



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs L Hancock

**Respondent:** Warrington and Halton Hospital NHS Foundation Trust

**HELD AT:** Liverpool

**ON:** 20-22, 24, 27-28  
November 2017  
22 December 2017  
(in Chambers)

**BEFORE:** Employment Judge T Vincent Ryan  
Mr M Gelling  
Miss J M Stewart

## REPRESENTATION:

**Claimant:** Mr K Ali, Counsel

**Respondent:** Mrs B Worthington, Solicitor

# JUDGMENT

1. The unanimous judgment of the Tribunal is that the claimant's following claims were withdrawn by the claimant and dismissed, namely all claims of victimisation and direct discrimination in relation to the protected characteristic of disability, and her claims of harassment and discrimination arising from disability in relation to an allegation that she was misinformed and misled about the basis on which she was entitled to appeal the outcome of a "Dignity at Work" procedure.

2. The claimant's following claims are well-founded and succeed (by reference to the agreed document entitled "List of Claims and Issues – Schedule of Complaints" C2) as follows:

- (1) The respondent discriminated against the claimant indirectly (s.19 Equality Act 2010 ("EA")) in relation to the protected characteristic of disability in relation to complaint number 1.
- (2) The respondent discriminated against the claimant by harassment in relation to the claimant's protected characteristic of disability contrary to section 26 EA in respect of the complaints numbered 3, 4, 5, 7, 9, 10, 11, 12, 13 and 18.

- (3) The respondent discriminated against the claimant because of something arising in consequence of her disability in respect of complaints numbered 10, 11, 12, 13, 14 and 18.

3. The claimant was constructively and unfairly dismissed by the respondent when she resigned with effect from 31 August 2016, the claimant terminating the contract under which she was employed with notice in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct.

4. All other of the claimant's claims that the respondent failed to make reasonable adjustments, discriminated against her because of something arising in consequence of her disability, harassment and indirect discrimination, fail and are dismissed. This judgment is summarised at paragraph 5 below in tabular form for ease of reference.

## **REASONS**

### **1. Introduction**

1.1 The claimant has made many claims covering a protracted period that are set out in a document entitled "List of Claims and Issues". This document, having set out issues over pages 1-3, then has attached to it a "Schedule of Complaints" at pages 4-6. This document is an agreed document and is referred to as C2. Throughout the judgment there will be reference to C2 and/or Schedule of Complaints and the numbering employed therein which cites 19 discrete incidents or situations giving rise to 52 individual claims. The claim of constructive unfair dismissal relies, at least in part, on the cumulative effect on the relationship of trust and confidence of several of those discrete incidents. The incidents are numbered chronologically in the sequence of events in the Schedule of Complaints and are numbered 1-20, but the claims in relation to the allegation at number 19 has been withdrawn and has been dismissed. We have considered each incident or situation sequentially following the numbering in the Schedule of Complaints in making our findings; we then considered also the circumstances as a whole to consider whether a pattern, or the like, was evident from an overview that might lead to us drawing inferences or which would otherwise give us cause to alter our initial findings in respect of individual claims. This exercise, including the analytical reconsideration, was consistently carried out in respect of each claim whether or not stated below, and our judgment was reached unanimously.

1.2 Because of the multiplicity of claims we agreed to make findings both as to fact and the application of the law to those facts following the sequence of claims in the Schedule of Complaints at C2. These reasons for the above judgment will therefore set out in order the issues, the law, and then findings of fact and application of the law to those facts in respect of each claim. This exercise necessarily results in a long and at times seemingly repetitive judgment but in fairness to the parties we felt that it was the clearest way of explaining our findings in respect of this

multiplicity of claims. The claimant shall be referred to as “C” (with due apology to Mrs Hancock for the impersonal address) and the respondent shall be referred to as “R”. Otherwise abbreviation will be used sparingly but Warrington Hospital will be referred to as “WH”, Halton General Hospital as “HGH”. C was employed as an accredited Accuracy Checking Pharmacy Technician which will be referred to when necessary as an “ACPT”. R was in the course of introducing an IT system for patient records at the time in question and it is referred to in this judgment by its name “Lorenzo”

