal with the delay above: the grievance was made on 12 May, it needed investigating and the claimant objected to the proposed investigator. Ms Perrin carried out a thorough investigation, which took time. The delay was not because of his protected act, it is because the investigation took time, and was diligent, and thereafter a delay in getting available dates for all involved.

On 25th June 2019 C invoked a formal grievance to Ms Singh about being harassed and discriminated against by Ms Clark and Ms Lightfoot.

Detriments relied on are: "conspiring against" C to provide a "sham" grievance process, by Ms Perrin, Ms Page, Ms Colas, Ms Hefron, Mr Simmons, and Mr Singh; the conduct of Ms Perrin, Ms Hefron, Ms Uvieghara and Ms Lavall at the hearing on 1st August 2019.

255. The respondent accepts that this grievance amounts to a protected act – there is refence to unlawful disability discrimination and harassment.

256. A principle concern in the evidence about the conduct of the hearing was that the respondent read documents he had brought along, were invited to copy them during a break in the proceedings, they did not, and then asked him for copy documents. This did occur. Those present were entitled to read through and ask for copies, there was no copier to hand. This fact was in no way connected to the protected act.

257. We have dealt with the sham grievance process above: it was a thorough and even handed investigation and grievance report; it made some criticisms of the respondent's processes and suggested recommendations to improve, for example leave allocation issues. We did not accept that the grievance process, the report or its outcomes were in any way connected to the claimant's protected act.

8th August 2019 - C complained to Ms Hefron and Ms Perrin that he was "bringing the matters to the attention of the Employment Tribunal".

Detriment - Ms Hefron and Ms Lavall ignored the facts presented by C instead rejecting the allegations. They scheduled the final grievance hearing on 15th August 2019 despite knowing the C was on annual leave. Ms Singh and Mr Simmons were also involved in the process and the decisions made in that they appointed the managers to hear the grievance and controlled the outcome.

258. The claimant says that he had reached the point of no return and was bringing a claim to the Tribunal. He refers to discrimination. We accepted that in the context of the issues the claimant was no raising, that this was an allegation of unlawful discrimination which would be considered in a Tribunal. We accepted that this was a protected act.

259. Ms Heffron's evidence was that she gave the claimant options to reschedule, that he had said he could cancel his leave, she decided to go ahead as she did not get an answer to her questions. This was in no way connected to the fact that he had made a protected act, Ms Heffron was willing to engage with the claimant, he failed to do so, she went ahead. They offered an option twice and he did not take either option, so they chose to go ahead with the meeting as originally planned.

260. That Ms Singh and Mr Simmons chose the managers and controlled the outcome. We accepted that HR may have an involvement in allocating

managers to deal with grievances – this is part of HR's role to coordinate and assist in the process.

261. We rejected this allegation – they had no involvement in the decision process. Ms Heffron was given some advice by Mr Simmons, as is appropriate for a HR professional to give. He was not a decision maker. The decision was Ms Heffron's alone, she followed the evidence and reached conclusions consistent with the evidence.

13th May 2020 - protected act: C starting ET proceedings on 15 August 2019 (intention notified to R in an email from C to Ms Hefron on or around 8 August 2019).

Detriment is Ms Singh *delaying her reply to* C's "whistleblowing letter" dated 6th August 2019, and stating that all matters and allegations were not upheld and that the matter was now resolved.

262. It is accepted that the claim is a protected act.

263. The there was a combination of issues which led to a delay from August 2019 to May, and we have concluded that Ms Singh's delay in providing the outcome was honest and accurate. The delay was unfortunate, and it was a 'detriment' for the claimant, but it was in no way because he had made a claim to tribunal.

264. The report was entitled to conclude on the facts that the claimant's whistleblowing allegations were not made out; there was no health and safety breach by the respondent, and this conclusion had nothing to do with the claim to the Tribunal. An accurate report cannot in any event be a detriment.

15 August 2019 - protected act: C lodged Employment Tribunal proceedings.

Detriment: C was dismissed on 2 November 2020.

