EMPLOYMENT TRIBUNALS

Claimant: Mrs Stella Bates

Respondent: Chesterfield Royal Hospitals NHS Foundation Trust

Heard: in Nottingham, as a hybrid hearing with some of the respondent's witnesses attending via Cloud Video Platform

On: 4,5,6,7,8,11,12,13,18,19, and, in chambers, on 20 and 21 July 2022 and 22 August 2022

Before: Employment Judge Ayre, sitting with members
Ms L Woodward
Mr G Edmondson

Representatives:
Claimant: Mr B Williams, counsel
Respondent: Miss K Nowell, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant was unfairly dismissed.

2. The respondent discriminated against the claimant because of disability, contrary to section 13 of the Equality Act 2010, as set out in allegations 11, 18, 22 and 23.

3. Allegations 8, 12 and 17 are dismissed upon withdrawal.

4. Allegation 6 is out of time and the Tribunal does not have jurisdiction to consider it.

5. The remaining allegations of direct discrimination fail and are dismissed.

6. The respondent discriminated against the claimant contrary to section 15 of the Equality Act 2010 by commencing the absence management process and by dismissing her.

7. The respondent failed to make a reasonable adjustment contrary to sections 20 and 21 of the Equality Acct 2010 by not moving the shift handover briefing to a quieter area.

8. The remaining allegations of failure to make reasonable adjustments fail and are dismissed.

REASONS

Background

1. The claimant was employed by the respondent from 21 December 2015 until 16 January 2020 when she was dismissed. She brings claims of unfair dismissal and disability discrimination against the respondent.

2. The claimant has issued two claims in the Employment Tribunal. She commenced early conciliation in the first claim on 29 October 2019 and early conciliation concluded on 12 December 2019. She issued the first claim on 10 January 2020 and it was allocated the case number 2600072/2020.

3. Early conciliation in the second claim started on 24 January 2020 and ended on 27 January 2020. The second claim was issued on 17 April 2020 and the claim was allocated the case number 2601217/2020.

4. On 29 April 2020 the two claims were consolidated.

5. A first Preliminary Hearing took place before Employment Judge Ahmed on 12 October 2020. At that hearing the respondent conceded that the claimant was disabled by reasons of Borderline Personality Disorder ("**BPD**") and deafness.

6. A second Preliminary Hearing took place on 1 April 2021 before Employment Judge Victoria Butler. The claimant withdrew her complaints of harassment, victimisation and indirect discrimination and was allowed to amend her claim to include a new allegation of direct discrimination.

The Proceedings

7. The hearing took place as a hybrid hearing, with the final days taking place entirely remotely via CVP.

8. We heard evidence from the claimant and, on behalf of the respondent, from the following:

a. Kim Beevers, Facilities Manager.

b. Jayne Bradbury, Catering Manager.

c. Helen Corfield, Ward Sister.

d. Kathryn Cowley, Switchboard Manager.

e. Russell Morrow, Switchboard Manager / Head of Fire, Health and Safety.

f. Zoe Notley, General Manager of the Surgical Division.

g. Sue Shore, Matron.

h. Andrea Stayley, Divisional Head of Nursing.

i. Jane Walker, Senior Matron of Surgical Services Division.

9. There was an agreed bundle of documents running initially to 843 pages, to which an additional document was added, by consent, during the course of the proceedings.

10. The parties agreed a List of Issues, and submitted detailed written representations, for which we are grateful.

11. We wish to put on record our gratitude to the advocates in this case whose co-operation and general approach to the proceedings is to be recommended. Their assistance was much appreciated by the Tribunal.

The issues

12. The issues that fell to be determined in the case were set out in an agreed list of issues. The respondent admitted, prior to the start of the hearing, that the claimant was disabled at the relevant time by virtue of BPD and deafness, including tinnitus.

13. At the end of the hearing, having heard the evidence, the claimant withdrew direct discrimination allegations 8, 12 and 17 below.

Time limits

14. Given the date the first claim form was presented and the dates of early conciliation, any complaint about something that happened on or before 29 July 2019 may not have been brought in time.

15. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

b. If not, was there conduct extending over a period?

c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

    i. Why were the complaints not made to the Tribunal in time?
    ii. In any event, is it just and equitable in all the circumstances to extend time?

Direct disability discrimination (section 13 of the Equality Act 2010)

16. Did the respondent do the following things:

a. Keep the claimant out of the kitchen whilst she was working in the café ("**Allegation One**")?

b. Implement weekly meetings for the claimant from May 2017 until February 2018 when the claimant moved to Devonshire Ward ("**Allegation Two**")?

c. Prevent the claimant from returning to work between July and October 2017 ("**Allegation Three**")?

d. Did Holly Fogden tell the claimant on 11 July 2017 that she wished the claimant had never been given the job in the café ("**Allegation Four**")?

e. Did Holly Fogden tell the claimant on 11 July 2017 that she needed to face up to her anxieties and 'deal with it' ("**Allegation Five**")?

f. Withdraw the café role on 3 October 2017 ("**Allegation Six**")?

g. Respond to two incidents in the shop in December 2017 by failing to investigate them properly and instead concluding that they were the claimant's fault because she had been aggressive ("**Allegation Seven**")?

h. On 20 December 2017:

    i. Did the respondent inform the claimant that the role was not a permanent one, despite having previously said that it was; and
    ii. Did Russell Morrow respond aggressively and inappropriately and blame the claimant when the claimant found herself without any work to do after her computer was required by a colleague?

    (together "**Allegation Eight**")

Allegation Eight was withdrawn during the course of the hearing.

i. Give the claimant an extension of time to complete her care certificate ("**Allegation Nine**")?

j. Give the claimant restricted authorisation to work on other wards so that she was only permitted to work on Barnes and Devonshire wards ("**Allegation Ten**")?

k. Was Matron Shore unsympathetic and dismissive of the claimant's hearing loss issues ("**Allegation Eleven**")?

l. Deny the claimant's request for additional training ("**Allegation Twelve**")?

Allegation Twelve was withdrawn during the course of the hearing.

m. Did Matron Shore react unsupportively to the claimant's complaint about feeling belittled and intimidated by certain colleagues ("**Allegation Thirteen**")?

n. Did Matron Shore react unsupportively to a matter involving a patient complaint when the claimant sought specific help from her in January 2019 ("**Allegation Fourteen**")?

o. Did Matron Shore request a risk assessment for the claimant in March 2019 when she was not off sick as a result of her mental disability ("**Allegation Fifteen**")?

p. Did Matron Shore determine that the claimant was not fit to work on a ward or in an emergency situation, based on assumptions drawn from her review of the claimant's personnel file and/or information from HR ("**Allegation Sixteen**")?

q. Remove the claimant's name from the staff rota in April 2019 and replace it with Bank staff ("**Allegation Seventeen**")?

Allegation Seventeen was withdrawn during the course of the hearing.

r. Fail to deal with the claimant's grievance in a timely manner, fail to deal with all of the allegations and fail to investigate all allegations fully and properly ("**Allegation Eighteen**")?

s. Did Sister Corfield fail to support or assist the claimant in her appraisal on 8 August 2019 ("**Allegation Nineteen**")?

t. Was Sister Corfield unsupportive and unsympathetic in her reaction to the claimant's sickness by telling her that she was letting the ward down on 13 August 2019 ("**Allegation Twenty**")?

u. Refer the claimant to occupational health in September 2019 for a lengthy appointment without discussing this with her ("**Allegation Twenty One**")?

v. Fail to hold a stage 1 meeting with the claimant or produce any documentation ("**Allegation Twenty Two**")?

w. Progress the claimant through stages 2 and 3 of the health and wellbeing process in a rushed manner ("**Allegation Twenty Three**")?

x. Conclude that the claimant was not safe to work on a ward or in emergency situations and that she was a risk to herself ("**Allegation Twenty Four**")?

y. Fail to properly consider redeployment ("**Allegation Twenty Five**")?

17. Were any of those things less favourable treatment? The claimant relies on a hypothetical comparator for all of the above allegations.

18. If so, was it because of the claimant's disabilities? The claimant relies upon her BPD in relation to all of the allegations except Allegation Eleven, where the relevant disability is her deafness.

Discrimination arising from disability (section 15 of the Equality Act 2010)

19. Did the respondent treat the claimant unfavourably by:

a. Commencing the absence management process; and / or

b. Dismissing her on 16 January 2020?

20. Did the claimant's absence from work arise in consequence of the claimant's disability?

21. Was the unfavourable treatment because of the claimant's absence from work?

22. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aim was the effective management of the respondent's business and care for its patients, staff and visitors?

23. The Tribunal will decide in particular:

a. Was the treatment an appropriate and reasonably necessary way to achieve those aims?

b. Could something less discriminatory have been done instead?

c. How should the needs of the claimant and the respondent be balanced?

24. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Reasonable adjustments

25. Did the respondent have the following PCPs:

    a. Conducting daily handover meetings at the nurses' station on the ward rather than (as had previously been the case) in a side room?

    b. Keeping all sensitive medical and personal information in the personnel file in Matron's office which is accessible to all managers and HR?

26. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

    a. The background noise at the nurses' station was too loud for the claimant to hear everything that was said; and

    b. Managers, senior nurses with supervisory responsibilities and HR were able to see the claimant's sensitive information including that she had attempted suicide and has a personability disorder, that she was on medication and being counselled, leading to negative views of her and detrimental assumptions being drawn?

27. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    a. Moving the briefing to a quieter area or turning off the air-conditioning;

    b. Removing the sensitive information from the personnel file; and

    c. Storing the personnel file in a more secure location.

28. Was it reasonable for the respondent to have to take those steps?

29. Did the respondent fail to take those steps?

Unfair dismissal

30. What was the reason or principal reason for the dismissal? The respondent says the reason was capability.

31. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:

    a. Did the respondent genuinely believe that the claimant was no longer capable of performing her duties?

b. Did the respondent adequately consult the claimant?

c. Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?

d. Could the respondent reasonably have been expected to wait longer before dismissing the claimant?

e. Was dismissal within the range of reasonable responses?

Findings of Fact

32. We make the following findings of fact unanimously.

33. The claimant has significant hearing loss and suffers from tinnitus. She wears hearing aids. She also has borderline personal disorder, the symptoms of which include emotional instability, unstable relationships and self-harm.

34. The claimant began her employment with the respondent on 21 December 2015 as a Band 1 Patient Services Assistant ("**PSA**") in the respondent's Facilities Services Division. She was initially employed to work 15 hours a week. The respondent is an NHS Trust operating out of the Chesterfield Royal Hospital.

35. Her contract of employment, which she signed on 1 April 2016, included a clause headed "Sickness Absence" which contained the following relevant provisions:

"*6.2 Where the Trust is satisfied that the employee is unable to perform their duties, after consultation with the employee and reference being made to any medical report, the Trust is entitled to terminate the employment prior to the exhaustion of sick pay entitlement."*

36. Clause 17 of the contract deals with data protection and asks the employee to consent to the respondent holding, using and processing personal data about the employee, including information about physical or mental health conditions.

37. The contract also contained a provision incorporating the respondent's corporate policies and procedures, including the Health and Attendance Management Policy ("**the Policy"**). It appears from the Policy that the respondent has an Employee Assistance Programme available for all of its employees.

38. On 25 April 2016 the claimant had one day's sickness absence due to a migraine.

39. On 20 June 2016 the claimant began a period of 5 days' sickness absence due to food poisoning.

40. On 17th October 2016 the claimant began a further period of sickness absence, this time due to 'anxiety state and situational depression'. She was off work for 21 days.

41. As the claimant had three periods of absence within less than 12 months, she was invited to a Stage 1 absence review meeting. That meeting took place on 8 November 2016 with her supervisor at the time, Pat Wigmore. During the meeting the claimant told Pat Wigmore that she had depression due to family issues but felt a bit better and able to return to work. She said that she was going to see a counsellor and was given a contact at BUPA.

42. After the meeting Pat Wigmore wrote to the claimant summarising what had been discussed and reminding the claimant that if she had any more than one further occasion of sickness absence during the next six months, she may move to Stage 2 of the absence management procedure.

43. In November 2016 the claimant's mental health deteriorated. On 24 November 2016 she began a further period of sickness absence during which she attempted to take her own life and was admitted to hospital for a period of approximately 8 weeks. Whilst she was in hospital, she was diagnosed with emotionally unstable borderline personality disorder ("**BPD**") as well as depression and anxiety.

44. On 30 November 2016 Kim Beevers became aware that the claimant had attempted to take her own life. She made Holly Fogden in HR aware of the situation and placed a note on the claimant's file to the effect that staff should not attempt to contact the claimant during her absence.

45. On 8 March 2017 Kim Beevers and Holly Fogden visited the claimant at home whilst she was still off sick. There was some conflict of evidence between the claimant and Mrs Beevers as to what happened during that meeting and no notes were taken. On balance we prefer the claimant's evidence as to what happened during the meeting. This was clearly a meeting that had an impact on her, and which has stuck in her memory. In contrast Mrs Beevers accepted, to her credit, that her recollection of the meeting was vague. The only contemporaneous documentary evidence of the meeting was a letter sent to the claimant on 17 March 2017.

46. Mrs Beevers' evidence to the Tribunal was that she had formed 'no views' as to the claimant's medical condition, despite knowing that she had attempted suicide and been in hospital for 8 weeks. We find this surprising, given that Mrs Beevers was managing the claimant's sickness absence and was supported by HR at the meeting. She told us that the reason she formed no view was that she is not a medical professional.

47. The claimant's evidence, which we accept, was that during the meeting on 8 March, she told Mrs Beevers and Holly Fogden that she felt she had been bullied at work. She also said that she did not want

to go back to work in the PSA department, and there was a discussion about possible roles in the hospital café or shop.

48. The claimant did not want to disclose details of the bullying to Mrs Beevers, and Mrs Beevers told her that as a result no action would be taken about it. There was also a discussion about the claimant being referred to occupational health.

49. After the meeting Mrs Beevers wrote to the claimant summarising what had been discussed. In the letter she commented that:

"*…you explained that there have been some issues at work that contributed to your time off but you hoped that these issues would not be a problem when you come back to work, as you have a role in a different area following the service review…*"

50. Mrs Beevers referred the claimant to occupational health and an occupational health doctor saw the claimant on 3 April 2017. The occupational health referral contained a number of relevant questions including:

"*Please comment on the employee's ability, on health grounds, to undertake their usual work role, identifying any recommendations (i.e. work adjustments / restrictions) and timescales?*

Please comment on the future outlook with regard to the employee's ability, on health grounds, to undertake their usual work role…

Please advise whether, with regard to the employee's health at work, you advise any additional managerial risk assessments?

Is a long term underlying health condition(s) adversely affecting the employee's capacity to undertake their usual work…"

51. In a report to Mrs Beevers dated the same day, the doctor wrote that:

"*…Mrs Bates suffers from long-term mental health problems…*

Mrs Bates also suffers from bilateral hearing loss for which she has hearing aids in place since 2011 and suffers from tinnitus at night times…

She is likely to make sufficient recovery to return to work when her current sick note runs out….

There is no need for any other adjustments other than phased return to work."

52. The occupational health doctor made no mention of the claimant's BPD and described her mental health problems as being "*reactive depression"* which was being managed through medication and the support of a community psychiatric nurse ("**CPN").**

53. The claimant remained off sick and on 20th April 2017 the respondent wrote to her inviting her to a Stage 2 absence meeting to take place on 4th May 2017. Ged Holland, Facilities Manager, chaired that meeting as Kim Beevers was unable to attend. There were no notes of that meeting before us.

54. At that meeting there was a discussion about the claimant returning to work in another area, specifically in retail or the café. The claimant was looking to increase the number of hours that she worked each week from 15 to between 22.5 and 30, and the respondent was willing to accommodate that.

55. After the meeting Ged Holland wrote to the claimant confirming what had been discussed.

56. A further meeting took place on 18 May between the claimant, Kim Beevers and Abigail Caudwell in HR. At that meeting it was agreed that the claimant would return to work in the café. There was a conflict of evidence as to whether the claimant had specifically been told that the role in the café was a temporary one or not. The claimant was adamant that she had not been told that, the respondent's position was that the role in the café was always a temporary one.

57. After the meeting on 18 May Abigail Cauldwell wrote to the claimant confirming arrangements for her return to work. In her letter she stated that "*it has been agreed for you to return to work on a trial basis as a Catering Team Member at Café at the Royal for a period of 4 weeks. After the 4 weeks, this will be reviewed."*

58. We find, on balance, that the role in the café was offered on a trial basis, and that the respondent did not make it clear to the claimant that the role may only be a temporary one. As a result, the claimant thought that the 4-week trial was in effect a probationary period in the role, to make sure she was capable of doing it.