- 1.3 C is a qualified pharmacist and in her role as ACPT is the final check on prescribed medication before it is issued to patients. She is one of several ACPTs employed by R and deployed at WH and HGH. C has been diagnosed with fibromyalgia and degenerative disc disease. In consequence, she suffers pain and discomfort. Her concentration and sleep patterns are adversely affected. She is on medication which again has side effects such as, on occasions, drowsiness. R accepts that C is a disabled person and was so throughout the relevant period of the history recorded below. It is accepted that in view of required adjustments put in place to remove substantial disadvantages facing the claimant at work owing to her disabilities, prior to the events described below, her five-day working week was reduced to a three-day working week (albeit her pay was not reduced) and her duties and responsibilities were limited to working within the pharmacy and not having to work on wards at either WH or HGH. She was provided with some auxiliary aids such as suitable seating at least at WH, although it was not easily transportable. On occasions, the claimant worked in other hospital premises within the Trust’s estate. Whilst the claimant was initially accommodated she gained the impression that the respondent wanted her to leave her employment over a period because of the requirement for further adjustments, perceived difficulty in accommodating some of her needs at a time of stressful working conditions generally and with the introduction of new IT systems. C’s genuinely held belief is that R displayed a negative view towards her because of “restrictions” placed on her work because of her disability, that R’s attitude hardened over time and that ultimately R was no longer prepared to deal with C’s grievances. In those circumstances, she resigned and her claims are set against this background. The issues in the claim reflect C’s view of the relationship as I have just described it.

## 2. The Issues

- 2.1 The parties agreed a joint List of Issues as stated above, comprising the first three pages of document C2. Save that R abandoned its argument that C failed to present her claim to the Tribunal in time in relation to the date of the early conciliation certificate, which was set out at paragraph 5 under the heading “Time Limits”, the document was adopted in full setting out as it does the generic issues in respect of each of C’s claims as follows:

### 2.1.1 Constructive Unfair Dismissal –

- 2.1.1.1 Was C unfairly dismissed (section 95 Employment Rights Act 1996 (“ERA”)) and/or subject to a discriminatory constructive unfair dismissal contrary to section 39(2) Equality Act 2010 (EA)?
- 2.1.1.2 In particular, was there a fundamental breach of contract (if the breach is of the implied term of trust and confidence, then the employee must show that the employer acted in a way calculated or likely to destroy or seriously damage the employment relationship)?
- 2.1.1.3 Did C resign in response to the same (it is only necessary for the employer’s repudiatory breach to play a part in the employee’s decision to resign – it is not necessary for the repudiatory breach to be the main or only reason for the resignation)?
- 2.1.1.4 Did C affirm or waive the fundamental breach (the employee must resign reasonably promptly to avoid the accusation that he or she waived the alleged breach)?
- 2.1.1.5 Fourthly and finally it remains open for the employer to persuade the Tribunal that notwithstanding any serious breach of contract the effect of dismissal was still fair.
- 2.1.2 Discrimination arising from disability –
  - 2.1.2.1 Did R treat C unfavourably?
  - 2.1.2.2 If so, was this because of something arising in consequence of C’s disability?
  - 2.1.2.3 Was the unfavourable treatment a proportionate means of achieving a legitimate aim?
- 2.1.3 Indirect disability discrimination –
  - 2.1.3.1 What was the provision, criterion or practice (“PCP”) applied by R?
  - 2.1.3.2 Did this PCP put, or would it put, persons with C’s disabilities at a particular disadvantage when compared with persons who are not disabled?
  - 2.1.3.3 Did it put, or would it put, C at that disadvantage?
  - 2.1.3.4 Can R show the PCP to be a proportionate means of achieving a legitimate aim?

- 2.1.4 Failure to make reasonable adjustments –
  - 2.1.4.1 In relation to each event complained of, what provision, criterion or practice (“PCP”) does C state was in operation?
  - 2.1.4.2 Did any PCP of R put C at a substantial disadvantage in comparison with persons who are not disabled, to the extent that R ought reasonably to have known that reasonable adjustments were required?
  - 2.1.4.3 In the event that reasonable adjustments were required, did R fail to make or refuse to make those reasonable adjustments?
  - 2.1.4.4 If R did refuse and/or failed to make reasonable adjustments, was that refusal or failure by R reasonable in the circumstances?
- 2.1.5 Harassment –
  - 2.1.5.1 In relation to each event complained of, did R’s treatment of C amount to unwanted conduct?
  - 2.1.5.2 Was the unwanted conduct (if any) related to C’s protected characteristic of disability?
  - 2.1.5.3 Did the conduct complained of have the purpose or effect of violating C’s dignity or creating an intimidating, hostile, degrading or offensive environment for C?
- 2.1.6 A failure to follow the ACAS Code –
  - 2.1.6.1 Did R fail unreasonably to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?
  - 2.1.6.2 If so, should C receive a 25% uplift on compensation awarded?
- 2.1.7 Time Limits –
  - 2.1.7.1 Do the events complained of by C constitute a continuing act of discrimination by R?
  - 2.1.7.2 If so, what is the date of the last act and is that in time?
  - 2.1.7.3 In the event that the complaints do not constitute a single ongoing act of discrimination, which other claims advanced by C are in time?