265. It is accepted that the claimant's ET claim is a protected act. For the reasons we set out below, we concluded that the genuine reason for the claimant's dismissal was a view that he was on long-term sick leave with no prospect of returning to work.

266. We concluded that the reason why the respondent (Ms Waller) held this view was because of the facts as they were at this time. There was little prospect of him returning to work because his absences were caused by him getting ill as a result of a dispute between him and his employer. The reason for the dispute was that he was unwilling or unable to accept the outcome of his complaints and was unwilling or unable to return to work with any of the managers he had worked with thus far. He then failed to engage with the managing attendance process.

267. The conclusion reached by Ms Waller, and the decision that as a result he had little prospect of returning to work in the foreseeable future had nothing whatsoever to do with his claim to Tribunal.

268. **All claims of victimisation therefore fail and are dismissed.**

Reasonable Adjustments

C relies on the following acts or omissions as amounting to a failure to make reasonable adjustments
In relation to each, did R apply the provision, criterion, or practice as alleged?
If so, did if (or did they) put C at a substantial disadvantage in comparison with persons who are not disabled?
If so, was R aware or should it reasonably have been aware of that fact?
If so, are the adjustments suggested reasonable and did R fail to make them

9th April 2019 - Ms Clark refused to approve C's Christmas leave request

The PCP was the requirement to have only one member of staff off at a time.

The substantial disadvantage was the fact that his mental health disability made this particularly difficult for him because Christmas is the only time that C can be reunited with his family.

The reasonable adjustment would have been to have allowed more than one person off.

269. It is agreed that the PCP was to have only one staff member off at a time. We accepted that this amounted to a substantial disadvantage to him.

270. Is this a substantial disadvantage in comparison to others who are not disabled (*Archbald)*? We concluded no. We accepted that the claimant has mental health difficulties, and that these were impacted for him. But it is also the case that the claimant was made aware of the leave issue 8 months in advance. We concluded that although the claimant was upset and depressed by this decision, that the impact of not going to Poland could be reduced by him making alternative arrangements, for example going home just before or just after Christmas. We did not accept therefore that there was only one chance a year to meet with his family. Also, it is a very sad time for anyone who wants to be with family not to be able to do so it can cause isolation and be a very negative experience. We therefore concluded that this decision did not cause a substantial disadvantage to the claimant.

271. Was it reasonable adjustment to allow for more than one person off? We concluded no: firstly, even if this was the policy there is no guarantee that this would lead to the claimant booking leave at any time he wanted, there was a queue. Secondly, there were logistical issues if too many people had leave off, managers have to do Ward Admin tasks, and as with the claimant not wanting to work on GH1, it is disruptive to staff who are at work. there is the issue of unexpected absences further stretching the service.

272. We therefore concluded that this was not a reasonable adjustment, given the operational requirements of hospital.

11 April 2019 - Ms Smith complained to C via email for not doing the job at Marcus Ward as she did it (para 44).

The PCP was to impose Ms Smith's way of working on C

The substantial disadvantage was: to cause C stress because of his mental health disability/disabilities

The reasonable adjustments would have been to have given C proper handover, training or information on how Marcus Ward was run

273. We did not accept that Ms Smith's email can amount to a PCP of imposing her way of working on C. The email was telling him how to order records on that ward, a one-off email from Ms Smith which she sent because files were ordered twice. This email was not a PCP, it was a one-off request to resolve an issue on the ward. The claimant accepted that he would have raised similar concern had this occurred on his ward, albeit he would have formalised his concern through his manager and not emailed the staff member.

274. We accept that the claimant was stressed by this email. However see no basis on the medical evidence that this disadvantage was in fact caused because of his mental health difficulties. The reason why he was stressed was because he could not accept another Ward Administrator telling him how to order records on her ward. He felt he had a better method and he told her so. His view was that the issue should have been raised via managers. We concluded that the reason for the stress was because the claimant was not prepared to accept such advice, he was angry the advice had been given. This stress was not connected to his mental health difficulties. The email was not a criticism, but the claimant took it to be so, and this is what caused his health difficulties. There was no substantial disadvantage in comparison with a non-disabled Ward Administrator.