59. The claimant returned to work on 22nd May 2017 and began working in the café. Her duties involved primarily serving food to customers, working on the counters and the tills. The café is very busy, and the kitchen is a small one. Normally only the two chefs and a dedicated pot washer are allowed in the kitchen and pot washing area at any one time, and other café staff are discouraged from going into the kitchen due to the lack of space.

60. The claimant was not required to go into the kitchen in order to carry out her duties in the café. The café is managed by Jayne Bradbury, the Catering Manager. At the time the claimant worked in the café Mrs Bradbury did not know that the claimant had BPD, and she only became aware of that during the course of the Employment Tribunal proceedings. Mrs Bradbury did know that the claimant is deaf because she saw her wearing hearing aids at work. There was no evidence before us to suggest that any of the claimant's colleagues in the café knew about her BPD.

61. There was an incident in the café during which the claimant was prevented by a colleague from entering the kitchen. She found this distressing. On another occasion, after an incident with a colleague, she tried again to go into the kitchen for a short break but was prevented from doing so. There was no evidence before us that the staff who prevented the claimant from entering the kitchen had any knowledge of her BPD. The reason the claimant was prevented from entering the kitchen was because this was normal practice, as the claimant did not need to go into the kitchen in order to perform her duties.

62. There was another incident when the claimant walked out of the café during a shift without telling anyone where she was going.

63. After the claimant returned to work in May 2017, weekly meetings were put in place to review how things were going. The decision to put the meetings in place was a joint one made between the claimant, Kim Beevers and HR, and the claimant did not initially object to the meetings taking place. Similar meetings have been put in place for other members of staff who were on phased returns to work or working in roles on a trial or temporary basis. We find that they were implemented with a view to supporting the claimant. The claimant had been off work for six months with serious health conditions and was returning to different duties in a different area. The meetings were held in private and were, in our view, a reasonable step for the respondent to take. The claimant did not raise any objections to the meetings taking place at the time.

64. One of the meetings took place on 5 June 2017 and after that meeting Kim Beevers wrote to the claimant summarising what had been discussed. The claimant had, during the meeting, referred to having panic attacks at work and anxiety about confrontational colleagues, which she was managing by going into the kitchen area and taking two minutes to gather her thoughts. The claimant was reminded that she should work on the counter, carrying out patient facing duties only.

65. A further meeting took place on 9th June 2017 during which the claimant said that she felt she had really excelled, felt much more confident and had seen a massive difference in herself. Mrs Bradbury gave her positive feedback on her work that week.

66. During another meeting on 19th June 2017 the claimant said that she was really enjoying the role in the café and felt she was doing really well.

67. Whilst she was working in the café the claimant was involved on more than one occasion in disputes with colleagues. On 3 July 2017 there was an incident involving the claimant and a colleague Marie which was partially witnessed by Jayne Bradbury. Mrs Bradbury heard the claimant raising her voice in an abusive manner towards Marie, at the front of the café in a public area. The claimant shouted at Marie and then at Mrs Bradbury. Mrs Bradbury asked the claimant to calm down and took her to the office, where she called Mrs Beevers.

68. After the incident on 3 July 2017 the claimant went home feeling very upset and having suicidal thoughts. She poured herself a glass of wine and went for a bath. She then realised that this was not the best way for her to deal with her emotions, poured away the wine, made a cup of tea and called the mental health crisis team. The claimant's evidence, which we accept, was that whilst she had a suicidal thought on that day, she had managed it appropriately.

69. The claimant's behaviour towards her colleagues and her suicidal thoughts were symptoms of her BPD, which caused her to experience emotional dysregulation.

70. The incidents in the café which culminated on 3 July 2017 caused Mrs Bradbury to raise her concerns with Mrs Beevers and ultimately to conclude that she did not want the claimant to work in the café anymore. On 6 July 2017 Mrs Beevers spoke to some of the claimant's colleagues in the café to try and find out more about the claimant's behaviour at work. She sent an email to Holly Fogden in HR in which she wrote:

"*…I really need to speak to you regarding Stella Bates and Jayne not wanting her to work in catering department. I've spoken to some staff today to get there understanding of what been happening. Their perspective and Stella perspective do not match!!!*

Stella has stated on her return to work paper that she feels that she is relapsing and she feels suicidal…"

71. On 7 July 2017 the claimant was invited to attend a meeting with Mrs Beevers and Mrs Bradbury to discuss the recent incidents. Holly Fogden from HR was also present at that meeting. There were no notes of the meeting in the bundle before us.

72. There was a conflict of evidence as to what was said during that meeting. The claimant said that the respondent wanted her to go home for her own benefit because of her suicidal thoughts, but that she refused because she did not feel ill. Mrs Beevers said that the claimant was shouting in the corridor, walking up and down and raising her hands, and that she and Holly Fogden were trying to calm the claimant down. We find that the claimant did become distressed on the 7th July 2017 because she felt she was being told to go home when she did not want to, and that she became agitated as a result.

73. By this stage Mrs Beevers had formed the view, having spoken to other members of staff in the café, that the claimant's perception of events was different to that of her colleagues, and she believed that the role in the café was causing the claimant to have suicidal thoughts. Mrs Beevers was concerned that she had a duty of care towards the claimant in light of the suicidal thoughts that the claimant had told her she was having.

74. The claimant alleges that during this meeting Holly Fogden told her that she wished the claimant had never been given the job in the café, and that she needed to face up to her anxieties and 'deal with it'. Mrs

Beevers' evidence was that those comments were not made. We find, on balance, that those comments were not made by Holly Fogden during the meeting. Mrs Beevers was clear in her evidence that they were not made. On other occasions Mrs Beevers readily accepted that she did not have a good recollection of meetings, which caused us to believe what she said about this meeting, which she did have a clear recollection of. The claimant was clearly very distressed during this meeting, and that may have affected her recollection and perception of events.

75. Another meeting took place on 11 July 2017 and the claimant was accompanied at that meeting by Steve Sloan, who was the manager of the CPN who was supporting the claimant at the time, and who worked for Derbyshire Community Health Services. He was present at the meeting to provide support to the claimant.

76. During the meeting the claimant said that she thought she'd got on well in the café but had had panic attacks and felt overwhelmed on occasion. Kim Beevers told the claimant that she had spoken to colleagues in the café who perceived the claimant as being very confrontational, fixating on every word that staff members said, and showing aggressive behaviour.

77. The claimant admitted that she could get offensive but explained that this did not, in her view, stop her from doing her job, and that staff did not know that she had a behavioural disorder. Holly Fogden said that the respondent had a duty of care for other members of staff as well as the claimant and that she could not have colleagues being aggressive towards each other.

78. The claimant tried to explain that she was not being aggressive, but merely reacting to incidents. Holly Fogden told the claimant that the respondent had serious concerns about the claimant's ability to do the job and deal with people in the café and recommended that other roles in the Trust were explored. She asked the claimant if having time off work would help her.

79. At that stage Steve Sloan told the meeting that the claimant had emotional dysregulation, which meant that she was unable to control or regulate her emotional responses.

80. The claimant said that she felt she was fit for work but could not ask staff for support because they did not understand her situation, including her health.

81. Holly Fogden told the claimant that she would not be going back to work in the café, in part because it appeared that incidents in the café had caused the claimant to have suicidal thoughts. She thought it was best for the claimant not to do any more shifts in the café until the respondent had sought advice from occupational health.

82. In response to this the claimant said that she had spoken to the crisis team, her GP and her CPN, who all said that she was not at risk.

83. After an adjournment, Steve Sloan said he and the claimant thought it was a 'brilliant idea' for the claimant to take some time off work whilst the respondent investigated other roles within the Trust. The meeting ended with an agreement that the claimant would be referred to occupational health.

84. The claimant was therefore sent home after the meeting on full pay, with her agreement. She remained off work until 3 October 2017. The respondent wrote to the claimant after the meeting confirming what had been discussed.

85. On 12th July the claimant was referred to occupational health. Occupational health met with the claimant on 19 July 2017 and produced a report in which they commented that:

"*…As you are aware, Ms Bates suffers from personality disorder and is under the care of the specialised team. She has been commenced on medication and is due to commence psychotherapy…..Ms Bates is not fit to return to work for now. I will arrange to review her once I have received the psychiatrist's report…"*

86. The claimant was reviewed again by occupational health on 17 August 2017. Occupational health assessed her as fit to return to work at that stage. In the letter sent to Mrs Beevers the doctor commented that:

"*…Stella Bates suffers from panic attacks, anxiety and stress related symptoms…She also handed in a GP report dated 28th July 2017 which states that Ms Bates is improving in her mood and the GP has said that she would greatly benefit from returning to work.*

There are currently no thoughts of self-harm and no suicidal ideation today. I can confirm that Ms Bates is fit to return to work…

…thgere is no need for any phased return to work…"

87. On 11 September 2017 a meeting took place to discuss the claimant's return to work - p.352. Holly Fogdon restated that the respondent had a duty of care towards the claimant as well as other staff members. It does appear that by that stage the respondent had formed the view that the claimant was a danger to others as well as to herself, based on her behaviour in the café and the fact that she had told them she'd had suicidal thoughts on one occasion.

88. It was agreed at that meeting that the claimant would transfer to the shop when she was fit enough to return to work, and would work there for 12 weeks on a temporary basis. The claimant agreed to return to work in the shop and said that she was happy to do so.

89. On 3rd October 2017 a further meeting took place to discuss the claimant's return to work. The claimant was accompanied at that meeting by Bridget Dunks, a Unison representative. At that meeting the claimant said that she had understood the role in the café to be a permanent one, and Kim Beevers said that it had always been a temporary placement.

90. The claimant expressed disappointment at being removed from the café because there was, in her view, nothing wrong in her performance. She said that she was interested in becoming a Healthcare Assistant ("**HCA**") and Holly Fogdon said that the respondent could support her with this.

91. It was agreed that the claimant would return to work in the shop on 3rd October 2017 and that the weekly meetings, which she said were not helpful to her, would take place fortnightly instead. The claimant was also warned that any aggressive or bad behaviour would be investigated under the disciplinary policy.

92. We find that the respondent moved the claimant from the café to the shop as a result of the comments made by colleagues in the shop who thought the claimant was difficult to work with, and that Jayne Bradbury did not want her working there. The decision to move the claimant out of the café was not linked to performance. The respondent was concerned that working in the shop was making the claimant unwell, and causing her to have suicidal thoughts. Her managers perceived her to be aggressive. By that stage colleagues in the café did not want to work with her anymore.

93. It was for those reasons that the respondent told the claimant that the role in the café was only a temporary role. That had not been made clear to the claimant previously. We find that originally both parties had viewed the role in the café as potentially permanent, subject to a trial period.

94. The claimant returned to work in the shop on 3 October 2017. Things seemed to go well in the shop initially. The claimant got on well with Ann and Peter, the supervisors in the shop, and enjoyed working there.

95. During a review meeting on 6th November 2017 the claimant reported that she enjoyed working in the shop and said that if a permanent role was not available there, she would be interested in moving into a PSA catering role or an HCA role. Kim Beevers agreed to arrange a couple of shadowing shifts for the claimant with a PSA caterer to give the claimant a better insight into that role.

96. Whilst the claimant was working in the shop, she was involved in further incidents involving other members of staff. On one occasion she was stocking shelves with a box of Christmas toys that were not selling well and had a disagreement with a colleague, Angela, about where to place the toys.

97. A further review took place on 4 December 2017. By that stage there had been a few incidents in the shop that the claimant reported. She said that she'd had a difficult conversation with a member of the shop team, who she had found to be aggressive. She said that she'd spoken to her union representative about the issue at the time and it had been resolved.

98. She also referred to an incident involving a very difficult customer and was reassured by Kim Beevers that she had dealt with the customer correctly and appropriately.

99. The claimant alleges that the respondent failed to investigate these incidents properly, instead concluding that she had been aggressive. There was, however, no evidence before us to suggest that there had been an investigation into the incidents, or that the claimant had asked for an investigation to take place.

100. The claimant did not raise them at the time as complaints that needed investigating, although she did mention them in the meeting on 4th December 2017. She said that the incident with Angela had been resolved, and Kim Beevers praised her for the way that she had dealt with the second incident.

101. During the meeting on 4 December 2017, there was also a discussion about future roles for the claimant. It was not clear whether there would be a permanent role in the shop at that stage, so alternatives were discussed. The claimant had accompanied a PSA caterer for one shadow shift but did not return to do the second shadow shift because she felt the role was not right for her.

102. There was a discussion about a role on switchboard, which could potentially be a permanent one. The claimant was keen to try it out because she'd worked on a switchboard previously. After the meeting Mrs Beevers discussed the possibility of the claimant moving to switchboard with Russell Morrow, who was responsible for managing the switchboard, and he agreed to take the claimant on a temporary basis.

103. In December 2017 the claimant worked on the switchboard on a two week trial. The trial came to an end at the arranged time. No one working with the claimant on the switchboard was aware of her mental health issues or BPD, although they were aware that she wore hearing aids. Mrs Beevers did not make Mr Morrow aware of the claimant's physical or mental disabilities, although Mr Morrow did observe the claimant wearing hearing aids.

104. Whilst the claimant worked on the switchboard there were some concerns about her performance, and on 20 December 2017 a meeting took place following an issue on the switchboard. The claimant returned to working in the shop following that meeting and remained working in the shopt until February 2018 when she took up a role as HCA on Devonshire Ward.

105. On 8 January 2018 there was a meeting with the claimant to discuss alternative options for a permanent relocation. During the meeting the claimant said that the process of trying to find her a permanent role was making her unwell, and that she could not go back to her original, substantive, role as a PSA because of bullying in that department.

106. Following the meeting Kim Beevers referred the claimant again to occupational health. The claimant was assessed by Richard Thompson on 7 February 2018. In his report he commented:

"…*Stella's mental health issues are currently well managed and she is seeing all the appropriate services*.

…There is no health reason why Stella can not work…

Stella displayed a good understanding of her condition and can alert her Manager to any changes…

Stella's diagnosis fits the Equality Act criteria…"

107. Around this time the claimant applied for a position as an HCA and was successful in her application.

108. On 16 February 2018 the claimant began working as an HCA on Devonshire Ward, reporting initially to Matron Claire Davies. HCAs are required to complete a qualification known as a Care Certificate, and the expectation is that the certificate will be completed within a 12 week period.

109. The claimant appeared to struggle initially with some aspects of the role and to lack confidence. If she was faced with a challenge by a colleague or patient, or an unexpected situation, she found it difficult to cope.

110. On 9 June 2018 Claire Davies held a 'concern' meeting with the claimant to discuss concerns about the claimant's performance in the role. During the meeting Matron Davies explained that the Care Certificate should now be complete, and the claimant explained that whilst she had benefited from support provided by another HCA, the reason the Care Certificate was not yet complete was due to annual leave and not having had the opportunity to work with the other HCA as she had also been on annual leave. Matron Davies gave the claimant additional time to complete the certificate.

111. Matron Davies also discussed a number of other concerns with the claimant. Following the meeting an action plan was put in place to support the claimant and help her complete the Care Certificate. It was agreed that the claimant would meet and work with Dawn Moore, Clinical Education and Training Practitioner, to help her improve.

112. The reason the claimant was given an extension of time to complete her care certificate was to try and help her. She could not do the HCA role on a permanent basis without it, so Matron Davies' decision to give her more time was of benefit to the claimant. There was no evidence before us to suggest that the decision to give the claimant more time was linked in any way to the claimant's disabilities.

113. On 9 July 2018 Dawn Moore carried out a progress review with the claimant. She made a number of positive comments about the

claimant's work as an HCA, whilst also identifying areas for development.

114. With the help of Dawn Moore, the claimant got her care certificate completed on 3 August 2018.

115. In October 2018 Matron Sue Shore moved to the Devonshire Ward and took over responsibility for managing the ward from Matron Davies. Around that time the claimant applied for overtime work through NHS Professionals ("**NHSP**"). NHSP operates as an internal 'bank' of qualified staff. The claimant completed the application form and it was sent to Matron Shore for approval and sign off.

116. Claire Davies carried out a handover with Sue Shore in October 2018 and told her that the claimant was still struggling with some aspects of the role (particularly the taking and recording of observations) and that an action plan was in place. The claimant was not able to complete the jobs as well as other HCAs and failed to escalate issues.

117. In late 2018, shortly after she had taken over responsibility for Devonshire Ward, Matron Shore was asked to sign the claimant off as fit to work as an NHSP. She had not known the claimant very long at that stage, and was concerned that she did not feel confident signing the claimant off to work as an HCA on any ward. The expectation is that anyone who has been signed off to work for NHSP is able to work on any ward with limited supervision.