- 2.1.7.4 For those events that are not in time, is it just and equitable in the circumstances for the Tribunal to extend time in respect of those events?

### 3. The Law

- 3.1 Constructive unfair dismissal – an employee has the right not to be unfairly dismissed by their employer (section 94 ERA). The circumstances in which an employee is dismissed include where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (section 95 ERA). Conduct by an employer that amounts to a fundamental breach of contract, a breach that seriously damages or destroys the contractual relationship, is conduct that would entitle an employee to terminate the relationship and claim that they were dismissed. Breach of the implied term of trust and confidence amounts to a fundamental breach of contract and would justify such a claim. To succeed with that claim an employee must show that there was a fundamental breach of contract, that their resignation was because of the breach or at least that the fundamental breach was part of the decision to resign, and the employee must resign in response to the breach before waiving the effect of the employer's conduct and by so doing affirming the contractual relationship notwithstanding the alleged conduct. Delaying too long in this context is not a matter of chronology but of effective waiver of breach.
- 3.2 Discrimination arising from disability – The EA protects people with protected characteristics from discrimination and disability is one such characteristic. Section 39 EA provides that an employer must not discriminate against a person, in the terms of employment by dismissal or subjecting the person to any other detriment. Section 15 EA provides that an employer discriminates against a disabled employee if it treats that employee unfavourably because of something arising in consequence of their disability in a situation where the employer cannot show that the treatment was a proportionate means of achieving a legitimate aim. This section does not apply if the employer did not know and could not reasonably have been expected to know of the disability. To succeed in such a claim the Tribunal will have to determine what was the relevant "something" that arose in consequence of C's disability, whether R treated C unfavourably and whether such unfavourable treatment was because of the said "something". The Tribunal will then have to also consider any justification advanced by R.
- 3.3 Indirect disability discrimination – Section 19 EA provides that a person discriminates against another by applying a PCP which is discriminatory in relation to a relevant protected characteristic of that person. For the purpose of section 19 EA, a PCP is discriminatory in relation to a relevant protected characteristic of the employee in question if the employer would apply it to persons who do not share the characteristic, but it puts people with that characteristic at a disadvantage compared with others where the employee in question is put at that disadvantage

and the employer cannot show it to be a proportionate means of achieving a legitimate aim.

- 3.4 Failure to make reasonable adjustments – Section 39(5) EA imposes a duty to make reasonable adjustments on employers. Section 20 EA describes that duty. Where there is a PCP that puts an employee at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled then the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Section 20 also makes a similar requirement in respect of physical features and the provision of auxiliary aids. The Tribunal in this case must determine in respect of each of the claimant's allegations what was the PCP; whether such PCP placed the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; and whether or not R took such steps as it was reasonable to have to take to avoid that disadvantage for C.
- 3.5 Harassment – Section 26 EA defines harassment in our context as being where one engages in unwanted conduct related to a relevant protected characteristic, where the conduct has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. The Tribunal must therefore consider whether the conduct in question was unwanted and whether it related to a relevant protected characteristic, which in this case would be disability. The Tribunal must also consider not only whether the effect of the conduct was to violate C's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for C, but alternatively whether that was R's purpose. An employee can succeed with a claim on either limb, that is purpose or effect. In deciding whether conduct has the effect referred to above the Tribunal must take into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct found to have occurred to have the harassing effect. In this judgment violation of C's dignity and/or the creation of an intimidating, hostile, degrading, humiliating or offensive environment will be referred to as the "harassing effect". "Conduct related to a relevant protected characteristic" is not just conduct that is unwanted by the claimant who is, in the general context, a disabled person; it must be conduct that is itself related to C's being a disabled person.
- 3.6 The ACAS Code – ACAS has produced a statutory Code of Practice entitled "ACAS Code of Practice: 1. Code of Practice on Disciplinary and Grievance Procedures (2015)". Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) provides for an adjustment of awards for a party's failure to follow that Code. The section applies to C's claims in this case. Section 207A TULCRA provides that if it appears to the Tribunal that the claim to which the proceedings relate concern a matter to which that Code applies and a party fails to comply with the Code, in circumstances where such failure was unreasonable, then any award may be adjusted one way or the

other to the extent of 25%, insofar as the Tribunal considers it just and equitable in all the circumstances to do so.