275. We also concluded that it would not be a reasonable adjustment to have a more formal handover. The reason why Ward Administrators are asked to move wards is because of an immediate need, e.g. sickness, which means there is no one there to give a handover. Ward Administrators are therefore expected to learn slightly different ways of doing the same job, and in doing so emails such as Ms Smith's are a reasonable way of doing so.

12th April 2019- Ms Clark "harassed" C for refusing to work on GH1 ward.

The PCP was requiring him to work on various additional wards

The substantial disadvantage was that this was stressful for him, particularly as a result of his mental health impairment.

The reasonable adjustments would have been not to have asked him to work on GH1 ward in addition to others or to provide cover for C's duties on GH3.

276. It is accepted that the PCP was requiring him to work on additional wards.

277. We accepted that it was stressful for him to work on additional wards, and that this was more stressful than it wold have been for non-disabled Ward Administrators.

278. But when he objected he did not undertake this duty, it was covered by another Ward Administrator. So there was no substantial disadvantage to him, because in the event he did not undertake this duty, he was not required to do so on this date. In fact, we concluded that a non-disabled Ward Administrator would have been required to undertake this duty; the claimant was treated more favourably by in the end not being required to move wards.

279. Was it a reasonable adjustment not to ask him to work on GH3 at this time? The claimant had not raised an objection prior to this date about working on other wards. There was no suggestion from the claimant that asking him to do so could affect his ill health.

280. In fact, this adjustment was made, as soon as the claimant raised it with OH, the the 9 May 2019 OH report made this recommendation, and it was implemented after discussion with Matron Asoro with the claimant's agreement on limited work he would do on other wards.

281. We concluded therefore that at the time the request to work on GH3, the claimant had never raised a concern; when he did the adjustment was made. There was no failure to make a reasonable adjustment on this occasion.

12th - 14th, 20th and 24th May 2019 - conduct of Ms Page, Ms Perrin, Ms Colas in relation to the meeting on 24th May 2019 (para 49).

The PCP was: the manner in which Ms Perrin conducted the meeting, namely the refusal for C to bring a companion or to record the meeting

The substantial disadvantage was it caused stress, intimidation and confusion to C as a result of his mental health impairment(s);

If so, did if (or did they) put C at a substantial disadvantage in comparison with persons who are not disabled?

The reasonable adjustments would have been allow a companion, permit a recording to be made

282. We did not accept that Ms Perrin raising her voice in a meeting, is a PCP. There is no suggestion this was her normal method of interacting, it was not her 'practice' to do so.

283. We accepted that the respondent did not allow companions or recordings at informal grievance meetings – that this was a PCP.

284. However, we did not accept that the lack of companion or recording cased the claimant a substantial disadvantage. The reason the claimant was stressed is that he did not accept what he was being told, and he got angry. Therefore, his stress was caused by his own actions. A recording or companion, *may* have led to him acting more appropriately, but it was his losing his temper and raising his

voice which caused the meeting tone to deteriorate, not the lack of companion or recording.

285. Accordingly the PCP did not put the claimant at a substantial disadvantage and the suggested adjustments would not have reduced any disadvantage caused by his own behaviour.

25th June 2019 - conduct of Ms Page, Ms Perrin, Ms Colas, Ms Hefron, Mr Simmons, Ms Singh in relation to the grievance process (para 51).

The PCP was: to appoint a number of different personnel to become involved in the grievance process

The substantial disadvantage was: to cause C stress and to lose focus because of his mental impairments

The reasonable adjustments would have been to appoint a single manager who would be responsible for managing the process.