118. Matron Shore did not want to put the claimant in situations where she would struggle to cope, and agreed that she would support her to pick up NHSP shifts on Devonshire Ward, where staff knew her and she could more easily be provided with support. Matron Shore has done similar things for other members of staff and has agreed with new staff to the ward who need to be competent and confident working in their own ward before joining NHSP, that they would pick up extra shifts on their own ward initially.

119. We find that the claimant's ability to pick up additional shifts was limited to Devonshire ward. Matron Shore did not have the power to limit her ability to work on Barnes ward, and the claimant was only allowed to work on Devonshire.

120. The reason Matron Shore did not sign the claimant off as competent to work on NHSP in late 2019 was because she had genuine concerns about the claimant's ability to cope in stressful and emergency situations, based upon the feedback provided by Matron Davies and her own observations of the claimant. She was also worried that situations might arise on other wards that the claimant would have no control over, and that she would struggle with.

121. We find that Matron Shore's views of the claimant's capabilities was based on a combination of her own experience of working with the claimant, the handover from Claire Davies, and Matron Shore's

assumptions about the claimant which were linked to her personality disorder.

122. It was striking to us that Matron Shore appeared to have very little if any empathy for the claimant and no understanding of the impact that her personality disorder had on her at work. Matron Shore became aware of the claimant's BPD about a month after she moved to Devonshire ward, and was therefore aware of it throughout most of the time that she was managing her.

123. Matron Shore commented that the claimant had never told her she had a disability, which we were surprised by. She seemed to place the responsibility for any failings entirely on the claimant.

124. At some point whilst the claimant was working on Devonshire Ward, the respondent made a policy decision to change the location of handovers at shift changeovers. Previously shift handovers had taken place in the staff room. The respondent decided that they should take place on the ward, at the nurses' station. There was a concern that handovers were taking too long, and that whilst the handover was taking place a single nurse was left alone on the ward, whilst everyone else was in the staff room.

125. The impact of the change on the claimant was that she struggled to hear the handovers because they were taking place on the ward at the nurses station, which was much noisier and where there was also the noise of the air conditioning.

126. The claimant told Matron Shore that she was struggling to hear what was being said at the handovers. Matron Shore's only suggestions were that she should stand close to the person giving the handover, and ask if she missed anything. No consideration was given to making any adjustments for the claimant. The evidence before us suggested that several people would speak during a handover, not just one person, so Matron Shore's suggestion would not have resolved the difficulties the claimant was experiencing.

127. In addition, it would in our view not have been possible for the claimant to have asked someone to repeat what she had missed. How would she know she'd missed something if she hadn't heard it?

128. Matron Shore's suggestions were not a practical solution to the problem. There was no referral to occupational health for advice as to what adjustments could be made in relation to the handover in light of the claimant's hearing difficulties, and it was apparent from the evidence before us, that the respondent did not even consider making, adjustments for her.

129. The respondent adopted a blanket approach to the handover issue, regardless of the impact of that approach on the claimant and other disabled employees. There was no evidence before us of the respondent having carried out any Equality Impact Assessment in relation to the change, or of it having considered the potential impact of the change on disabled employees, including those with hearing loss.

130. On 9 January 2019 the claimant began a 7 day period of sickness absence due to a chest infection.

131. On 23 January 2019 the claimant was involved in an incident on the ward involving a patient who had low blood pressure. The patient was recovering from an appendectomy and was suffering from nausea, post operative pain and dizziness. The claimant was worried about the patient's very low blood pressure, and moved the head of the bed that the patient was lying on up, to try and bring the patient into more of a sitting position. The claimant believed that this may help with the blood pressure issue.

132. When the claimant moved the bed, the patient cried out in pain and insisted that the bed be moved back down again. The claimant left the room and went to find the nurse who was caring for that patient, a Lucy Smith. Lucy Smith went into the patient's room, shortly followed by the claimant. When the claimant entered the room, the patient's mother was there, unhappy about what had happened. Nurse Smith asked the claimant to leave the room to de-escalate the situation, as the patient and her mother were not happy with what the claimant had done, and were threatening to make a complaint about her. It was, in our view, entirely reasonable for Nurse Smith to ask the claimant to leave the room in that situation, as the patient had to come first, and Nurse Smith wanted, quite rightly, to de-escalate the situation.

133. The nurse in charge of the ward that day was Jane Barnett, who asked the claimant to write a statement about what had happened in case there was a complaint, which is also in our view a reasonable request. In the event the patient and her mother did not make a complaint, but it is clear that the claimant was very upset by this incident.

134. There was a conflict of evidence between the claimant and Matron Shore as to what happened next. We prefer the evidence of Matron Shore on this issue. It was entirely appropriate, in our view, for Matron Shore, who was not in charge of the Devonshire Ward that day, to refer the matter back to Nurse Barnett who was in charge of the ward. The claimant was clearly very distressed by what had happened, and we believe that influenced the claimant's perception and interpretation of events. She thought that Matron Shore was dismissive of her on that day, but Matron Shore was, in our view, acting entirely appropriately, and was not dismissive of her.

135. Matron Shore was working that day but was not responsible for the Devonshire Ward as she was 'site matron' responsible for the whole of the hospital on that day, together with one other matron. The claimant approached Matron Shore in her office and asked her to intervene. She said that she was not happy with the way that Nurse Smith had spoken to her, and that she felt she was being blamed for what had happened. Matron Shore suggested that the claimant speak to either Nurse Smith or Nurse Barnett, as Nurse Barnett was in charge of the ward that day. The claimant said that she did not feel able to speak with Nurse Smith and had issues with Nurse Barnett so didn't

want to speak to her either. Matron Shore offered to speak to them on the claimant's behalf, but the claimant declined. This was not being dismissive, but rather an appropriate course of action for Matron Shore. It is difficult to see what more Matron Shore could have done in the circumstances, given that the claimant did not want to speak to either of the two nurses suggested, and did not want Matron Shore to speak to them either.

136. The following day the claimant saw her GP and was signed off work with stress and anxiety. She remained absent for 53 days. The claimant alleged that Matron Shore's behaviour that day was an example of Matron Shore being dismissive of the claimant because of her mental health issues. Whilst we accept the claimant's evidence that she felt Matron Shore was being dismissive of her, on the evidence before us we find that Matron Shore was not dismissive.

137. The claimant finds conflict in the workplace difficult to deal with. She thought that Matron Shore was not listening to her and this understandably upset her. However, we find that Matron Shore did offer to help the claimant that day, despite not being responsible for the Devonshire Ward, by offering to speak to either Nurse Smith or Nurse Barnett on the claimant's behalf, an offer that the claimant refused.

138. The claimant in her evidence clearly felt that the incident had resulted in a complaint. In fact, there was no complaint made by either the patient or the patient's mother, and the incident went no further. We do not find that Matron Shore ignored the claimant, as the claimant alleged.

139. During the first days of the claimant's absence from work Matron Shore did not make any attempt to contact the claimant to ask after her health. We find this strange, particularly since Matron Shore knew that the claimant had been upset by the incident that happened on her last day in work.

140. In early March 2019 Matron Shore spoke to the claimant over the telephone. During that call Matron Shore asked whether the claimant would be willing to do a work based stress risk assessment. The claimant said that she did not feel it was necessary, that the reason for her absence was work related stress only, not her personality disorder, and that there were no ongoing issues that needed to be addressed. The respondent's Health and Attendance Management Policy specifically provides that a stress risk assessment can be carried out in appropriate circumstances.

141. Matron Shore wanted to refer the claimant to occupational health. She asked the claimant during the phone call about a referral and the claimant said that she was willing to attend. By that time the claimant had been off sick for 40 days, and on 5 separate occasions since April 2018.

142. This was the first time that Matron Shore had referred the claimant to occupational health. Her normal practice when referring staff to occupational health is to include as much information as

possible in the referral, and she adopted this practice with the claimant. Matron Shore accessed the claimant's personnel file, which was kept in a locked filing cabinet in her office along with the personnel files of other members of staff on the ward.

143. Matron Shore included in the referral a lot of information about the claimant's health, taken from the file, and from her observations of the claimant on the ward. The referral was not seen by the claimant before it was sent to occupational health.

144. The claimant returned to work on 1 April 2019 and an informal attendance review meeting took place between her and Matron Shore. During that meeting the claimant was asked whether there were ongoing issues which may re-occur, and commented that this would depend upon potential stressful situations and how she felt they are dealt with. There was a discussion about how the claimant could access the Employee Assistance Programme for support, and the claimant acknowledged that she had previously been given information about that programme. The meeting took place before the claimant met with occupational health.

145. Later that day, the claimant was seen by Steve Peters, a Clinical Nurse Specialist working in occupational health and wellbeing. The claimant told Nurse Peters about the concerns she had about returning to work and about her emotional well-being. Nurse Peters prepared a report on the claimant in which he commented that:

"*she still feels ill-equipped and unsupported in dealing with some of the more complex issues on the ward and would welcome further training…*

this employee is in work at this time, but they seem to have a number of issues which are likely to affect and impact on their work…"

146. During the meeting the claimant was made aware of the content of the occupational health referral made by Matron Shore and was very upset by this. She sought advice from her trade union and asked for a meeting with HR and Matron Shore.

147. A meeting was arranged for 11 April 2019 and the claimant was accompanied by Bridget Dunks from Unison. The claimant explained that she'd asked for the meeting because she was very upset about the occupational health referral and what Matron Shore had said about her. She also wanted to discuss moving to a different area because she felt unsupported and believed that Matron Shore was discriminating against her because of her mental health.

148. During the meeting Matron Shore commented that the claimant could not cope with emergency situations, because that was the view she had formed of her based upon her observation of the claimant working on the ward. Devonshire Ward is an acute surgical ward where emergency situations are not uncommon.

149. There was a discussion about a possible move to another ward. Matron Shore expressed the opinion that another ward, with fewer emergency situations and less pressure, may be a better place for the claimant to work. The claimant interpreted this as Matron Shore saying that she did not want the claimant to work on Devonshire ward, which was in fact not the case.

150. Matron Shore did however have serious concerns about the claimant's ability to work on Devonshire ward. She asked the claimant twice to carry out a stress risk assessment to help her to discharge her duty of care towards the claimant, by identifying potential stressful situations and steps that could be taken to manage them, and to manage her duties towards the patients on the ward. It was, in our view, reasonable for Matron Shore to do this.

151. The claimant had sickness absence due to stress and anxiety as a result of an incident in the workplace. In these circumstances it was entirely appropriate and in line with the respondent's policy for Matron Shore to ask the claimant to undergo an assessment. It was nothing to do with the claimant's personality disorder, although the claimant perceived it as such.

152. The claimant alleges that Matron Shore determined that the claimant was not fit to work on a ward or in an emergency situation. We find that Matron Shore did have some concerns about the claimant's ability to cope with emergency situations and about whether Devonshire Ward was the best place for the claimant in light of this. She was worried that the claimant may become overwhelmed, and that this could put patients at risk. She was looking out for both the claimant's welfare and the welfare of the patients on the ward, which was entirely appropriate.

153. We find that Matron Shore did not however decide that the claimant was not fit to work on a ward or in an emergency situation.

154. On 30 April 2019 the claimant lodged a formal grievance about the way in which she had been treated by Matron Shore. She began the grievance by making allegations of discrimination, which she said had started on 13 March 2019 with the referral to occupational health.

155. In her grievance she raised a number of issues including:

a. The incident with the patient's blood pressure;
b. Lack of contact from Matron Shore in the early days of her sickness absence;
c. Failure to authorise the NHSP application;
d. Matron Shore advising her to tell her colleagues about her BPD as it may give them a better understanding of her;
e. The occupational health referral in March 2019 which the claimant said contained too much medical information and breached her confidentiality;
f. False diagnosis of the claimant by Matron Shore;
g. Matron Shore's conduct and comments at the meeting on 11 April 2019;

h. Telling the claimant she could not cope in a crisis;
i. Being asked to do a stress risk assessment;
j. Shift handovers being carried out at the nurses' station;
k. Colleagues having access to her personnel file and sensitive medical information;
l. Being removed from shifts; and
m. The way in which she had been treated historically.

156. On 14 May 2019 Karen Turner in HR wrote to the claimant acknowledging her grievance. Karen Turner wrote again on 23 May 2019 informing the claimant that Senior Matron Jane Walker had been appointed to hear the grievance and inviting her to a grievance meeting on 30 May 2019.

157. Jane Walker was, at the time, Matron Shore's line manager and Matron Shore had discussed the claimant with Senior Matron Walker on a number of occasions during their regular 1-2-1 meetings. Senior Matron Walker was therefore aware of the claimant's health issues and that Matron Shore also had concerns about the claimant's ability to do the HCA role. Jane Walker knew, at the time she dealt with the grievance, that the claimant has a personality disorder, that she was taking medication for depression, and that she had previously attempted suicide. Matron Shore had also asked Jane Walker for advice and guidance on how to manage the claimant during their 1-2-1 meetings.

158. On 2 May 2019 the claimant began a 34 day period of sickness absence due to neck, shoulder and back pain.

159. On 30 May 2019 the claimant was interviewed as part of the grievance investigation. She was accompanied at that meeting by Bridget Dunks her trade union representative. A lot of time was spent at the grievance meeting discussing the issue with a patient on the ward on 23 January 2019. Not all of the issues raised by the claimant in her grievance were discussed.

160. During the grievance meeting Jane Walker apologised to the claimant for the time it had taken Matron Shore to deal with the NHSP application. She also said that she would clarify with Matron Shore what her intentions were in asking the claimant to undergo a stress risk assessment.

161. Jane Walker commented, in response to the claimant's complaint about lack of contact in the early days of her sickness absence, that "*if somebody is off sick, it isn't necessary to ring them as this could be seen as harassment".* She also said, in relation to the referral to occupational health that "*I expect that Sue had a thought process for the referral and would reiterate that past medical history can be used to help the assessment by Occupational Health"*

162. These comments suggest that Mrs Walker had already formed a view that was supportive of Matron Shore, before even having discussed the situation with her.

163. We find that Mrs Walker did not approach the grievance with an open mind, but, rather, with a view to supporting Matron Shore. She was close to Sue Shore, having known her for years, and had regularly discussed the claimant with Matron Shore. She was not an independent grievance hearer. Mrs Walker went into the grievance investigation with a mindset of supporting Sue Shore rather than with an open or enquiring mind.

164. We find it strange that Jane Walker perceived contact with an employee who is off sick as harassment. In our view such contact is part of a normal sickness management procedure, and good employee relations.

165. Jane Walker told us that she did not know the symptoms of BPD, and she appears to have taken no steps to enquire about them or even to have considered whether the claimant's behaviour at work could be linked to her BPD. Instead, she just accepted that what Matron Shore had done was correct, without question.

166. Jane Walker's evidence to the Tribunal was unconvincing. For example, at one point she told the Tribunal that she had prepared a list of the issues to cover in the grievance, but later in her evidence she said that she had not. She did not cover all of the issues raised by the claimant in the grievance, and her explanation for not doing so was not persuasive.

167. On 2 July 2019 Sue Shore was interviewed as part of the grievance investigation. Many of the issues raised by the claimant, including ones that Jane Walker has specifically told the claimant she would raise, were not discussed during that meeting. For example, Mrs Walker did not challenge Matron Shore as to her reasons for doing a risk assessment, or why there was a delay in approving the claimant's NHSP application.

168. On 30 July 2019 Jane Walker interviewed Clare Davies. She asked Matron Davies about the claimant's Care Certificate, whether the claimant had been involved in an emergency situation, whether she had discussed the claimant with Jane Barnett, about the claimant's tinnitus and about her management of the claimant's sickness absence.

169. Jane Walker accepted in her evidence that it was her role as grievance hearer to ensure that all of the issues raised by the claimant were properly investigated.

170. There is no evidence of any investigation other than the interviews with Matron Shore and Matron Davies, and no critical assessment of what they told Jane Walker. Rather, their version of events appears to have been accepted by Mrs Walker without question.

171. On 21 August 2019 Mrs Walker wrote to the claimant inviting her to a meeting on 27 August 2019 to discuss her grievance findings.

The meeting was rearranged for 26 September 2019 because the claimant's union representative was not available.

172. The claimant did not attend the meeting on 26 September 2019 because she was off sick. Her union representative attended in her place. Mrs Walker referred in her evidence to being disappointed that the claimant did not attend, and to the claimant being 'discourteous' by not attending. She appeared not to have any understanding or empathy for the claimant and the fact that, as at 26 September 2019, she was off work ill. This lack of empathy for the claimant was apparent throughout the evidence of Jane Walker.