- 3.7 Time limits – Claims of unfair dismissal and unlawful discrimination ought to be presented to the Tribunal within three months of the events to which they relate or, where there is a series of events, to the last in a series. In respect of an unfair dismissal claim, a claimant must present the claim within time unless it was not reasonably practicable to do so, in which case on that finding a Tribunal may extend time provided that the actual presentation was within a reasonable time after the prescribed time. In respect of discrimination claims, if a claimant does not present the claim within three months the Tribunal has a discretion to extend time insofar as it is just and equitable to do so. If a claim is out of time and neither of the said provisions for extension of time applies, then the Tribunal does not have jurisdiction to entertain the claim or claims.

#### 4. Findings of Fact and Application of Law to those Facts

##### 4.1 General

- 4.1.1 C was employed as an ACPT (Band 5) by R from 15 December 1997 until 31 August 2016. On 23 June 2016 C tendered her resignation (page 447 of the trial bundle to which all page references refer unless otherwise stated). C was one of 19 ACPTs employed by R. ACPTs are the final accuracy checkers for dispensed items. The work of an ACPT generally involves pharmacy work and work on hospital wards. C's principal place of work was WH. After the commencement of her employment and before the events described below there was a merger of hospitals and hospital Trusts such that WH and HGH (along with other satellite hospitals) came under the auspices of R such that it is accepted C could be instructed to work at WH, HGH or one of the satellites such as Hollins Park Hospital.
- 4.1.2 Initially C was engaged in work within the pharmacy and on hospital wards. Prior to June 2015, however, C was deemed unable to work on ward duties because of difficulties with mobility and by agreement those duties were removed from her. Ward duties amounted to 60% of an ACPT's role in general. C became purely dispensary based. She was engaged in final accuracy checking of medicines dispensed against prescriptions. This involved working with patients' own medicines unless that was done at ward level by her colleagues, providing information to outpatients about their medicines at a dispensary hatch and C was also trained in the release of unlicensed medicines. C therefore worked either in the dispensary/pharmacy or otherwise in an office environment such as when she was attending patients at the hatch. Ward work included undertaking medicine reconciliation, checking re-written prescription charts, preparatory and final accuracy checking of medicines for discharge as well as providing medicines on an



urgent basis and providing medication information to patients on wards. It was understood that the ward work was efficient in ensuring speedier discharge of patients and gave ACPTs regular experiential patient contact.

- 4.1.3 Around the time of the events described below R was preparing itself and staff for the introduction of an IT system named Lorenzo. The Lorenzo system is an electronic patient record and was due to be introduced by R in November 2015. It amounted to a significant and substantial change in working practices for all concerned. There was some uncertainty as to the effects of the introduction of Lorenzo on job security generally. R considered that Lorenzo would have a greater effect on work within the dispensary at WH than at HGH. There was a genuine concern on the part of R's management that the introduction of Lorenzo would adversely impact upon C's job as it would be of such assistance to ACPTs on the ward that they would find that ward-work assumed greater significance.

#### Findings in respect of the Schedule of Complaints C2

- 4.2 Complaint No. 1 – Working on a three-month rota between Warrington and Halton Hospital (failure to make reasonable adjustments/indirect discrimination/constructive unfair dismissal).

##### 4.2.1 The Facts –

4.2.1.1 At the material time ACPTs were based at WH and there was no permanent pharmacy staff at HGH. There was more dispensing and less ward work at HGH than at WH as it was a smaller hospital. R recognised that it could accommodate C at HGH or alternatively on rotation. There was some reluctance among the ACPTs to having to go to HGH and several tried to have their attendance at HGH excused for a variety of reasons. At least part of the reluctance experienced was that at the time in question, and for a period of some three years, there was a major road work and bridge building development at Runcorn that caused serious disruption to traffic. Transport was difficult, slow and disrupted for three years. R did however provide a shuttle bus service between the two sites. In all the circumstances R devised a rota for the 19 ACPTs based at WH to be deployed at HGH. The intention was that there would be a three-monthly rotation of each of the 19 ACPTs.