286. We accept that a practice in any grievance process is to have several people involved. The claimant had objected to Ms Page's involvement, Ms Perrin was the investigator, Ms Heffron chaired the grievance process Ms Colas appointed Ms Heffron and Ms Perrin. Ms Singh had no involvement, Mr Simmons provided HR advice.

287. We do not accept that thus number of individuals lad to a substantial disadvantage for the claimant, and he gave no evidence that he was disadvantages as consequence.

288. In any event, it cannot be a reasonable adjustment to have one person controlling the whole process. This would be unfair in law, see the CAS Code on the need for separate investigation and grievance manager, and the role of HR.

9th July 2019 - Mr Simmons informing Ms Asoro and Ms French to cover up *"the incident"* (i.e. C suffering a panic attack at work because he believed there was going to be a visit from the CQC) and to make a referral to the occupational health department (para 53).

The PCP was: arranging a "staged" CQC visit by the Trust and requiring C to be present when it took place;

The substantial disadvantage was: to cause C stress;

The reasonable adjustments would have been to introduce the visit and explain it to C in a non-stressful manner and/or to allow him not to participate

289. We do not accept that Mr Simmons was told to cover up the claimant's panic attack – this did not happen.

290. It is accepted that the staged CPC was a PCP and that the claimant was required to be present.

291. We also accepted that the CPC visit caused the claimant stress, and that this was substantial disadvantage, that an employee who did not have the medical conditions would not have suffered this disadvantage.

292. But, the claimant accepts that he was expecting an inspection to take place – he was told this. He did not suggest to his mangers that this was an issue for him, he did not ask for any adjustments to be made. The claimant had worked in hospitals previously, he was aware of a CQC regime, and did not raise any objection to participating in these events in the future. It was not reasonable for the respondent to know that the CQC regime could cause him a substantial disadvantage, as he had never raised it with them.

293. In any event, Matron Asoro was understanding, she did not object when he said he needed to leave and then go home, and no action was taken.

294. Accordingly the reasonable adjustments – giving some notice and allowing him not to participate, were made, and the claimant did not seek any further adjustments in advance.

30 July 2019 - Ms Clark denied any knowledge of C's GP letter during grievance process. C's grievance was not upheld. Conduct of Ms Perrin and Ms Lavall during C's grievance hearing, in particular not calling any witnesses at the adjourned hearing. Ms Hefron delayed the grievance process, and lied to C in an email dated 5th August 2019 (paras 56 and 57).

The PCP was not calling any witnesses from R at C's grievance hearing; not making copies of C's evidence in advance of the hearing on 1st August 2019; requiring C to rely on R's notes;
The substantial disadvantage was: these PCPs made the process harder for C, caused him distress and aggravated his mental health conditions;

The reasonable adjustments would have been to allow C to cross examine Ms Clark, Ms Lightfoot and Ms Page; and making copies of C's evidence in advance of or at the hearing on 1st August and allowing him to record the hearing

295. Witnesses were called at the first hearing and the claimant asked approximately 80 questions of Ms Clark. They were not called again, because all the questions the claimant wanted asking were put in writing to these witnesses who responded.

296. This failure to call witnesses on this occasion was a one-off act, it was not the normal practice of the respondent. And the reason why was because The employer is entitled to act proportionately, witnesses had been available but the amount of questions C had were disproportionate for these witnesses – 500 questions between 3 witnesses - and so the respondent was entitled to put these

question in writing. This was an act because of the huge amount of time and resources the process was taking to this point.

297. There was a PCP of making copies of all documents presented in advance of the hearing. The respondent gave these documents to the claimant in advance. The claimant brought his documents with him on 1 August – a significant number of documents. There was an adjournment while these were considered. No documents copies were taken as there was no copier available. The claimant thereafter refused to provide copies of these documents.

298. It follows that there was a PCP of providing all documents in advance, but the respondent could not copy the claimant's in advance because he had not provided them earlier. This PCP was not engaged.