173. Jane Walker wrote to the claimant informing her of her decision on the grievance on 7 October 2019. She did not uphold any of the grievance, despite already having apologised to the claimant for the delay in processing the NHSP application. Her outcome letter deals with only 5 of the issues raised by the claimant, and is woefully lacking in detail and reasoning. It did not, for example, address at all the issues raised by the claimant about:

a. The delay in processing her NHSP application;
b. The removal of the claimant's name from the rota; or
c. The risk assessment

174. Jane Walker told us that part of her reason for not upholding the grievance was that she felt that the claimant had not engaged with the help offered to her, because she had walked out of an occupational health meeting with Richard Thompson on 25 September 2019. This is not a valid reason for not upholding the grievance.

175. It took over 5 months for Jane Walker to provide the claimant with an outcome to her grievance. The outcome when it was provided was just two and a half pages long. There was no valid reason provided to us as to why it took so long for Mrs Walker to deal with the grievance. This was not a case in which Mrs Walker carried out intensive investigations. She just interviewed two people. The grievance could have been dealt with much more quickly.

176. On 8 August 2019 the claimant attended an appraisal meeting with Helen Corfield. The claimant's evidence was that during that meeting she made Sister Corfield aware of the difficulties that she was facing at work, that nobody on the ward would help her with patients, and that she would ask for help but not get it. Sister Corfield's evidence was that the claimant had not raised any concerns with her during the appraisal, and that if concerns had been raised, she would have recorded them in her notes of the appraisal.

177. We were provided with a copy of the appraisal form that was completed by Helen Corfield on the day, and signed by the claimant. The notes made on the appraisal form record that:

a. The claimant felt she had developed as an HCA and had a good relationship with patients and the ward team;

b. In the section 'what proved more challenging for you' the claimant said 'looking after the deteriorating patient and dealing with personal emotions' and 'being in conversations with colleagues about personal circumstances'.

c. The claimant felt that her health was not affecting her work;

d. The claimant had nothing else to discuss; and

e. In the summary at the end of the appraisal form, Helen Corfield comments that: "*Stella has improved her knowledge and confidence whilst working on the ward. She has identified areas for development and has been advised to escalate and delegate issues out of her control. I have mentioned that there are more structured areas to work within the trust although Stella wishes to continue to work on the ward in the next 12 months*".

178. There was a direct conflict of evidence about what happened on 8 August 2019. The claimant was very detailed in her evidence about the appraisal, but the only contemporaneous evidence of the appraisal, which was signed by the claimant, does not support her version of events.

179. Helen Corfield was not an impressive witness and she appeared to have very little empathy for the claimant. She told us that she did not know about the claimant's BPD until the time of the Tribunal proceedings, despite the fact that by the time of the appraisal she had been working with the claimant for 16 months. She accepted that she only had a vague recollection of the appraisal meeting.

180. Helen Corfield accepted that she had told the claimant that colleagues should not be putting a lot of work on her, and that prompted her advice that the claimant should delegate. There was clearly a difference in perception as to what was said during that meeting.

181. On balance we prefer Helen Corfield's version of events of the appraisal meeting, which is consistent with the record of the appraisal which the claimant signed. In light of the other evidence before us, such as the claimant refusing to engage in the stress risk assessment, we find that if the claimant had not been happy with the contents of the appraisal, she would not have signed the document.

182. We accept that the claimant did raise issues during the appraisal about relationships with some colleagues and that prompted Helen Corfield's advice about delegation and escalation. The claimant's perception of the severity of the issues that she raised was different to that of Helen Corfield, which is why Helen Corfield didn't feel the need to take any further action.

183. On the day after the appraisal, the 9th August 2019, the claimant injured her back at work and had to go home. She was unable to come in to work the following day (10th) and called in sick. She was not

due to work on Sunday 11th August 2019 and went out for lunch with her daughter. She took a photo and posted it on her Facebook page, where it was seen by Helen Corfield.

184. The claimant had anticipated returning to work on Monday 12th August and told the respondent on 11th that she would be back the following day. However, on the evening of the 11th the claimant became overwhelmed by recent events and took an overdose of tablets and alcohol in an attempt to take her own life. The claimant slept through the whole of Monday, so did not attend work or contact the respondent to let them know that she would not be in.

185. Helen Corfield tried to contact the claimant six times on the 12th August 2019 and was unable to reach her. She became frustrated.

186. On Tuesday 13th August 2019 the claimant telephoned the respondent and spoke to Helen Corfield. She told her that she was unwell and would not be able to attend work, that she had taken too many painkillers and could not move her legs. She did not, understandably, tell Helen Corfield that she had attempted to take her own life.

187. Helen Corfield told the claimant, in response, that she did not expect anyone to be out and about whilst they are on sick leave, and asked whether it was a good idea to take painkillers when the claimant had been drinking. Helen Corfield then said that the claimant had let the ward down and should make sure she attended her shift the following day. She was clearly annoyed with the claimant, and in particular that the claimant had been posting pictures on Facebook of her being out whilst on sick leave.

188. We accept that Helen Corfield's comments to the claimant on 13th August were made because she was frustrated and angry by the lack of contact from the claimant the day before, after she'd posted on Facebook indicating that she was out with her daughter. The claimant's unexpected absence caused an issue with staff to patient ratios on the ward.

189. Mrs Corfield would in our view have reacted in the same way to a non disabled member of staff who had behaved in that way.

190. On 19 August 2019 the claimant began a 159 day period of sickness absence due to anxiety and depression.

191. In September 2019 Jane Walker arranged for a further occupational health assessment of the claimant. The reason she did this was because the claimant had told her during the grievance hearing that she was not happy with the previous occupational health report obtained by Matron Shore, and Jane Walker thought the last report was 'light on practical advice'. On 28 August 2019 Karen Turner in HR wrote to the claimant telling her that a referral was being made.

192. Mrs Walker arranged for the review to be carried out by a mental health nurse, Richard Thompson. It was agreed that details of

the claimant's mental health would not be included in the referral, and Mrs Walker told the claimant that she would have to provide these to Mr Thompson. The referral document itself is brief and contains very little detail. In the document Jane Walker asks occupational health to "*make further recommendations and provide guidance in terms of future support and management of her health and well-being"*.

193. The appointment with Mr Thompson took place on 25 September 2019 and was a traumatic experience for the claimant. It lasted three hours before the claimant left in a state of great distress. The claimant was not made aware in advance of how long the appointment with Mr Thompson would last, or of the nature of the questions that would be put to her.

194. For some reason, unbeknown to the Tribunal, Mr Thompson took it upon himself to question the claimant at great length and in detail about her past, going back to her childhood. The Tribunal does not understand why Mr Thompson chose to do this, given that his role was not to treat the claimant, but merely to provide advice and recommendations on a return to work and ongoing support for the claimant in the workplace.

195. The claimant described the appointment as 'utterly horrific' and we accept her evidence on this issue entirely. She became distressed when talking about it during the course of her evidence. She described Mr Thompson as being 'on a mission', asking her about abuse in her childhood, and this made the claimant so upset she left the appointment. Mr Thompson then decided to contact her GP because he was concerned for the claimant's welfare, given how upset she was when she left their meeting. The claimant did not consent to him contacting her GP.

196. Mr Thompson then produced an occupational health report which the claimant did not agree could be sent to her employer, understandably, because it contained a lot of very personal information about the claimant's past which was not relevant to her current employment. Mr Thompson did not tell the claimant in advance that he wanted to share this information with the respondent.

197. Mr Thompson wrote to the claimant's GP listing the history of abuse and difficult situations that the claimant had experienced. It is not clear what he was trying to achieve by doing this, and it clearly distressed the claimant very much.

198. Mr Thompson also wrote to Jane Walker. In the letter he told Mrs Walker that:

"*…at the end of the session Stella became upset when I asked her about her behaviour and expressed my concerns about her Health…*

…she is not consenting to allow my report to be sent to you and she does not want the history to go to her GP. Because of this I am going to complete a case review of her time at Chesterfield Royal Hospital

based on reports and management referral forms already consented to and in her personnel file…

Stella has stated that she will not return to Devonshire ward. She will not complete a stress risk assessment. Stella has now declined to have the OH report sent to you or information shared with the GP.

Stella has demonstrated a pattern of behaviour that has repeated during her time at Chesterfield Royal Hospital. Based on this repetition it would be logical that without intervention that changes this behavioural pattern it will be repeated again…This pattern includes long periods of absence and episodes of suicidal intent and attempts, and has served to reinforce Stella's low self esteem. This would appear to be an unhealthy cycle for Stella…"

199. The tone of the report and the way in which it is presented is very harsh. There is, once again, no empathy shown for the claimant. It gives the impression that the claimant is being difficult and does not explain that the reason the claimant was reluctant for the report to be shared was because it contained information about her history, and her childhood which was clearly very distressing to her and not relevant to the trust. In our view it presents a one sided and unfairly unsympathetic view of the claimant.

200. Had the full occupational health report gone on her file, managers would have had access to the most intimate details of the claimant's life. It is understandable that the claimant did not wish that information to be shared, and we see no reason why it should have been shared, given that the focus of Mr Thompson should have been on supporting the claimant back into work and making practical recommendations as to adjustments that could be made.

201. On 1 April 2019, as well as conducting a return to work interview with the claimant, Matron Shore also carried out a review of the claimant's absence. She had intended this to be a formal Stage 1 meeting under the respondent's policy on Health and Attendance Management. She did not however tell the claimant that it was a formal meeting, and infact used the wrong form during the meeting. The form that she used was headed 'informal attendance review meeting', and was signed by the claimant.

202. By the time of the meeting on 1 April 2019, the claimant had had four periods of absence in the last 12 months. The form records that the claimant was told there would be a further review in 2-3 weeks' time to find out how things were going. It does not contain any warning about the consequences of future absence, or any indication that it is part of a formal attendance management process.

203. The claimant was not given any notice of this meeting, and therefore did not have the opportunity to consider if she would like trade union representation at the meeting, in line with the respondent's policy.

204. On 28th June 2019 Matron Shore wrote to the claimant inviting her to a formal meeting to discuss her health and attendance at Stage 2 of the Health and Attendance Management process. We find it surprising that Matron Shore dealt with this process, given that there was an outstanding grievance against her by the claimant at the time, which specifically related to the way in which Matron Shore was treating the claimant.

205. On 24 July Matron Shore met with the claimant to carry out the Stage 2 review meeting. The claimant was accompanied by her trade union representative. No notes were taken. Approximately four weeks after the meeting Matron Shore wrote to the claimant summarising what had been discussed. She acknowledged that the claimant had now completed a transfer request, asking to move to another ward, and warned the claimant that if she were to have more than 1 occasion of absence or a total of 7 days or more absence over the next 6 months, the respondent may move to Stage 3 of the policy and consider terminating her employment.

206. On 21 October 2019 Matron Shore wrote to the claimant inviting her to a second Stage 2 review of health and attendance. That meeting took place on 6 November and the claimant was again accompanied by her trade union representative. There were no notes of that meeting either. Matron Shore did however write to the claimant after the meeting summarising what was discussed.

207. During the meeting on 6 November 2019 the claimant was told that she had not met the attendance targets set in the July meeting. The claimant explained that she had not refused for Mr Thompson's occupational health report to be disclosed in its entirety, but had just asked for a small part of it to be removed because it was too personal to disclose. The claimant also said during that meeting that she felt that she had been tricked into answering Mr Thompson's questions and that Mr Thompson had told her he would be ending her employment.

208. There was also a discussion about alternative roles within the trust and about a stress risk assessment. There was a direct conflict of evidence between the claimant and Matron Shore as to whether the claimant had, during that meeting, agreed to carry out a risk assessment. On balance we prefer Matron Shore's version of events and find that the claimant did not agree to a stress risk assessment being carried out. By that time the claimant had, understandably, lost faith in the management of her absence and of her mental health by the respondent, particularly following the traumatic meeting with Mr Thompson.

209. At the end of the meeting the claimant was told that her case would be escalated to stage 3 of the procedure, which could involve considering the termination of her employment, because there was no indication at that stage as to when she may be able to return to work.

210. On 21 November 2019 the respondent wrote to the claimant to inform her that her full sick pay had run out almost two months earlier, on 30 September 2019.

211. On 12 December 2019 Sue Shore completed a further occupational health referral for the claimant in preparation for a stage 3 review meeting. The claimant consented to the referral during a telephone conversation. HR advised Matron Shore to specifically request that Richard Thompson saw the claimant again. We find this advice surprising, given what had happened at the last meeting between Mr Thompson and the claimant, and the comments that the claimant had made about that meeting and Mr Thompson during the stage 2 meeting in November.

212. After receiving the referral, Richard Thompson sent an email to HR and to Matron Shore. He specifically said that "*one thing we can not offer is Management opinion on if a redeployment is advisable. I would refer you back to my case review. I clearly state that if Stella does not cooperate with and take on board the therapeutic options available to her she is highly likely based on the history in the report to repeat this pattern of behaviour.*

213. Mr Thompson was of the view that, in light of what had happened at his last meeting with the claimant, it would not be appropriate for him to carry out a further occupational health review of her. He did however suggest offering an appointment with an alternative occupational health nurse and allowing her to have someone the claimant trusted present with her in the appointment.

214. Gill Stevens, head of HR, was asked for her advice on the situation. She had originally advised that the claimant should be re-referred to occupational health, but subsequently changed her mind, and advised that they should move ahead to Stage 3 without a new occupational health report.

215. On 17 December 2019 Matron Shore wrote to the claimant inviting her to a meeting at Stage 3 of the Health and Attendance Management Policy. She was warned that a potential outcome of the meeting could be the termination of her employment.

216. Matron Shore prepared the management case for the meeting. She summarised the history of the claimant's employment with the respondent, and her absences, which were, in total, 510 days and 10 occasions. She referred to the previous absence review meetings and to the claimant's request for an internal transfer, and to the fact that the claimant had raised a grievance. She also quoted at length from Richard Thompson's report.

217. Towards the end of the management case Matron Shore wrote:

"*Since the stage 2 meeting took place I have spoken with Stella to ask if she would reconsider undertaking the stress risk assessment to which she agreed…*

To ensure that consideration has been given to all supportive measures a further Occupational Health referral was made to focus specifically if it would be appropriate for Stella to return to work in her usual capacity or be redeployed to another area or role…"

218. Matron Shore finished by asking the panel to make a decision regarding the sustainability of the claimant's employment in light of the respondent's Health and Attendance Support Policy.

219. The Stage 3 meeting went ahead on 6 January 2020. The claimant attended without union representation. The meeting was chaired by Andrea Staley, Head of Nursing. Matron Shore also attended, as did two members of the respondent's HR team.

220. During the meeting the management case was read out and the claimant commented that some areas of it were incorrect. The claimant said that she felt bullied, shouted at and prejudged on the ward.

221. The claimant was asked how she felt, and said that she had outstanding problems with disorders, panic attacks, agoraphobia and insomnia. She was asked how she felt about returning to work and said that at the moment she panicked at the thought of it and had panic attacks if she saw anything related to the respondent. The claimant also said that she had accessed the crisis team, and that she was on medication and waiting to be referred for counselling.

222. The claimant said clearly that she did not want to lose her job and needed counselling to help her move forward. She was clear that she did not want to return to Devonshire ward because she said that she had been called an imbecile, intimidated and spoken to as a child. When asked whether she had reported it, she said that she didn't want to because she didn't talk about her personal life because of the way people reacted to her.

223. When she was asked whether there was anything more that the respondent could have done, she talked in some detail about the incident with the patient on 23 January 2019.

224. At the end of the meeting Angela Staley told the claimant that she wanted some time to review the file in more detail, to understand what support had been given to the claimant and what had been done. There was no evidence before us however that Angela Staley did review the file in more detail.

225. Instead, Catherine Husband, HR Partner drafted a letter dismissing the claimant and sent it to Mrs Staley for review. Mrs Staley sent the letter to the claimant on 16th January 2020 giving her notice of termination of her employment. In the letter Mrs Staley wrote that the claimant's employment was being terminated on the grounds of incapability due to ill health, and that the claimant would be paid four weeks' pay in lieu of notice and any accrued holiday pay. She advised the claimant of her right to appeal against the decision.

226. Mrs Staley told the Tribunal that she had decided to dismiss the claimant without having checked what was contained in the claimant's grievance. She also gave evidence that she did not consider any alternatives to dismissal, and did not consider the cost to the respondent of continuing to employ the claimant.

227. In evidence to the Tribunal Mrs Staley also said that if the claimant had been accessing medical treatment at the time of her dismissal and had been able to provide an estimate timeframe for returning to work, she would not have dismissed her. She said that if the claimant had agreed and started to access support between August 2019 and January 2020 it would have changed things. She admitted however that she had not told the claimant this during the meeting on 6 January 2020.