4.2.1.2 In June 2015, the claimant fulfilled her rota obligation at HGH and this was the only time that she was called upon to do so and that she did so. R provided hospital transport between sites but the shuttle bus that would

enable C to arrive from WH at HGH in time for her shift arrived far earlier than she needed to be there and the return bus was long after the end of her shift. C had to leave home early to avail of the shuttle bus at WH and would eventually arrive at HGH with plenty of time to spare before the commencement of her shift and before the pharmacy opened allowing her access to her work. She would wait outside in the corridor. C could drive from her home, which was nearer to WH, to HGH. The journey by car would suffer the same diversions, delays, traffic congestion as the shuttle bus but would not permit C any room to mobilise and she would suffer stiffness and pain because of her disabilities. C had no issue with the principle of working at HGH or the work she was required to do there. C had a major concern over the requirement for her to travel to HGH because neither the bus nor car proved convenient or more importantly suitable because of the onset of symptoms related to her disabilities if she availed of either source of transport, albeit a bus gave her some more flexibility than if she was required to drive or be a passenger in a driven car. The claimant would suffer pain and discomfort travelling by either means and found the commute very tiring.

- 4.2.1.3 On 30 June 2014 Dr T Hussain, Occupational Health Consultant, reported by a letter that appears at page 250A that C would be fit to return to work after a period of absence at the end of July 2014 and suggested a phased return, commenting that C was better suited to work based in one place without involving significant physical or manual handling elements. Dr Hussain reported that C made her aware that she found working at HGH more demanding than at WH, but whilst she was happy to cover at HGH she did not feel she could do so over a protracted period because of the more demanding nature of the work. Dr Hussain's conclusion was that C was fit to work at either site provided the demands of the role were in keeping with the recommendations within that report and earlier ones in R's possession.
- 4.2.1.4 On 11 August 2015 Dr H Hui, Occupational Health Consultant, reported to R (pages 273-274) that transport was an issue for the claimant. Dr Hui informed R that C was likely to struggle to continue with three monthly rotations if the travel issues described in that report continued, and she set out the timings of the bus, the shifts and the general transportation difficulties which caused C increased

fatigue, exhaustion and stress. These symptoms were encountered by C to the extent that she had to take time off work for tiredness. Dr Hui's conclusion on assessment was that it was mainly the travel issue that was impacting on C's health and her ability to manage her rotation at HGH. C's disabling conditions did not impact upon her ability to carry out the duties required of her at either hospital site with the current adjustments in place.

4.2.1.5 C found travelling to and from shifts at HGH to have a detrimental effect upon her in that it exacerbated the symptoms of her disabling conditions, notably causing pain, discomfort and fatigue. She made this known to her line management. C made this known to Occupational Health. Occupational Health made this known to C's line management.

4.2.1.6 R considered representations received from and on behalf of C regarding the HGH rotation. It was prepared to allow C to rotate on a six monthly rather than three monthly basis if being in a settled environment was better for her, and that she would only have to undertake the rota duties during summer months, both of which matters C asked R to consider. R did not suspend the operation of the rota insofar as C was concerned. No dates were set for the continuing allocation of ACPTs to the rota, but throughout the chronology set out below it was the expectation that C would fulfil her duties as and when her time next came up, whether that be for three or six months, but it would be during summer months. Throughout the chronology until C's resignation R made it clear that being on the rota, working between WH and HGH was non-negotiable. Having to travel to HGH from her home or WH, in all the circumstances, especially those pertaining at the time regarding extraordinary traffic congestion, diversions and the like (as opposed just to the physical distance between sites) caused C pain, discomfort and fatigue. This was so howsoever she travelled, but particularly when driving. The issue of the PCP and its effects on C, her symptoms were exacerbated by the PCP, was unresolved as at the date of C's resignation and was hanging over C. She was asked to and agreed to investigate public transport but did not do so.

4.2.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaints at number 1 in her Schedule of Complaints (C2) are as follows:

#### 4.2.2.1 Reasonable Adjustments –

4.2.2.1.1 The PCP: R engaged the PCP of a three-month rotation of ACPTs who were generally engaged at WH to be redeployed at HGH. ACPTs redeployed on that rotation to HGH would be required to work their usual shift pattern at that site. R subsequently indicated that it could allow a six-month rotation and that C might only work at HGH in the summer but these modified PCPs were not formally adopted or implemented.