299. The audio recordings were sent to the claimant on 18 November 2019. This was 3 months after the hearing. But we did not accept that this was a substantial disadvantage to the claimant; he was able to draft a 29 page letter of appeal and he did not need the transcripts to do so. We do not accept that this made the process harder. Also, we do not accept that the transcripts could have in any way assisted the claimant in his appeal, as this was a poor appeal on the evidence. There was no substantial disadvantage to him.

Reasonable adjustments – 2nd claim

C relies on the following acts or omissions as amounting to a failure to make reasonable adjustments
In relation to each, did R apply the provision, criterion, or practice as alleged?
If so, did if (or did they) put C at a substantial disadvantage in comparison with persons who are not disabled?
If so, was R aware or should it reasonably have been aware of that fact?
If so, are the adjustments suggested reasonable and did R fail to make them

A failure to discount disability-related absences when invoking the Managing Long Term Absence Procedure

300. There was a failure to discount these absences in the claimant's case. While we heard no evidence of whether this was the respondent's practice, we accept that in this case even if it was a practice that applied only to the claimant, it was a PCP. We also concluded that this amounted to a substantial disadvantage to the claimant, in comparison to non-disabled employees. We concluded that the respondent was or should have been aware of this fact.

301. However in the context of the claimant's employment, we did not consider that it was a reasonable adjustment to discount these absences.

302. The reason why is that the essential cause of the absences was not the claimant's disability, but his inability to work reasonably with his managers, to accept occasional criticism or to accept decisions which he finds difficult, such as the leave request. that he may be wrong or if not with managers without taking offense and raising complaints, and becoming stressed as a consequence. It

was the claimant's unreasonable conduct which created conflict, which caused his absences.

303. In addition, there was no prospect of the claimant returning to work in the foreseeable future, and the relationship had broken down with his employer. Accordingly, this was not an adjustment that it was reasonable to make.

A failure to make adjustments to working pattern and environment when suffering an outbreak of psoriasis; adjustments contended for include working from home when the outbreak was severe.

304. The PCP was that this role was ward-based.

305. On occasion the claimant was unable to attend work because of his psoriasis; it was a substantial disadvantage to him as he could not undertake his duties and he was recorded as off work sick.

306. However, there was no adjustments which could be made, because his role was ward-based, there was nothing he could do for home, and he did not suggest he could do any work from home when he was ill. There was no evidence from the claimant on what part of his role he cold undertake working from home. He accepted that his whole role was ward-based.

A failure to offer homeworking opportunities, for example in the accounts department.

307. It is accepted that there was a failure to offer homeworking opportunities. However this is not a PCP of the respondent, it accepted that it could potentially offer homeworking opportunities to employees. The reason why none were offered to the claimant is that he failed to engage with the respondent at any stage of the managing attendance process.

308. We did not accept that in the situation where the claimant was refusing to engage, was saying that he had lost trust, he was on long-term sick covered by fit notes, where the issue is according to OH a management rather than a health issue, that it was an adjustment which could have been made.

A failure to offer the claimant special leave for shielding during the Covid pandemic.

309. The respondent did have a policy of allowing staff who were vulnerable to shield. The claimant was, according to government guidance a 'vulnerable' person, and not an extremely vulnerable person. Therefore there was no requirement, under the guidance, to offer the claimant to shield.

310. Also, the purpose of the guidance and shielding policy, is to allow employees who are otherwise fit to work to shield because of their medical condition. Had the claimant been fit for work, we concluded that he would more than likely have been allowed to shield as a clinically extremely vulnerable person from August 2019. This is based on the combination of his conditions, coupled with his Dr's

letter given to the respondent on 22 July 2019. But because he was off sick, there was no requirement for the respondent to do so.

311. Also, the claimant failed to engage at any stage in the process; if he had done, shielding could have been considered when the claimant would otherwise have been fit to attend work. If he is not engaging, the respondent cannot do so for him.

312. We concluded that the PCP was to allow staff who had medical vulnerabilities to shield if they were otherwise fit to work; this PCP did not apply to the claimant, and it was in any event an adjustment which it was not reasonable for the respondent to consider as he was not engaging in the managing attendance process.