228. Mrs Staley said that she had considered waiting longer before dismissing the claimant but felt that there was little more she could do. She was concerned that the claimant did not have a regular mental health worker nor a counselling referral date. Mrs Staley knew that the claimant was being supported by her GP, but did not appear to think that this support was sufficient.

229. Mrs Staley's evidence was that the claimant's absence was having a significant impact on the ward because there was a gap in the rotas that was difficult to fill. She told us that Matron could not recruit into the post whilst the claimant was still employed. There was a bank of staff that Matron could ask to cover the claimant's shifts, but there was no guarantee of cover. In practice this could mean that the ward operated short staffed, which may have a detrimental impact on patient care.

230. Mrs Staley was aware, on the morning of the 6 January 2020, that HR had originally suggested that the claimant be re-referred for a more up to date occupational health report and for advice on redeployment, but that no report had been obtained. The last occupational health report was that prepared by Richard Thompson in September 2019 which was more than three months old. The respondent's normal policy is to use reports prepared within the last three months.

231. At the time of the dismissal, the respondent did not therefore have any up to date medical evidence as to whether the claimant was fit to be redeployed. Mrs Staley did not look at redeployment because the claimant could not give her a timescale for a return to work.

232. The claimant was therefore dismissed with notice and her employment terminated on 20 January 2020.

233. On 27 January 2020 the claimant appealed against her dismissal. In her letter of appeal, she wrote that:

a. She believed she had been discriminated against during the course of her employment and in relation to her dismissal;

b. Her dismissal had been a foregone conclusion;

c. The respondent was incapable of dealing with or managing someone with complex mental health issues and had made assumptions about her;

d. Assumptions had been made about her health, she had been treated less favourably than others and this had caused her ill health; and

e. Her dismissal was unfair.

234. Angela Staley prepared a management response to the appeal. In the response she wrote that the claimant had raised a grievance on the grounds of discrimination in April 2019, that the grievance had been "*fully investigated*" and that "*none of the five points in Stella's grievance were upheld."* She also commented that the Stage 3 meeting on 6 January 2020 "*was not to rehear the points that had been raised in the grievance, so I am unable to comment on Stella's appeal points that related to this…*"

235. Mrs Staley then went on to set out her response to three points that she identified the claimant as raising in the grievance. The first was an allegation of discrimination, not just during the course of her employment, but also in relation to the dismissal itself. Mrs Staley wrote that she was not able to comment on matters of discrimination that had been part of the grievance in 2019, and that "*The decision to dismiss Stella was not because of a disability or from matters arising from a disability…*".

236. The second point covered by Mrs Staley was that assumptions had been made about the claimant's health, that she had been less favourably treated and that this had caused her further ill health. Mrs Staley's response to this point was very brief:

"*I am not able to comment on matters of assumptions about Stella's health, decisions that were made, stipulations that were put in place, and information that was shared. It is my belief that these points were considered in the formal grievance raised in 2019…The decision to dismiss Stella was not because of the points raised above."*

237. The third point commented on by Mrs Staley in the management response was the suggestion that the claimant's dismissal was a foregone conclusion, and that the respondent was incapable of dealing with someone with complex mental health issues and made assumptions about her. Mrs Staley wrote that:

"*I am not able to comment on how Stella was treated, and with reference to her mental health whilst working on Devonshire Ward, it is my belief that the points raised in relation to the way Stella felt she was being treated were considered in the formal grievance…*

The decision taken to terminate Stella's employment was not a "foregone conclusion…"

238. Mrs Staley concluded the management response by commenting that she believed the decision to dismiss the claimant was fair and reasonable, and that nothing in the claimant's appeal letter would change that decision.

239. On 30 January 2020 Gill Stevens in HR wrote to the claimant to acknowledge receipt of the grievance. She told the claimant that she would begin to arrange an appeal hearing and would be in touch as soon as possible to confirm the details of the appeal hearing. An appeal hearing was subsequently arranged for 30 March 2020.

240. In March 2020 the country was hit by the Covid 19 pandemic, which placed a lot of pressure on the NHS, and on 23 March 2020 the first national lockdown was announced. On 23 March 2020 the respondent wrote to the claimant postponing the appeal and offering her the choice of either conducting the appeal on the basis of written submissions or deferring the appeal hearing.

241. The claimant had, by this time, instructed solicitors to act on her behalf. On 26 March 2020 the claimant's representative wrote to the respondent proposing waiting a month before conducting the appeal hearing.

242. On 24 April 2020 the respondent again offered the claimant the options of conducting the appeal by correspondence or waiting for a hearing due to the Covid 19 pandemic.

243. On 8 May 2020 the claimant's solicitor wrote to the respondent agreeing that the appeal would be conducted on the papers, without an appeal hearing.

244. On 26 May 2020 the respondent wrote to the claimant directly explaining that correspondence about the appeal would be sent to her directly and setting out a proposed timetable for the appeal process. The timetable included the following dates:

a. 5 June 2020 – claimant to submit any written submissions, following which she would be provided with the management case;

b. 17 June 2020 – both the claimant and the management to ask questions of the other's case;

c. 24 June 2020 – each side to respond to any questions raised by the other side;

d. 3 July 2020 – the panel to ask any questions;

e. 10 July 2020 – responses to be provided to panel questions; and

f. The panel decision to be sent as soon as practical thereafter.

245. The claimant was confused by the process and neither she nor her solicitors submitted any written submissions in support of her appeal.

246. The respondent wrote to the claimant on 8 June 2020 stating that as no written submissions had been received, the appeal letter and the management case would form the appeal documentation. The claimant was invited again to ask any questions about the management case by 17 June 2020. She did not raise any questions.

247. The appeal panel met on 25th June 2020 to discuss the claimant's appeal. The panel was chaired by Zoe Notley, General Manager in the respondent's Surgical Division. Also on the panel were Linda Gustard, Head of Nursing and Midwifery, and Ian Siara, Deputy Director of HR and OD who provided HR advice.

248. The panel asked two questions of the management side and none of the claimant. They asked management whether the claimant had appealed against the outcome of the grievance she had raised previously and were told that she had not. They also asked management to summarise the steps that had been taken to re-deploy the claimant.

249. On 6 July 2020 Zoe Notley wrote to the claimant to inform her of the panel's decision on the appeal. The letter runs to two and a half pages, most of which is taken up with a summary of the appeal process. The responses to the substantive issues raised by the claimant in her appeal are contained within three brief paragraphs as follows:

"*1) That you have been discriminated against because of a protected characteristic.*
The purpose of the appeal was to consider the fairness of your dismissal, not to re-open a grievance case. We note that your grievance was looked into, a response was given and you were offered an appeal. You did not appeal against this decision. We did not find evidence of discrimination.

2) Assumptions about your health
We are satisfied that management behaved reasonably in trying to understand your condition and support you to continue at work as outlined in detail throughout the management case.

3) The decision to dismiss was a foregone conclusion
We believe that management have described a process by which you were supported to remain at work and how due consideration was taken at the hearing in arriving at their decision."

250. We were not impressed by Zoe Notley as a witness or by the appeal outcome. Zoe Notley did not challenge anything that she was told by the management side and did not even interview Angela Staley about the reason for dismissal. The appeal panel refused to consider

the allegations of discrimination, despite the fact that the claimant was clear in her appeal that she believed her dismissal itself to be discriminatory.

251. The appeal panel provided woefully short reasons for their decision and appears to have merely accepted the management case in its entirety. This has led us to the conclusion that the appeal was not independent

252. Zoe Notley was not an impressive witness. She had very poor recall and was vague in her answers to questions. She failed in her role as chair of the appeal panel to ensure that a robust appeal process was conducted. The claimant is a disabled person who had lost her job and who was making allegations of discrimination about her dismissal. Those allegations were dismissed without proper consideration.

253. Zoe Notley had little experience in dealing with appeals. She knew Andrea Staley well, having worked with her for many years, and accepted what Mrs Staley said in the management case, without challenge. The same mistakes that had been made previously, with managers accepting without challenge what they were told by colleagues who they had worked with for years, were also made at the appeal stage.

254. Zoe Notley was not aware that Andrea Staley would not have dismissed the claimant had the claimant been receiving treatment or able to give a timeframe for a return to work. Mrs Staley did not tell Zoe Notley it would have been helpful to have an up to date occupational health report, despite admitting as much in her evidence to the Tribunal. Mrs Notley knew that the occupational health report was more than 3 months out of date, which was outside the respondent's policy.

The Law

Time limits – discrimination claims

255. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination may not be brought after the end of:

> "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or…*
> *(a) Such other period as the employment tribunal thinks just and equitable.*

256. Section 123 (3) states that:

"*(a) conduct extending over a period is to be treated as done at the end of the period;*
(a) Failure to do something is to be treated as occurring when the person in question decided on it."

257. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e. an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time: ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434*.**

258. Factors that are relevant when considering whether to extend time include:

a. The length of and reasons for the delay in presenting the claim;
b. The extent to which the cogency of the evidence is likely to be affected by the delay;
c. The extent to which the respondent cooperated with any requests for information;
d. How quickly the claimant acted when she knew of the facts giving rise to the claim; and
e. The steps taken by the claimant to obtain professional advice once she knew of the possibility of taking action.

259. In ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*** the court held that in order to prove that there was a continuing act of discrimination which extended over a period of time, the claimant has to prove firstly that the acts of discrimination are linked to each other and secondly that they are evidence of a continuing discriminatory state of affairs.

Burden of proof

260. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

"*(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…"

261. There is, in discrimination cases, a two stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205*** which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In **Igen v Wong** the Court of Appeal endorsed guidelines set down by the EAT in ***Barton v Investec***, and which we have considered when reaching our decision.

262. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment.

263. In ***Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913*** the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

264. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263****,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

265. In ***Glasgow City Council v Zafar [1998] ICR 120***, Lord Browne-Wilkinson recognised that discriminators 'do not in general advertise their prejudices: indeed they may not even be aware of them'.

266. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

267. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In ***Madarassy v Nomura International plc [2007] ICR 867*** Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

268. In ***Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276***, Lord Justice Sedley adopted the approach set out in ***Madarassy v Nomura*** that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

269. Unreasonable behaviour is not, in itself, evidence of discrimination (***Bahl v The Law Society [2004] IRLR 799***) although, in the absence of an alternative explanation, could support an inference of discrimination (***Anya v University of Oxford & anor [2001] ICR 847***).

Discrimination against employees

270. Section 39(2) of the Equality Act 2010 states as follows:

"*An employer (A) must not discriminate against an employee of A's (B) –*

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or4 training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment."

271. In ***De Souza v Automobile Association [1986] ICR 514***, the court held that 'detriment' is go be given a wide definition, and that the Tribunal must be satisfied that a reasonable worker would or might take the view that he had been disadvantaged as a result of the alleged acts of discrimination, taking account of all of the circumstances. In other words, is the treatment of such a kind that a reasonable worker might take the view that it was to his detriment? An unjustified sense of grievance will not amount to a detriment (***Barclays Bank plc v Kapur (no 2) [1995] IRLR 87***.

272. The EHRC Employment Code provides, at paragraphs 9.8 and 9.9, that:

"*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage…. However, an unjustified sense of grievance alone would not be enough to establish detriment.*"

Direct discrimination

273. Section 13 of the Equality Act 2010 provides that:

"*(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."*

274. An actual or hypothetical comparator is required for a direct discrimination claim, and section 23 of the Equality Act states that:

"*(1) On a comparison of cases for the purposes of section 13, 14 or 19, 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…."

275. A hypothetical comparator must be in the same position in all material respects as the claimant, save that she or he is not a member of the protected class.

276. In ***Nagarajan v London Regional Transport [1999] ICR 877, HL***, a race discrimination case, the House of Lords held that the protected characteristic had to be "*a significant influence on the outcome*". The protected characteristic need not be the only reason for the treatment, or even the main reason, but it must have a significant influence.

277. In ***Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL***, the House of Lords held that in direct discrimination cases the Tribunal must ask why the alleged discriminator acted as s/he did, ie what was the conscious or subconscious reason for the treatment of the claimant. This involves examining the mental processes of the alleged discriminator.

278. Some cases have suggested a 'but for' approach to determining questions of direct discrimination – ie 'but for' the disability, would the claimant have been treated in the way that she was. More recent authorities however have held that it is not always the most appropriate question to ask, and that the best approach is to focus on the reason why the employer acted as it did, based on the facts.

279. When deciding why the employer acted as it did, motive and intention are irrelevant, so it is no defence for an employer to argue that it had a 'good reason' for discriminating. In ***Ahmed v Amnesty International [2009] ICR 1450*** the employer argued that in refusing an employee of Sudanese ethnic origin a role as researcher for Sudan, it was acting to protect her health and safety because it was concerned that if she visited Sudan she would be at risk of violence. That argument was not successful, as once the Tribunal found that race was the reason the claimant was refused the job, it mattered not what the employer's motives were.

280. If the employer makes an assumption about the claimant and that assumption influences the employer's less favourable treatment of the claimant, then direct discrimination is normally made out. Employers should avoid making assumptions that an individual has certain

characteristics because of disability (or any other protected characteristic).

281. In ***Stockton on Tees Borough Council v Aylott [2010] ICR 1278*** the Court of Appeal agreed that the dismissal of an employee with bipolar disorder was direct discrimination because the employer had a stereotypical view of mental illness. In that case the Tribunal found, on the facts, that the employer did not want the claimant to return to work, but rather wanted to manage him out of the organisation. The employee had been involved in an argument with his line manager but his behaviour had never been threatening and the medical evidence indicated that he could have continued to work in a more junior role with fewer responsibilities. The Tribunal was right to conclude that a non-disabled comparator with a similar sickness record would not have been treated this way and that the reason for the treatment was a stereoptypical view of mental illness.

282. Tribunals have the power to draw inferences of discrimination. In ***Nagarajan v London Regional Transport*** Lord Nicholls commented that "*many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did*".

283. The principles to be considered when deciding whether to draw an inference of discrimination were summarised by HHJ Shanks in ***Talbot v Costain Oil, Gas and Process Ltd and ors [2017] ICR D11*** and include the following:

a. It is essential that a Tribunal makes findings about any primary facts that are in issue so that it can take them into account;

b. The Tribunal can consider all the relevant surrounding circumstances, which may include conduct by the alleged discriminators before and after the unfavourable treatment in question;

c. The Tribunal's assessment of the parties and their witnesses when they give evidence can be an important factor;

d. When assessing the evidence of the alleged discriminator, it must assess not only the witness' credibility, but also reliability, which involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and

e. The Tribunal must consider the burden of proof in section 136 of the Equality Act. If the Tribunal considers that it would be proper to draw an inference of discrimination in the absence of any other explanation by the respondent, the burden lies on the

alleged discriminator to prove a non-discriminatory reason for the treatment of the employee.

284. Inferences can only be drawn from findings of fact based on the evidence before the Tribunal.

Discrimination arising from disability

285. Section 15 of the Equality Act 2010 states that:

"*(1) A person (A) discriminates against a disabled person (B) if –*

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

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

286. In a claim under section 15, no comparator is required, and the claimant is merely required to show that she has suffered unfavourable treatment and that the reason for that treatment was something arising because of her disability.

287. In ***Secretary of State for Justice and another v Dunn EAT 0234/16*** the then president of the EAT, Mrs Justice Simler, identified four elements that must be made out for a claimant to succeed in a complaint under section 15:

a. There must be unfavourable treatment;
b. There must be something that arises in consequence of the claimant's disability;
c. The unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability; and
d. The respondent must be unable to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

288. The EAT also held in that case that motive is irrelevant, and that the 'something arising from disability' need not be the sole reason, but it must be a significant or at least more than trivial reason.

289. The Equality and Human Rights Commission Code of Practice on Employment ("**the EHRC Code**") states that the consequences of a disability include 'anything which is the result, effect or outcome of a disabled person's disability (para 5.9).

290. In ***T-Systems Ltd v Lewis EAT 0042/15*** the EAT considered the words 'something arising in consequence of the disability' and commented that the 'something' must be part of the employer's reason

for the unfavourable treatment. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent.

291. The EAT held, in the case of ***Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305*** that there is a two step test for a claim under section 15 to succeed. The first is that the Tribunal must ask itself what is the consequence, result or outcome of the disability. The second is to consider why it was that the employer treated the claimant in the way that it did, and whether it was because of that 'something' arising from disability.

Reasonable adjustments

292. Section 20 of the Equality Act 2010 states as follows:-

"(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A*

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"

293. Section 21 of the Equality Act 2010 provides that:-

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

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"

294. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in ***Environment Agency v Rowan [2008] ICR 218*** and in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, both approved by the Court of Appeal in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734***.

295. Part 3 of Schedule 8 to the Equality Act 2010 ("Work: Reasonable Adjustments") provides, at paragraph 20 ("Lack of knowledge of disability, etc") that:

"(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…that an interested disabled person has a disability and is likely to be placed at the disadvantage…"

296. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

a. What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

b. How does that PCP/ physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

e. Is the claim brought within time?