4.2.2.1.2 Substantial disadvantage: The PCP exacerbated C's symptoms of pain, discomfort, stress and fatigue. The exacerbation was to the extent that C had time off work through ill-health. The exacerbated symptoms impacted on C's personal life and professional engagement. These are all substantial disadvantages.

4.2.2.1.3 Reasonable adjustment: C's difficulties described above became known to her, OH and R only during C's first deployment on rota at HGH. Public transport would have the advantage of C being able to avoid driving and the discomfort it produced whilst at the same time perhaps allowing her to arrive at work at a convenient time and not too early for her shift, or having to wait at the hospital at the end of her shift for transport back to WH. R remained flexible in respect of the future rota operation as to its duration and seasonal timing and transport or the provision of hospital transport. Whilst the rota remained in place there was no known calendar commitment for C to ever have to work at HGH again. Her time would come and R was prepared to consider the situation at that time in light of C's further investigations regarding public transport and the like. It follows that from the time that situation was known and appreciated by C, OH and R's management, C was not subjected to the PCP. For the remainder of her employment she worked only at WH. She was not, therefore, subjected to any substantial disadvantage of

the PCP. As this PCP was ineffective in practical terms (in that she was subjected to a rota but never had to take up her rota place), R was not under a duty to make any adjustment to remove what was only a notional disadvantage.

4.2.2.1.4 For the above reason, this claim fails and is dismissed.

#### 4.2.2.2 Indirect Discrimination –

4.2.2.2.1 PCP: The Tribunal found as above. The PCP applied to persons with whom C did not share the protected characteristic of disability.

4.2.2.2.2 Disadvantage: The PCP would put persons with whom C shared the characteristic of disability at a particular disadvantage when compared with persons with whom she did not share it insofar as the travel requirement exacerbated symptoms of the disabling impairments, and the PCP would have put C at that disadvantage. In fact, by R's insistence C remained on the rota throughout the remainder of her employment. This was a matter that was never finally resolved by R, and failing formal suspension of the rota or C's exclusion from it or suitable reasonable adjustments C remained the subject of an applicable PCP.

4.2.2.2.3 Justification: R's legitimate aim was to ensure the provision of ACPTs to both hospitals, and it was a legitimate aim in that it had to provide a professional service to its patients. There were 19 ACPTs and the rota was to take effect therefore, it being on a three-monthly basis, over a considerable period. It was not proportionate to maintain C on that rota when R could have at the very least suspended its operation in respect of her pending resolution of transportation difficulties or even the finalisation of the road works that were at the root of the problem with transport between the sites. Informing C that the PCP was dis-applied would have been a proportionate means of achieving the legitimate aim in that there would still have been 18 ACPTs able to complete the rota for a substantial period and probably beyond when C would suffer any adverse impact from it.

4.2.2.2.4 This claim is well-founded and succeeds. Although this sounds a contradictory finding to that in respect of the reasonable adjustments claim our finding is that R did indirectly discriminate against C by its insistence that she remain on the rota. The reasonable adjustments claim requires “a substantial disadvantage” yet none was suffered by C requiring an adjustment at the material time. That said R did apply the PCP to C in that she remained on the rota; R was intransigent about the need for C to rotate between WH and HGH. This was a continuing and stressful concern to C. That was a disadvantage; her stress and distress was related to a concern that as and when she worked at HGH her physical symptoms would be exacerbated. The disadvantage was therefore related to her disability.

#### 4.2.2.3 Constructive Unfair Dismissal –

4.2.2.3.1 The requirement that C attend at HGH on the rota in June 2015 was not conduct likely to seriously damage or destroy the relationship of trust and confidence and was not in breach of any express term of C’s contract which had been varied upon merger of hospital Trusts to include as a principal place of business both WH and HGH.

4.2.2.3.2 C did not accept that she ought to be on the rota. She did not immediately resign following her attempt to fulfil the rota in June 2015. She was not required to work it again in practice, although it remained an inevitability. What she considered to be R’s intransigence in not excluding her from the rota or suspending her had a cumulative adverse effect on the relationship of trust and confidence between C and R and it was a matter that C wanted to have resolved. In not resolving it, and in its dealings with C, R added to her feelings that R had a negative attitude towards her. Whilst not a fundamental breach of contract in itself R’s handling of the issue of the rota contributed to the breakdown in the relationship of trust and confidence and this allegation forms part of the claim that the cumulative effect of R’s conduct was to seriously damage or destroy the

relationship amounting to a fundamental breach of contract in due course.