A failure to take into account the claimant's medical conditions in the pandemic, when he was required to shield, when deciding to dismiss

313. There is no PCP that the respondent fails to take into account employees' medical conditions, we accepted that the respondent generally did so when deciding to take action. But the claimant failed to engage.

314. Also, we concluded that the respondent was entitled to conclude that it was not his medical conditions which were stopping him returning to work, but because he had a dispute with his employers; when this was resolved he would be able to return, but he was not able to accept the respondent's decisions throughout his employment, and this is the reason why he was off work. Therefore there was no requirement to take into account his medical conditions.

315. This allegation can only succeed if the claimant was required to shield, and for the reasons set out above he was not required to shield.

316. **All claims of a failure to make reasonable adjustments fail and are dismissed.**

Public interest disclosure claim

Did C make a qualifying disclosure of information within the meaning of section 43B of the Employment Rights Act 1996? C relies on the letter he sent to Ms Palmer on 6th August 2019 (para 58) which set out that the Trust was failing to comply with a legal obligation to which it was subject, namely the requirement to provide a safe system of work.
If so, was he subjected to detriment on the ground that he had made that protected disclosure? C relies on the fact that that Ms Singh (to whom C's letter had been forwarded) delayed her reply to the letter, and stated that all matters and allegations relating to C's grievance were not upheld and that the matter was now resolved.

317. We accepted that in making this disclosure claimant had a genuine belief that his health and safety was at risk. But we do not think it is objectively a reasonable belief, because while the claimant may have been caused stress, it was because

of a management response to his issues at work. The respondent's position was that Ms Clark had to undertake her role and was not acting unreasonably in her dealings with the claimant. Ms Clark was speaking to a member of staff and the claimant took exception to her presence. It was not reasonable for the claimant to be so stressed as a consequence.

318. Accordingly, her claimant cannot show that he was acting reasonably in waring a complaint. We also did not accept that this was an issue which was in the 'public interest'; his complaint related to interactions between him and his managers, and that his caused him stress. There was no public interest element to his disclosure. This was an essentially personal interest issue, not one in public interest. There were no features which make it reasonable to regard this disclosure as being in the public interest.

319. We did not accept that a detriment relied on, delay, was because of his disclosure – see reasons above.

320. The reason why this claim was not upheld had nothing to do with the fact of the disclosure. It was dismissed, because his allegations had already been considered within the grievance and rejected and Ms Mossman and Ms Singh saw no grounds to overturn this decision.

321. **The claim of public interest disclosure detriment fails and is dismissed.**

Unfair dismissal

322. What was the reason for dismissal. We accepted ha the respondent genuinely believed that the dismissal was on grounds of capability – for the reasons set out above.

323. This is a potentially fair reason for dismissal: the legal test requires the Tribunal to consider whether the dismissal was within the reasonable range of responses a reasonable employer, taking into account the respondent's size and administrative resources.

324. We noted that Ms Waller was involved in the process without any input from the claimant; the was no medical reason why he could not take part in this process. The reason why he decided not to do so was because he did not trust the respondent any longer.

325. Ms Waller considered the claimant's history of absences, she was entitled to conclude that there was no reasonable prospect of his returning to work in the near future. She did consider the operational requirements, the need for a Ward Administrator who was able to work. Ms Waller was also entitled to conclude that the claimant's absence was not a medial absence but a because of his dispute at work – as OH had said. This was within the range of reasonable responses.

326. The claimant was given every opportunity to attend hearings; the first hearing was adjourned when he failed to turn up; he had no contact with the respondent. The ;process adopted was within the range of reasonable responses.

327. The claimant's dismissal was fair, and his claim of unfair dismissal is dismissed.

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EMPLOYMENT JUDGE EMERY

Dated: 1 July 2022

Judgment sent to the parties
On
01/07/2022

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For the staff of the Tribunal office

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