297. Paragraph 6.28 of the EHRC Code sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

a. The extent to which it is likely that the adjustment will be effective;

b. The financial and other costs of making the adjustment;

c. The extent of any disruption caused;

d. The extent of the employer's financial resources;

e. The availability of financial or other assistance such as Access to Work; and

f. The type and size of the employer.

298. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law (***Romec Ltd v Rudham [2007] All ER(D***).)

299. It is almost always a good idea for the respondent to consult the claimant about what adjustments might be appropriate. A failure to consult the claimant makes it more likely that the employer might fail in its duty to make reasonable adjustments.

Unfair dismissal

300. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent

must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996 ("**the ERA**").

301. Section 98(1) provides that: "*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.*"

302. Under section 98(2)(a) of the ERA a reason for dismissal is potentially a fair reason if it "*relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*". Section 98(3)(a) defines capability as "*in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality*".

303. The burden of proving a potentially fair reason for dismissal lies with the respondent. If it discharges that burden the Tribunal must then go on to consider whether a dismissal is fair under section 98(4) of the ERA which states as follows:

"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) Depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) Shall be determined in accordance with equity and the substantial merits of the case.

304. The range of reasonable responses test applies in capability dismissals not just to the decision to dismiss but also to the procedure that the employer follows when reaching that decision (***Pinnington v City and Country of Swansea and anor EAT 0561/03***).

305. Where an employee has been off work on long term sickness absence, the Tribunal must consider whether the employer can be expected to wait any longer for the employee to return (***Spencer v Paragon Wallpapers Ltd [1977] ICR 301***). In ***S v Dundee City Council [2014] IRLR 131*** the Inner House of the Court of Session suggested that when deciding this question the Tribunal must balance relevant factors, including:

a. The likely length of the absence;
b. The nature of the illness causing the absence;
c. The size of the employer;

d. Whether other employees can cover for the absent employee; and
e. The cost of continuing to employ the employee.

306. In order for an employer to fairly dismiss an employee on long term sickness absence, the employer must also follow a fair procedure. In most cases this will involve obtaining medical evidence, consulting with the employee and considering alternatives to dismiss.

307. Consultation with an employee on long term sickness absence should be carried out with a view to finding out the medical position and prognosis. Warnings are often not appropriate in cases of long term absence (***Taylorplan Catering (Scotland) Ltd v McInally [1980] IRLR 53***). In **East Lindsey District Council v Daubney [1977] ICR 566** Mr Justice Phillips stated that "*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position."*

308. Consultation with the employee should ideally start at the beginning of the employee's sickness absence and continue periodically throughout that absence.

Submissions

Claimant

309. Mr Williams submitted on behalf of the claimant that since returning to work in 2017 many assumptions had been made about the claimant and she had been falsely diagnosed as being unwell or having symptoms that were not there. The assumptions included that she was a danger to herself and others, and that she could not work in emergency situations. The respondent had failed to properly understand the claimant's borderline personality disorder and the impact it was having on her ability to perform her role.

310. On the question of credibility, Mr Williams says that the claimant's recollection of events is clear, in contrast with that of the respondent's witnesses who have often said that their own recollections are vague. There is a notable lack of contemporaneous notes in the case overall.

Direct discrimination

311. Mr Williams submitted that it is important to look at the background going back to 2016. In this case the 'fountainhead' of the discriminatory course of conduct is the respondent's failure to get to grips with the claimant's disability early on. The claimant's hospitalisation put the respondent on notice that it should enquire into her health. Kim Beevers should therefore have been aware when she

found out about the claimant's attempted suicide that the claimant had serious mental health problems. Her evidence however was that she had no understanding that the claimant had any mental health condition at all. Her evidence as to the training she received may explain her lack of awareness.

312. Kim Beevers had failed to prepare properly for the welfare meeting on 8 March 2017 at the claimant's home. Her evidence to the Tribunal was that she was not a medical professional and did not understand medical conditions. There was a lack of understanding about the claimant's health from the outset and this led to assumptions being made and negative views being adopted.

313. In Mr Williams' submissions, there was sufficient information in the occupational health report dated 3 April 2017 to put the respondent on notice that they were dealing with a disabled employee. Kim Beevers failed to recognise this however by saying in evidence that she did not form a view on the claimant's health.

314. In relation to the role in the café, Mr Williams submits that the role was a permanent one and that if the claimant succeeded in the trial she would be put into the role on a permanent basis.

315. Mr Williams says that it is plain from the notes of the meeting on 11 July 2017 that Kim Beevers had taken the views of the claimant's colleagues into account in relation to the claimant's behaviour in the café, and had accepted the colleagues' version of events. Kim Beevers had decided that the claimant was at fault before even speaking to her.

316. The claimant's behaviour was inextricably linked to her underlying health concerns. This was another red flag missed by the respondent. Instead, the claimant was labelled as aggressive and as fixating on others. This is, Mr Williams says, an example of the respondent making assumptions about the claimant's behaviour and abilities without any medical evidence and without even speaking to the claimant or asking for her views. The claimant was not listened to.

317. Mr Williams invited the Tribunal to find that the claimant was kept out of the kitchen when working in the café as she alleges. It is for the respondent to establish that the reason for keeping the claimant out of the café was not related to perceptions about her disability. He asked the tribunal to draw an inference against the respondent and find that Allegation One is made out.

318. Mr Williams also says that by the time the claimant was sent home by Kim Beevers in July 2017 the respondent was well aware that the claimant was suffering from a personality disorder, and that Kim Beevers had expressed an inaccurate and uneducated view of the claimant's personality disorder.

319. There was, Mr Williams argues, a continuing failure by the respondent to ask the relevant questions and a continuing course of discriminatory conduct.

320. Mr Williams withdrew Allegation Eight, which related to the meeting on 20 December 2017, but submitted that the conduct in that meeting was worthy of comment. Following that meeting the claimant attended another meeting on 8 January 2018 and was referred to occupational health. Largely due to Kim Beevers' lack of understanding of the claimant's condition and any consequent need to consider reasonable adjustments, the occupational health referral states that it is not the respondent's responsibility to find the claimant a new role. Kim Beevers mind was, Mr Williams says, closed to the concept of adjustments.

321. In February 2018 when the claimant took up a new role as a Healthcare Assistant on Devonshire ward there was no handover by Kim Beevers to staff on that ward. The claimant's new manager, Claire Davies, recorded the claimant as being abrupt and there was no evidence that she knew about the way the claimant's health impacted on her employment.

322. The claimant was, Mr Williams submits, entirely competent in her role and yet in her evidence Matron Sue Shore focused entirely on the claimant's shortcomings. Matron Shore was an unimpressive witness. She said in evidence that the claimant had not said that she had a disability and this was another symptom of a poorly trained manager when it comes to disability awareness.

323. Despite being aware of the claimant's borderline personality disorder, Matron Shore failed to consider the claimant as a disabled employee. She was dismissive and unsupportive towards the claimant and made assumptions about her. For example she assumed that the claimant was depressed because she was taking antidepressant medication.

324. Helen Corfield's evidence was also, in Mr Williams submission, not convincing. Her equality, diversity and inclusion training was limited. Her recollection was vague, and she was unsupportive of the claimant. Her dismissive attitude towards the claimant was apparent from her evidence about the claimant posting on Facebook during her absence, and from the fact that she 'washed her hands' of the claimant as soon as the claimant went off sick in August 2019 and made no attempts to contact her during her absence.

325. The respondent's referral of the claimant to occupational health in September 2019 was inadequate. The respondent was, by now, 'going through the motions' and the claimant was not consulted about the occupational health referral. That inadequate referral led to an inadequate report and to the claimant's unfair and discriminatory dismissal.

Unfair dismissal

326. It is, in Mr Williams' submission, unarguable that the dismissal was fair for the following reasons:

a. Andrea Stanley decided to move to Stage 3 despite knowing nothing about the claimant's health;

b. She had very little medical evidence before her when she made the decision to dismiss – just Richard Thompson's report from September 2019;

c. That report was neither accurate nor up to date;

d. She had in her mind that the claimant's absences were related to her disability but did not ask for further medical evidence;

e. She knew that Richard Thompson's view was that a report could be obtained from another occupational health nurse but took no steps to obtain such a report;

f. She was aware of the duty to make reasonable adjustments and that Mr Thompson had not given an opinion on the question of redeployment.

327. It had been deemed necessary to get another occupational health report, but this approach was later abandoned and the report relied upon was old and was likely to be stale. It offered no view as to redeployment and expressly refused to answer that question.

328. In the Stage 3 meeting Andrea Staley dismissed the claimant's concerns about the treatment she had received on the grounds that they had been dealt with in a grievance. This failing carried through to the appeal. Andrea Staley blindly accepted what Matron Shore said to her.

329. Andrea Staley did not tell the claimant that what she was looking for was evidence that the claimant was taking medical advice and receiving support for her health, and a timeframe for the claimant to be able to return to work. She accepted that if the claimant had provided these things, she would not have dismissed at that stage.

330. Andrea Staley accepted in evidence that she had not considered any alternatives to dismissal. She provided no evidence that the claimant's absence was causing a specific problem on the ward, or of the cost of the claimant's absence.

Discrimination arising from disability

331. Mr Williams submitted that starting the absence management process and dismissing the claimant on 16 January 2020 were plainly unfavourable treatment given the ordinary meaning of those words. It was also clear, he says, that the treatment arose as a consequence of absences as a result of the claimant's disability. Andrea Staley had accepted that the claimant's disability was in her mind at the time of the Stage 3 meeting.

332. Mr Williams accepted that managing absence is a legitimate aim as the respondent has to deliver a service to its patients and, if there

are not enough staff in work, that could mean that the respondent is unable to deliver the standard of care required. The difficulty the respondent faces, in his view, is in establishing the proportionality of the action that it took. Andrea Staley had accepted she would not have dismissed had the claimant came forward with answers to the questions she now wishes she had asked, and there was no positive case put forward that the claimant's absences were causing an issue.

Reasonable adjustments

333. The claimant had, in Mr William's submission, been substantially disadvantaged when the handover was moved from the staffroom to the nurses station on the ward. The claimant had clearly raised the problems that she was having with the handovers, but the respondent gave absolutely no thought to making reasonable adjustments. The suggestion that the claimant should ask what she had missed when she would most likely not know what she had missed, was absurd, unsympathetic and unhelpful.

334. There was no good reason offered by the respondent's witnesses as to why the handover could not be moved as an exception. Blind reliance on policy is insufficient. The respondent has failed to establish that an adjustment would be unreasonable.

Time limits

335. On the question of time limits, Mr Williams submitted that there was a clear and continuing causal connection between the discriminatory acts from 2017 until the claimant's dismissal. The claimant's claims are therefore not out of time. In the alternative, it would be just and equitable to extend time given that the respondent had not been prejudiced in its ability to defend those claims.

336. The claimant's evidence was that she first became aware of the time limit for making a Tribunal claim in August 2019, when she was off sick. She contacted ACAS on 29 October 2019.

Respondent

Direct discrimination

337. Miss Nowell referred us to the judgment of Mummery LJ in the Court of Appeal in ***Stockton-on-Tees Borough Council v Allot [2010] ICR 1728*** that "*…the identity of the comparator for a direct discrimination must focus upon a person who does not have the particular disability, that disability must…be omitted from the circumstances of the comparator. In other respects the circumstances of the claimant and of the comparator must be the same or "not materially different". Although the comparator is not required to be a clone of the claimant, failure by the Employment Tribunal to attribute other relevant circumstances to the comparator may be an error of law…"*

338. In her submission, it is not sufficient for the claimant to show different treatment from the hypothetical comparator, rather she has to show that the treatment was less favourable, which is an objective test. She also referred us to the judgment of the House of Lords in ***Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065***

339. Miss Nowell submitted that the correct comparator for the direct discrimination allegations was an individual who did not suffer from a personality disorder.

340. She reminded us that the claimant's case at Tribunal, which she reiterated throughout is that her personality disorder did not affect her ability to carry out her role and did not require any adjustments.

341. The respondent had, in Miss Nowell's submissions, done everything it could to ascertain what reasonable adjustments were required and / or to put them in place. All reasonable steps were taken by Matron Shore, she says, to help the claimant return to work and fulfil her role.

342. Miss Nowell invited the Tribunal to accept that the claimant had made it clear that there were no adjustments or support that would enable her to return to the Devonshire ward, as evidenced by her continued refusal of the risk assessment.

343. In relation to the dismissal, Miss Nowell asks the Tribunal to find that by the Stage 3 meeting, which was 140 days into the period of sickness, the claimant had not started any treatment, could not contemplate a return to Devonshire ward at any time, and could not even think about returning to work anywhere in the respondent without having a panic attack.

344. The respondent had, Miss Nowell submitted, carried out a Stage 1 meeting, albeit that the incorrect paperwork was used. Stages 2 and 3 were, she says, not rushed given the stages and targets outlined in the respondent's policy.

345. There was, she argues, no evidence that the fact the claimant was suffering from BPD impacted on the way she was treated. It was the absences themselves which led to each stage being triggered.

346. In relation to the claim under section 15 of the EQA, Miss Nowell conceded that the reason the respondent started the absence management process and dismissed the claimant was her absence from work. The respondent does not, however, concede that that absence was something arising from the claimant's disability.

347. Miss Nowell accepted that all of the respondent's witnesses had said in evidence that they had not asked the claimant what reasonable adjustments she required in light of her personality disorder, but at every step of the capability procedure the claimant was asked what support she required. This was, Miss Nowell says, the same thing as asking what reasonable adjustments were required. Occupational health was also asked the question.

348. Miss Nowell submits that, when considering the capability process as a whole, and in particular the evidence available to Andrea Staley, there was no reasonable prospect of the claimant returning to work in the foreseeable future either with or without adjustments. Dismissal was, therefore, a proportionate means of achieving a legitimate aim.

349. She invited us to find that the capability procedure and the management of long term absence is a proportionate means of achieving a legitimate aim.

350. In relation to the reasonable adjustments claim, Miss Nowell referred us to the judgment of the EAT in ***Mr JP Burke v The College of Law (1) and Solicitors Regulation Authority [2011] UKEAT 0301/12*** in which the EAT held that a holistic approach to reasonable adjustments should be taken, so that the reasonableness of any adjustment should be considered in light of all other adjustments made by the employer.

351. It would not, in Miss Nowell's submission, be reasonable to move the shift handover back to a side room, given the operational reasons for the move.

352. Turning finally to the question of unfair dismissal, Miss Nowell invited the Tribunal to accept that the dismissal was by reason of capability and that it was both procedurally and substantially fair, relying in support of this contention on the points previously made in relation to the discrimination complaints.

353. On time limits, Miss Nowell referred us to the Court of Appeal decision in ***Aziz v FDA [2010] EWCA Civ 304*** and the decisions of the EAT in ***Greco v General Physics UK Ltd EAT 0114/16*** and ***South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19*** as authorities for the proposition that the test for 'continuing act' is:

a. To consider which, if any, of the allegedly discriminatory acts have been proven; and

b. To ask, of those that are proven, are they each individual matters or a continuing course of affairs, taking into account the timing of each event, the nature of the complaints and the personalities involved.

354. The discrimination allegations are, in Miss Nowell's submissions, isolated events over the course of 3 years involving different job roles and different individuals. There was, therefore, no continuing act and it would not be just and equitable to extend time.

Conclusions

355. We have reached the following conclusions having considered carefully the evidence before us, the legal principles summarised

above, and the oral and written submissions of the parties. Our conclusions were reached unanimously.

Direct disability discrimination (section 13 of the Equality Act 2010)

356. What was striking to us about this case, having listened carefully to the evidence of the respondent's witnesses, was that none of them appeared to show any understanding of the claimant's disabilities, in particular of her BPD, or any willingness to find out more about them.

357. It did not appear to occur to any of them that the behaviours that the claimant was demonstrating at times in the workplace may be symptomatic of her BPD. None of them appeared to show any empathy for the claimant, and at no point during the course of her employment did any of her managers ask the claimant if she needed any adjustments.

358. Rather, the responsibility for considering the claimant's health was passed to occupational health. Whilst, on the face of it, involving occupational health is a good management practice, that is not the case where, as happened here, managers then abdicated all responsibility.

359. Whilst all of the respondent's witnesses told us that they had received some training in diversity issues, none of them was able to recall with any confidence the content of that training.

360. As the claimant moved between departments, there was no meaningful handover between the departments.

Allegation One

361. We find that the respondent did try to keep the claimant out of the kitchen whilst she was working in the café. That was normal practice. The kitchen was small and there was not much room. She did not tell the staff that she wanted to go into the kitchen to calm down or suggest that her wish to go into the kitchen was linked to her disability. There was no evidence before us that the staff who prevented the claimant from entering the kitchen had any knowledge of her BPD.