4.3 Complaint No. 2 – A failure to follow the Occupational Health advice of 11 August 2015 (constructive unfair dismissal).

4.3.1 The Facts –

4.3.1.1 Dr Hui, Occupational Health Consultant, wrote to R on 11 August 2015 at pages 273-274 following an attendance upon C on 11 August 2015. She assessed C. Dr Hui explained in some detail, by reference to the times of the shuttle bus referred to above and the effect on C of the travel requirements, the effect on C of increased fatigue, exhaustion and stress necessitating time off work. She concluded that the travel issue impacted on C's health and her ability to manage the rotation at HGH.

4.3.1.2 R did not suspend the operation of the rota nor exclude the claimant from its effect, albeit no specific date was set for her next turn at HGH. R left matters to languish pending the next rotation but at all times made it known to C that the rota was still operational and there would in due course be a requirement for her to fulfil its requirements.

4.3.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 2 in her Schedule of Complaints (C2) are as follows:

4.3.2.1 R's conduct in maintaining C's place on the rota undermined the relationship of trust and confidence. As in fact C was not required to fulfil a rota place after June 2015 and specifically after Dr Hui's report of 11 August 2015, the maintenance of the rota did not amount to a fundamental breach of contract. C was not required to work contrary to the adverse findings made known to R by Dr Hui. R's failure to formally and efficiently enact or reflect Dr Hui's conclusions set out in that report amount to failure to follow advice, and as such was another "brick in the wall" of C's claim of constructive unfair dismissal. This added to C's perception of R's negative approach to her and a willingness to allow matters to fester so that C may take it upon herself in due course to resign or would otherwise in some situation leave R's employment.

4.3.2.2 Our findings here are that the failure to follow Occupational Health advice adds to the cumulative effect of R's conduct towards C throughout the period in question.

4.4 Complaint No. 3 – Inviting Occupational Health to advise on ill health retirement when this had never been discussed with C and was not what she wanted (harassment, discrimination arising from disability, constructive unfair dismissal).

4.4.1 The Facts –

4.4.1.1 R referred C to Dr Hui by using a Workplace health and Wellbeing Department Management Referral Form which is a standard document. R's referral of C is dated 22 July 2015 and appears at pages 261-262. In that referral form R asked Occupational Health to indicate whether C would be able to do future rotations to HGH having taken her off the rota in respect of Hollins Park Hospital because her specialised chair was too large for the department at Hollins Park Hospital. C's line manager ticked several boxes to indicate other advice required from Occupational Health, including fitness for current role, advice following frequent short-term sickness absence, any adjustments that should be made including redeployment, and "to assess possible eligibility for ill health retirement". R's line manager did not tick the boxes relating to prolonged sickness absence or whether or not C would meet the criteria for protection under EA or for a date when C was likely to return to duties, because none of these boxes were of any relevance in all the circumstances. This indicates that C's line manager exercised some discretion and consciously ticked boxes in respect of matters that she wanted to have considered. She required as much information as possible in respect of relevant matters where there was a gap in her knowledge and she wished to appraise C of the situation in this wider sense based on Occupational Health advice. R was prepared to facilitate C's departure from work by such retirement because of her disabilities which were restricting her performance of the full roll of an ACPT; it would have made management of the ACPTs and introduction of Lorenzo easier. C had not suggested that she wished R to consider the possibility of her eligibility for ill health retirement. R had not indicated to C that it was seeking that advice. The fact that R sought the advice was a surprise and a matter of considerable concern to C, who was greatly upset by it. In those



circumstances C felt that this was evidence of R wishing to terminate her employment one way or another and in circumstances where C does not consider even with hindsight that the question was an appropriate one to ask Occupational Health at that stage.

4.4.1.2 In her report Dr Hui concluded that there was no evidence to suggest that C was unable to work in any role or a role with adjustment, and therefore ill health retirement was not appropriate at this stage. In fact, Dr Hui commended C for her determination to continue working full-time given her condition. Dr Hui reported to R that C felt “quite upset and stressed at the thought of having to give up work”. The Tribunal finds that is an accurate description of the effect upon C of the subject of ill health retirement being broached with her.