362. The claimant's role was to serve in the café, and she had no reason to go into the kitchen when performing her duties. We accept the respondent's evidence as to the reasons why the claimant was not allowed to go into the kitchen, and we find that other front of house café staff would also have been kept out of the kitchen.

363. We find that the claimant was not prevented from going into the kitchen because of disability, but rather because that was normal practice for front of house café staff. We accept Miss Nowell's submission that the correct comparator would be someone without BPD who did not have a food safety certificate enabling her to work in

the kitchen and find that this hypothetical comparator would have been treated in the same way as the claimant.

364. Allegation One therefore fails and is dismissed.

Allegation Two

365. We find that regular meetings were put in place for the claimant during the period from May 2017 to February 2018 when the claimant moved to Devonshire ward. These meetings were intended to be a supportive measure for the claimant.

366. We accept Miss Nowell's submission that a hypothetical comparator for this allegation would be someone without BPD but who was on a phased return to work in a new role.

367. We have considered whether, looking at them objectively, these regular meetings can be said to amount to a detriment, which is a pre-requisite of a finding of less favourable treatment. We find that they were not. Rather, they were the actions that we would expect a supportive employer to take and were put in place to try and help the claimant.

368. We also find that a hypothetical comparator without BPD and who was on a phased return to work in a new role would have been treated in the same way. There was no evidence to suggest that they had been put in place because of the claimant's BDP.

369. Allegation Two therefore fails and is dismissed because the meetings were not a detriment and were not put in place because of disability.

Allegation Three

370. We find that the respondent did not prevent the claimant from returning to work between July and October 2017. Rather, it asked her to go home in July for good reason, because Mrs Beevers believed that the role in the café was causing the claimant's mental health to deteriorate. Both the claimant and the CPN Steve Sloan who was supporting the claimant agreed that this was a good idea. By asking the claimant to go home the respondent was acting out of concern for the claimant's health.

371. In light of its concerns about the claimant's health, the respondent was, in our view, justified in asking the claimant to go home in July 2017 and arranging a referral to occupational health. Occupational health assessed her in July 2017 as unfit for work. It was also, in our view, reasonable to ask the claimant to remain at home on full pay until she was fit to return to work.

372. On 17 August 2017 the claimant was reviewed by occupational health. The doctor who reviewed her said that the claimant was fit to return to work, was improving in her mood, and that her GP had said she would greatly benefit from returning to work.

373. Whilst we did have some concerns about the delay in allowing the claimant to return to work after 17 August when occupational health assessed her as fit to return to work, the claimant has not discharged the burden of proving that someone without her disability would have been treated differently. There was a delay of 6 or 7 weeks after the claimant was assessed as fit to return to work before she did return, but there was no evidence before us to suggest that the reason for the delay was disability rather than some other reason such as pressures of work for those involved in getting the claimant back to work.

374. We therefore find that the reason for this delay was not because of disability. Allegation Three therefore fails and is dismissed.

Allegation Four

375. In light of our finding of fact that Holly Fogden did not tell the claimant on 11 July 2017 that she wished the claimant had never been given the job in the café, this allegation fails and is dismissed.

Allegation Five

376. In light of our finding of fact that Holly Fogden did not tell the claimant on 11 July 2017 that she needed to face up to her anxieties and 'deal with it', this allegation fails and is dismissed.

Allegation Six

377. We find that it was not made clear to the claimant when she began working in the café that the role was a temporary one. She therefore thought that she could work permanently in the café if she passed the trial period successfully. She enjoyed her role in the café and wanted to remain working there. Removing the role from her was therefore a detriment.

378. We also find that the role in the café was withdrawn from the claimant. The reason it was withdrawn was because the respondent was concerned about the claimant's behaviour in the café and believed that working in the café was at least partially the reason for her having suicidal thoughts.

379. The claimant's behaviour in the café and her suicidal thoughts were, in our view, manifestations of her disability of BPD. One of the symptoms of the claimant's mental health condition was emotional instability and difficulty controlling her emotions, which had an impact on her behaviour at work.

380. Whilst we accept that the respondent was acting, at least in part, to try and protect the claimant, motivation is irrelevant in direct discrimination cases. The correct test to apply is one of causation rather than motivation.

381. We do not accept the respondent's submissions that the correct hypothetical comparator would be an individual without BPD who had a

recent past history of attempted suicide and who had come into conflict with colleagues. A hypothetical comparator without BPD may not have had suicidal thoughts or conflict – that behaviour was symptomatic of and an integral part of the claimant's disability.

382. We therefore find that the job in the café was withdrawn because of the claimant's disability.

383. However, the job was withdrawn in October 2017, more than two years before the claimant began Early Conciliation. This allegation is therefore out of time.

384. We have considered whether it formed part of a continuing act of discrimination, and we find that it did not. It was an isolated decision by Kim Beevers and Jayne Bradbury who were not involved in the later acts of discrimination. There was no evidence before us to suggest that they had any involvement whatsoever with the claimant or those managing her after she took up the role of HCA on Devonshire ward.

385. We have also considered whether it would be just and equitable to extend time to allow the claimant to pursue this complaint. We find that it would not. The claimant had the benefit of advice from her trade union and has not persuaded us that time should be extended in respect of this allegation. Time limits in Employment Tribunals exist for an important reason of public policy, and extensions of time should be the exception rather than the rule.

Allegation Seven

386. We find that the respondent did not respond to two incidents in the shop in December 2017 by failing to investigate them properly and instead concluding that they were the claimant's fault because she had been aggressive.

387. There was no evidence before us to suggest that the respondent concluded that the claimant was at fault in relation to either of the incidents. On the contrary, the claimant was told by Mrs Beevers that she had acted appropriately in relation to one of the incidents, and no criticism was made of the claimant in relation to the other incident.

388. The claimant made no formal complaint about either of the incidents. She applied for a position working on the switchboard because it was a role she was interested in (having worked on switchboard previously) and could potentially be a permanent position. job because of a potential for a future permanent vacancy. She was not moved away from the shop because of the incidents.

389. There was therefore no detriment to the claimant in relation to either incident. This allegation therefore fails and is dismissed.

Allegation Eight

390. This allegation was withdrawn.

Allegation Nine

391. We find that the claimant was given an extension of time to complete her care certificate. This was done to help her and resulted in her obtaining her care certificate. If the respondent had not given the claimant an extension of time that could have resulted in her no longer being able to work as an HCA. No reasonable worker would, in our view, have perceived an extension of time in these circumstances as being to their detriment.

392. In addition, there was no evidence before us to suggest that delays in providing the necessary support and assistance that the claimant needed to complete her care certificate was because of disability – rather it was because of time pressures on other people.

393. We therefore find that giving the claimant an extension of time to complete her care certificate was not a detriment or less favourable treatment, and that it was not because of disability. This allegation therefore fails and is dismissed.

Allegation Ten

394. We find that the claimant was given restricted authorisation to work on other wards. The reason for this was Matron Shore's concerns about the claimant's ability to work on different wards where she may not have the same support and could face unexpected situations. Matron Shore wanted to be confident that the claimant was capable of working unsupported on any ward before signing the NHSP form. She had concerns about some aspects of the claimant's performance and believed that the claimant struggled to deal with challenging situations.

395. We accept Matron Shore's evidence that she had done the same with others whose abilities she was not confident of. The claimant was therefore not the only person who Matron Shore had declined to sign off as fit to work with NHSP.

396. We have considered whether Matron Shore's views of the claimant's abilities were influenced by the claimant's disability, as Matron Shore became aware of the claimant's BPD approximately one month after moving to the ward. On balance we find that they were not. Whilst Matron Shore was not sympathetic to the claimant, the claimant herself was adamant that her BPD did not affect her ability to work as an HCA.

397. We find that Matron Shore would have treated other HCAs whose capabilities she had concerns about in the same way that she treated the claimant.

398. This allegation therefore fails and is dismissed.

Allegation Eleven

399. We find that Matron Shore was unsympathetic towards the claimant and dismissive of her hearing loss. When the claimant told her that she was struggling to hear what was being said at the shift handover, Matron Shore made suggestions which were inappropriate and would not remove the disadvantage caused to the claimant.

400. It was clear to us that Matron Shore was not willing to and did not consider making adjustments to the way in which the handover was carried out. Rather she took the blanket approach that, because the respondent had decided to make the change to handovers, no changes could be considered. There was no evidence before us that the respondent had considered the potential impact of the change on disabled employees, or of any flexibility.

401. It was not appropriate to suggest that the claimant stand next to the person who was speaking at the handover, as several people could speak during the handover and the claimant may not know who would be speaking. The suggestion that the claimant ask what she had missed was inappropriate as neither the claimant nor the person that she was asking would know what the claimant had missed.

402. We therefore find that Matron Shore dismissed the concerns that the claimant raised and that this was less favourable treatment because of the claimant's disability. We do not accept the respondent's suggestion that a non-disabled HCA would have been treated the same. There was no evidence before us to suggest that anyone else had asked for changes to the new handover arrangements, or that a non-disabled HCA would have needed to ask for an adjustment. The respondent was, in our view, not sympathetic to the claimant's hearing loss, as demonstrated by the fact that no one ever asked her if any adjustments were required to accommodate it, even when the claimant worked on the switchboard on a temporary basis.

403. This allegation therefore succeeds.

Allegation Twelve

404. This allegation was withdrawn.

Allegations Thirteen and Fourteen

405. These allegations are essentially the same as they relate to Matron Shore's response to a situation that occurred on the ward in January 2019 when the claimant approached Matron Shore for help. We therefore deal with them together.

406. We accept that the claimant genuinely believes that Matron Shore reacted unsupportively to her complaint about feeling belittled and intimated by certain colleagues following the incident on 23 January 2019 involving the patient.

407. Nonetheless, on the evidence before us we find that Matron Shore did not react in an unsupportive way. Matron Shore was not in

charge of the ward that day, as she was site matron, and another nurse was in charge of Devonshire ward.

408. Matron Shore suggested that the claimant speak to Nurse Barnett or Nurse Smith, and when the claimant said she was not comfortable speaking to either of them, Matron Shore offered to speak to them on the claimant's behalf. The claimant declined.

409. Matron Shore's response to the claimant raising her concerns that day was, in our view, supportive of the claimant, although the claimant did not perceive it as such. Perception alone however is not sufficient to make out an allegation of direct discrimination.

410. We find that Matron Shore would have reacted in the same way to any other HCA who had approached her for help that day – there was no evidence before us to suggest anything to the contrary.

411. Allegations thirteen and fourteen therefore fail and are dismissed.

Allegation Fifteen

412. We find that in early 2019, whilst the claimant was off work sick with stress and anxiety, Matron Shore did ask that the claimant undergo a stress risk assessment. This was in line with the respondent's policy, which specifically refers to a stress risk assessment as a tool for managers to use and was entirely appropriate. Given the reason for the claimant's absence at the time, and that the absence had been triggered by an incident at work, it was in our view, a supportive step for Matron Shore to take.

413. We accept the respondent's submission that a hypothetical comparator who was off with stress and anxiety would also have been asked to complete a stress risk assessment. There was no evidence before us to suggest that the reason the claimant was asked to complete a stress risk assessment was because the claimant has BPD, and the claimant's evidence that her absence was not linked to her disability. The claimant has not discharged the burden of proving that the reason for her treatment was disability.

414. This allegation therefore fails and is dismissed.

Allegation Sixteen

415. Matron Shore accepted in her evidence that she had concerns about the claimant's ability to work in unplanned, emergency or unpredictable situations, and that she had shared these concerns with the claimant. This was based upon her observations of the claimant in the workplace, and the fact that the claimant had a long period of sickness absence following an incident at work and was, in our view, justified.

416. Matron Shore did not, however, determine that the claimant was not fit to work on a ward or in an emergency situation at all. We therefore find that, on the facts, this allegation is not made out.

417. We also find that Matron Shore would have expressed similar concerns about a hypothetical comparator without BPD who experienced similar difficulties to the claimant on the ward. There was no evidence before us to suggest that Matron Shore's concerns about the claimant were because of the claimant's BPD.

418. This allegation therefore fails and is dismissed.

Allegation Seventeen

419. This allegation was withdrawn.

Allegation Eighteen

420. The respondent did not deal with the claimant's grievance in a timely manner. The grievance was raised on 30 April 2019, the grievance meeting took place a month later, but not all of the issues raised by the claimant were discussed during that meeting. The grievance outcome was not sent to the claimant until October 2019.

421. There was no valid reason for the delay and Jane Walker did not deal with all of the issues raised by the claimant in the grievance. When reaching her conclusions, which were that none of the grievance should be upheld, she accepted without challenge what Matron Shore told her. She showed no sympathy or empathy for the claimant, nor any understanding of the claimant's position.

422. Ms Walker formed a view that the claimant was difficult as a result, in part, of the fact that the claimant had walked out of the occupational health meeting with Richard Thompson. She made assumptions about the claimant based on her behaviour on that day. This is not a valid reason for not upholding the grievance. The claimant's behaviour on the day of the Richard Thompson assessment was, in our view, a manifestation of her disability.

423. We draw an inference, based upon Ms Walker's lack of sympathy for the claimant and lack of understanding of her condition, that the reason she deal with the claimant's grievance in the way that she did was, at least in part, because of disability. A hypothetical comparator, who did not have the symptoms that the claimant had, which included an emotional reaction to the way in which Mr Thompson questioned her during the meeting, would not in our view have been treated in the same way as the claimant.

424. This allegation therefore succeeds.

Allegation Nineteen

425. We accept that Sister Corfield did not know about the claimant's BPD at the time of the claimant's appraisal on 8 August 2019, and that she only found out about it during the course of these proceedings.

426. We prefer Sister Corfield's version of events as to what happened during the appraisal. Sister Corfield did not, in our view, fail to support or assist the claimant during her appraisal. There was a discussion about issues in the claimant's relationships with some of her colleagues, and Sister Corfield gave the claimant advice about delegation and escalation. This was, in our view, entirely appropriate.

427. The claimant signed the appraisal document, indicating that she agreed with its contents, and did not raise any concerns about the appraisal until some time later.

428. In light of the above, we find that the claimant was not treated less favourably in relation to the appraisal. We also find that the way in which the claimant was treated during the appraisal was not because of her disability, as Sister Corfield did not know about the claimant's disability at the time of the appraisal.

429. This allegation therefore fails and is dismissed.

Allegation Twenty

430. We understand that the claimant found Sister Corfield to be unsupportive and unsympathetic when she told her that she was letting the ward down on 13 August 2019.

431. At the time she spoke to the claimant on 13 August 2019 however, Sister Corfield did not know that the claimant had BPD, and her comments were born out of frustration and anger at the fact that the claimant had not contacted the respondent to let the respondent know that she would not be at work, having posted on Facebook the day before her unexplained absence.

432. The comment that Sister Corfield made to the claimant was, in our view, harsh, but was a result of frustration rather than disability.

433. This allegation therefore fails and is dismissed.

Allegation Twenty-One

434. We find on the facts that the respondent did refer the claimant to occupational health in September 2019. The respondent did not discuss the referral with the claimant, as she was off sick at the time, but did write to the claimant to tell her that the referral was being made.

435. The claimant did not object to the referral once she became aware of it and attended the meeting with occupational health. In these circumstances, we find that the referral to occupational health was not a detriment. We also find that an employee without BPD who was off sick for the same length of time as the claimant would also have been referred to occupational health.

436. The claimant has therefore not discharged the burden of proof in establishing that the reason she was referred to occupational health was because of disability. This allegation therefore fails and is dismissed.

Allegation Twenty-Two

437. We find that the meeting that Matron Shore held with the claimant on 1 April 2019 was not held in accordance with Stage 1 of the respondent's Health and Attendance Management Policy.

438. The respondent did not describe the meeting to the claimant as being a Stage 1 review and did not use the correct paperwork. The claimant was not given proper notice of the meeting, was not offered the opportunity to bring someone with her to the meeting, and, after the meeting, the respondent did not warn her of the consequences of not improving her attendance.

439. The form that Matron Shore used at the meeting was headed informal attendance review, and it was only after the meting had taken place that the respondent described it as a Stage 1 meeting.

440. At the time of the meeting on 1 April 2019 Matron Shore had known about the claimant's borderline personality disorder and had formed a negative view of the claimant, at least in part because of her BPD.

441. This was, in our view, a further example of the poor way in which the claimant was managed by the respondent. Matron Shore did not take care to ensure that she was following the correct procedure and, importantly, did not tell the claimant what would happen if her attendance at work did not improve.

442. Matron Shore demonstrated no sympathy or empathy for the claimant, nor any understanding of her condition. She took no steps to try and understand it, or to ask the claimant about the impact it had and whether any adjustments would be helpful. Matron Shore also demonstrated a lack of understanding of disability issues generally and had not had any meaningful training in equality and diversity issues.

443. We therefore draw an inference that the reason Matron Shore failed to hole a Stage 1 meeting with the claimant or produce the relevant documentation was because of disability, and find that a hypothetical comparator without BPD would not have been treated in this way.

444. This allegation therefore succeeds.

Allegation Twenty Three

445. The respondent met with the claimant under Stage 2 of the Health and Attendance Management Process in July 2019. The outcome of that meeting was that the claimant was warned that if she

had more than 1 occasion of sickness absence or an aggregate of 7 calendar days absence then her case may be escalated to Stage 3 of the procedure.

446. A further meeting was held under Stage 2 of the procedure in November 2019. The outcome of the meeting in November 2019 was that the respondent moved immediately to Stage 3 of the attendance management procedure.

447. The respondent's policy itself suggests that at the end of Stage 2 of the procedure, a target should be set for improvement in attendance, and an employee should be given six months to meet that target. A target was set following the July meeting, but no targets were set following the November meeting. The meeting in November was described, by the respondent, as a Stage 2 review meeting.

448. In this case there was no review period allowed for the claimant following the Stage 2 meeting in November 2019, and no explanation was provided as to why one had not been provided. If the respondent had intended the six month review period to run from July 2019, then why did it carry out a second Stage 2 meeting in November 2019?

449. Those managing the claimant's sickness absence showed no empathy or sympathy for the claimant and failed to consider the question of reasonable adjustments. There was, on the evidence before us, no indication that those managing the claimant's sickness absence understood her disability or the impact that it had on her. Rather, it seemed that they viewed the claimant as a difficult individual.

450. The claimant's behaviour in the workplace was, in our view, a symptom of her disability. Whilst the claimant's position was that her BPD did not affect her ability to do her role, and we accept this, we find that it did at times affect her relationship with others and her ability to deal with challenging situations.

451. The respondent's decision to move so quickly from Stage 2 to Stage 3 was in our view because of the claimant's BPD and the behaviour that she demonstrated in the workplace as a result of her BPD. The respondent failed to follow its own policy by moving to Stage 3 so quickly. We draw an inference from this, and from the lack of empathy shown to the claimant, that the reason for this was disability.

452. A non-disabled employee would not, in our view, have been moved from Stage 1 to Stage 2 to Stage 3 of the procedure so quickly. This allegation therefore succeeds.

Allegation Twenty Four

453. On the evidence before us we find that the respondent did not conclude that the claimant was not safe to work on a ward or in emergency situations, or that she was a risk to herself. The respondent had concerns about the claimant's ability to work on the ward but did not conclude that she was not safe to do so.

454. This allegation therefore fails and is dismissed.

Allegation Twenty Five

455. During the course of the claimant's employment the respondent took a number of steps to redeploy her. She was moved to roles in the café, the shop, the switchboard and finally to a role as HCA on Devonshire Ward. The respondent should be given credit for the steps that it did take to try and redeploy the claimant.

456. The respondent failed, however, to consider redeployment at the crucial point of Stage 3 of the Health and Attendance Management Process, namely when it was considering dismissing the claimant. . It was also notable that when the claimant moved between roles, there was no meaningful handover between the managers to whom the claimant reported.

457. We accept the respondent's submission that the appropriate comparator in relation to this allegation was an employee on long term sickness absence who remained unfit for any work for the foreseeable future, and for whom occupational health had not recommended redeployment.

458. The failure to consider redeployment at Stage 3 of the procedure was, in our view, because of something arising from the claimant's disability, namely her sickness absence and the lack of evidence as to when she may be fit to return to work. That is something arising from the claimant's disability rather than the disability itself.

459. This allegation therefore fails and is dismissed.

Discrimination arising from disability (section 15 of the Equality Act)

460. The claimant makes two allegations of unfavourable treatment:

a. Commencing the absence management process; and

b. Dismissing her on 16 January 2020?

461. We find that both of these amount to unfavourable treatment. The respondent did not deny taking either of those steps or attempt to argue that they did not amount to unfavourable treatment. Both were unwanted by the claimant and had adverse consequences for her. Ultimately, they resulted in the loss of her employment and the loss of her income. We therefore have no hesitation in finding that the respondent did subject the claimant to the unfavourable treatment alleged.

462. The respondent accepts that the reason it commenced the absence management process and the reason for the claimant's dismissal was her absence from work but denies that the absence arose in consequence of the claimant's disability.

463. The claimant did not seek to argue that her absence from work arose in consequence of her hearing loss but says that her absence arose in consequence of her BPD.

464. We find that, whilst not all of the claimant's absence from work arose in consequence of her disability, for example the absence due to neck and back pain, her absence from August 2019 onwards, which was the absence which triggered the November Stage 2 and the January Stage 3 hearings and the claimant's dismissal, did arise in consequence of her borderline personality disorder.

465. The absence management process was triggered by the high level of absence that the claimant had. Even though not all of that absence was disability related, a significant proportion of it was. The claimant was dismissed because of her poor absence record, and because she could not, at the time of dismissal, give a firm date for a return to work.

466. We therefore find that the commencement of the absence management process and the claimant's dismissal amount to unfavourable treatment because of something arising from disability, namely the claimant's high level of sickness absence.

467. Angela Staley accepted in her evidence that the claimant's last period of absence was disability related, and that she knew at the time of the dismissal that the claimant was disabled by reason of both physical and mental impairments. Matron Shore, who started the absence management process, was also aware of the claimant's BPD.

468. We have therefore gone on to consider whether the commencement of the absence management process and the dismissal were proportionate means of achieving a legitimate aim. The respondent says that its aim was the effective management of the respondent's business and care for its patients, staff and visitors.

469. We have no hesitation in finding that caring for patients, staff and visitors is a legitimate aim, particularly given the nature of the respondent's organisation. We also find that the effective management of the respondent's business is a legitimate aim – indeed the respondent would be open to criticism if it did not seek to run its operations effectively, particularly given its reliance on public funds.

470. The key question, therefore, is how should the needs of the claimant and the respondent be balanced?

471. The respondent is a large employer with a dedicated HR function and resources. It had the resources to consider alternatives to dismissal but failed to do so. It moved quickly to dismiss the claimant, without considering reasonable adjustments or the needs of the claimant.

472. Angela Staley told us in her evidence that if she'd had more information from the claimant about when she was likely to access

treatment and be able to return to work, then she would not have dismissed. Yet she took no steps to obtain that information. The respondent had the ability to obtain that information (for example by asking questions of the claimant's GP or obtaining an up to date occupational health report) or to ask the claimant for it. It failed to do so.

473. This therefore leads us to the conclusion that something less discriminatory could have been done – namely asking the claimant for the additional information that Angela Staley needed not to dismiss, asking her GP for that information or getting an up to date occupational health report. At the time of the dismissal the respondent had no recent medical evidence before it as to the claimant's fitness to return to a different role. No options except dismissal were considered by Angela Staley. The respondent could also have given the claimant more time to provide this additional information, particularly given the severity of the consequences of dismissal.

474. There was no evidence before us to suggest that starting the absence management process was the only option available to the respondent. The respondent failed to properly consider the impact of the claimant's BPD upon her, and at no point during the course of her employment did it ever ask the claimant whether there were any adjustments that could be made to support her in the workplace.

475. There were, in our view, steps that could have been taken as alternatives to starting the absence management process, such as obtaining occupational health advice on the prospect of the claimant returning to work, or properly engaging with the claimant on the question of reasonable adjustments.

476. The respondent has therefore not made out the justification defence in relation to the section 15 claim.

477. We therefore find that the respondent discriminated against the claimant contrary to section 15 of the Equality Act 2010 by commencing the absence management process and by dismissing her.

Reasonable adjustments

478. The claimant relied upon two PCPs in her reasonable adjustments claim. The first, that the respondent required the daily shift handover to take place at the nurses' station on the ward, is admitted by the respondent. In light of this admission, we find that the respondent did have a PCP of requiring the daily shift handover to take place at the nurses' station.

479. The second PCP alleged by the claimant is that the respondent kept all sensitive medical and personal information in the personnel file in Matron's office which is accessible to all managers and HR. The respondent admits this PCP also, with the caveat that the personnel file was kept at all times in a locked filing cabinet which was accessible to HR and those with line management responsibility for the claimant only.

480. We find that the first PCP did place the claimant at a disadvantage compared to someone without the claimant's disability of deafness and tinnitus, in that she was unable to hear everything that was said and therefore did not know what information had been passed on during the handover. The respondent submitted that this disadvantage was not substantial because the claimant chose not to wear her hearing aids during the handover.

481. We do not accept the respondent's submission on this point and prefer the claimant's evidence that she wore hearing aids during handovers. We also find that not being able to hear the handover did place the claimant at a substantial disadvantage because she did not know what information was conveyed during the handover, which had an adverse impact on her ability to carry out her duties. This impact was particularly marked, given the criticisms that Matron Shore and others were making of the claimant's ability to perform certain aspects of her role.

482. In relation to the second PCP, Mr Williams accepted in his evidence that it was unlikely that the claimant's personal information was accessed in the way the claimant feared.

483. We find that the claimant's personnel file was kept, with other personnel files, in a locked file in matron's office. It was accessed on a 'need to know' basis. This in itself did not place the claimant at a disadvantage. Those who accessed the claimant's personnel file were aware of the importance of keeping medical information confidential. There was no evidence before us of the claimant suffering any disadvantage as a result of the second PCP.

484. In relation to the first PCP the claimant suggests that, to avoid the disadvantage she suffered, the respondent could have moved the handover to a quieter area or turned off the air-conditioning.

485. Moving the briefing to a quieter area would have been a reasonable adjustment, on the days that the claimant was working. It would have removed the disadvantage faced by the claimant and had worked well previously. There was no financial cost to the respondent of making this adjustment, which would have been simple to implement. By failing to move the briefing the respondent has, in our view, failed to make a reasonable adjustment.

486. There was no evidence before us as to the practicability or otherwise of turning off the air conditioning, or of whether doing so would have removed the disadvantage faced by the claimant. This element of the claim for reasonable adjustments therefore fails.

487. In summary, therefore we find that the respondent failed to comply with its duty to make reasonable adjustments by not moving the handover briefing to a quieter area on days when the claimant was working. The other complaints of failure to make reasonable adjustments fail and are dismissed.

Time limits

488. Given the date the first claim form was presented and the dates of early conciliation, any complaint about something that happened on or before 29 July 2019 may not have been brought in time.

489. We have found that discrimination occurred on the following dates:

a. 3 October 2017 – withdrawal of job in café (allegation six);

b. Late 2018 / early 2019 – handover moved to nurses' station (allegation 11 and failure to make reasonable adjustments);

c. Stage '1' – April 2019 (allegation 22 and the start of the absence management process);

d. Grievance – conduct over a period ending with the outcome letter in October 2019 (allegation 18);

e. Stage 2 and stage 3 – July 2019 onwards (allegation 23); and

f. The dismissal in January 2020.

490. With the exception of the withdrawal of the job in the café, which was a distinct decision made by different managers, there was in our view a clear and continuing causal link between the acts of discrimination. The acts all involve Matron Shore to some degree.

491. The café incident involved different personalities. It was significantly out of time and was an isolated incident. It did not, in our view, form part of a continuing act of discrimination.

492. We have considered whether it would be just and equitable to extend time in relation to the café incident. For the reasons set out in paragraph 385 above we find that it would not be just and equitable to extend time in relation to this incident.

Unfair dismissal

493. The burden of proving the reason for dismissal and that it was a potentially fair reason for dismissal lies with the respondent. The respondent has, in our view, discharged this burden. We accept the respondent's submission, which is supported by the evidence before us, that the reason the claimant was dismissed was capability, namely her long term and high level of sickness absence.

494. We are satisfied that the respondent has discharged this burden. It is clear both from the evidence of Andrea Staley and from the letter of dismissal that the reason the claimant was dismissed was because the respondent believed that she could no longer perform her duties due to her health.

495. The claimant was therefore dismissed by reason of capability, which is a potentially fair reason for dismissal.

496. We have then gone on to consider whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

497. We were concerned that there was no rigorous examination of the question as to whether the claimant was no longer capable of performing her duties by the dismissing officer. There was no medical evidence that specifically dealt with that question, and the occupational health report before the dismissing manager was more than three months sold.

498. Andrea Staley appeared to accept without challenge what she was told by Matron Shore. Mrs Staley told the claimant at the end of the Stage 3 meeting that she wanted more time to consider and review the file before making her decision, but she did not do so.

499. In her evidence to the Tribunal Andrea Staley said that if the claimant had been receiving treatment or had a date for a potential return to work, then she would not have dismissed her. She accepted however that she did not tell the claimant that. As a result, the claimant did not know what she had to do to avoid dismissal, namely either start treatment or get a date for the start of treatment, or give an indication as to when she may be able to come back to work. The claimant did not, therefore, have the opportunity to address Mrs Staley on a critical issues.

500. Mrs Staley was candid in her evidence to the Tribunal and accepted that she gave no consideration to alternatives to dismissal or to redeployment. She did not even appear to consider whether the claimant might be able to come back to work elsewhere within the hospital, despite the fact that the claimant was saying clearly that she wanted to do so.

501. Mrs Staley did not have up to date medical advice before her. Despite HR having initially advised that an up to date medical report should be obtained, she chose to proceed without one.

502. The latest occupational health report was that from the assessment by Richard Thompson that had clearly caused the claimant a great deal of distress. That report gave no advice on the possibility of redeployment.

503. Whilst we accept that, at the time of her dismissal, the claimant had been off work continuously for five months and that she had a high level of sickness absence in 2019, she was clearly very keen to remain employed and to return to work when she was medically able to do so. The respondent did not take any medical advice as to when the claimant may be able to return to work.

504. A significant feature of this case was the friendliness between the different managers who were involved in managing the claimant

after she moved to Devonshire ward, in dealing with her grievance, her dismissal and her appeal. They appeared to trust each other's decisions and opinions without challenge.

505. None of the respondent's witnesses appeared to show any empathy for the claimant or a proper understanding of her condition. There was no real attempt made at any point during her employment to ask her what the impact of her BPD was upon her ability to perform at work, and to work with others.

506. The respondent's witnesses did not even try to understand her personality disorder. The common refrain was 'I'm not a medical expert'. That felt to us like an excuse and an abdication of responsibility, which is particularly concerning given that all of the respondent's witnesses worked for the NHS.

507. It is, in our view, not necessary for a manager to be a medical expert to ask the right questions of occupational health or to discuss reasonable adjustments, and indeed most managers are not medical experts. There was no discussion at all with the claimant about reasonable adjustments. It is the employer's responsibility to consider adjustments, the onus is not on the claimant to suggest adjustments them.

508. We therefore find that the respondent did not adequately consult the claimant before taking the decision to dismiss. We also find that the respondent did not carry out a reasonable investigation or obtain an up to date medical report. The report that they relied upon was more than three months old, which was a breach of their own policy and contrary to the initial advice from their own HR department.

509. The report that the respondent relied upon was not only out of date but did not answer the relevant questions, such as when the claimant may be able to return to work, or whether she could return to a different role.

510. There was a total failure on the part of Andrea Staley to consider alternatives to dismissal or the cost of continuing to employ the claimant.

511. We find that the respondent could reasonably have been expected to wait longer before dismissing the claimant. At the time of the dismissal the claimant had only been off for 5 months. The respondent could have waited to find out when she was due to start treatment. They could have asked a medical professional, such as occupational health or the claimant's GP, when it was likely that the claimant would be likely to return to work. The claimant had always returned to work in the past and was keen to do so.

512. Both the dismissing manager and the appeal hearer were not convincing witnesses and did not properly consider alternatives to dismissal or critically evaluate the information before them. They accepted without challenge what their colleagues told them.

513. Dismissal was, in our view, outside of the range of reasonable responses and the claimant's dismissal was both procedurally and substantively unfair.

514. The appeal did not cure the defects in the dismissal process. The panel did not properly consider or respond to the issues raised by the claimant in her appeal and asked no questions of the claimant. The appeal panel refused to consider the claimant's allegations of discrimination, for the misguided reason that they believed that they had been considered by the grievance and that the claimant did not appeal the grievance outcome. This was despite the fact that the claimant alleged that her dismissal itself was discriminatory.

515. The reasoning provided by the panel in the appeal outcome letter is embarrassingly brief and does not address properly the grounds of appeal.

516. We therefore find that the claimant was unfairly dismissed.

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Employment Judge Ayre
15 September 2022