#### 4.4.2 Findings –

The Tribunal’s unanimous findings applying the applicable law to the facts found in respect of each of C’s complaint at number 3 in her Schedule of Complaints (C2) are as follows:

##### 4.4.2.1 Harassment –

4.4.2.1.1 Conduct: The unwanted conduct of which C complains was her line manager’s request of Dr Hui for Occupational Health advice on C’s eligibility for ill health retirement.

4.4.2.1.2 Purpose/effect: The purpose of the enquiry was for R to have and to provide to C comprehensive analysis of the current situation and to explore all possibilities available to both parties so that they could make informed choices. It was not R’s purpose to create a harassing effect. In fact, however, R’s unwanted conduct in requesting that advice on the referral form had a harassing effect. C felt that R wanted her to give up work and she did not want to give up her work; she felt no need to do so as she was able to work. In all the circumstances, and as indicated by Dr Hui, the request was premature. C felt intimidated and humiliated. C was degraded in that she felt that her position was being undermined and R wanted to create a situation where the relationship could be ended, and this in turn created an offensive environment.

4.4.2.1.3 Factors in deciding effect: The Tribunal took into account C's perception which was plausibly and persuasively described by her and corroborated by Dr Hui at page 274. Taking that into account and all the circumstances of the case, particularly as its evolution became clearer over time, C's suspicions were entirely reasonable and it was reasonable for the unwanted conduct to have the harassing effect described by C.

4.4.2.1.4 The conduct related to C's disability because it was her physical impairment that caused R to ask the question of OH and it was that same disability that made R conclude that C may be a suitable candidate for retirement. R would have been content to allow C to so retire because of what it saw as restrictions placed upon its deployment of C owing to her disability.

4.4.2.1.5 This claim is well-founded and succeeds.

#### 4.4.2.2 Discrimination arising from disability –

4.4.2.2.1 "Something arising": What arose from C's disability was her difficulty in fulfilling rota obligations because of the travel requirements. She suffered pain and discomfort and was fatigued.

4.4.2.2.2 Unfavourable treatment: R's treatment of the claimant was to obtain information so it could consider it and that also C would be better informed. It was a premature enquiry and whilst the Tribunal accepts that C felt a harassing effect, the treatment in itself was not unfavourable insofar as it related only to the obtaining and dissemination of information that was factually correct, or at least resulted in an analytical conclusion by an Occupational Health physician. Obtaining professional advice is not unfavourable treatment. C was better informed in consequence of the question raised by R, albeit she was upset that the question was raised. R did not obtain the information because of C's pain and discomfort but because C was undergoing OH assessment and R wanted comprehensive advice.

4.4.2.2.3 In the absence of unfavourable treatment because of the “something” described above, albeit with C perceiving a harassing effect, this claim fails and is dismissed.

4.4.2.3 Constructive unfair dismissal –

4.4.2.3.1 To avoid repetition this example is considered by the Tribunal to be yet another “brick in the wall”, which is a cliché we will re-use as a convenient shorthand throughout the remainder of the judgment. Mixing metaphors briefly, the request for this information again chipped away at the relationship, undermining it. Rather than repeating the findings in respect of the constructive unfair dismissal allegations in complaints numbered 1 and 2, the Tribunal merely refers to those findings and again describes this conduct by R as another brick in the constructive unfair dismissal wall.

4.5 Complaint No. 4 – “Focussing on what C could not allegedly do rather than what she could do at the meeting on 10 November 2015” (this meeting is minuted at pages 276-279).

4.5.1 The Facts –

4.5.1.1 R’s principal pharmacy technician Joanne Nevinson (“JN”) (who was the line manager who referred C to OH above) met with C and Jo-Ann Murphy (of R’s HR department) on 10 November 2015. The invitation to that meeting is at page 275 and the meeting was called to discuss Dr Hui’s Occupational Health report of 11 August 2016 (pages 273-274).

4.5.1.2 R and C discussed C’s transport difficulties and possible solutions.

4.5.1.3 R wanted C to make further enquiries of her own regarding alternative transport arrangements and to report back in due course on her findings, but R did not undertake to make any investigations of its own or to consider what action it could take by way of reasonable adjustment or otherwise to assist.

4.5.1.4 R took the opportunity to remind the claimant that she was only doing a relatively small percentage of the duties of an ACPT in her adjusted role working in the pharmacy. It also took the opportunity to explain more to C about the introduction of Lorenzo and the possible effects that it would have upon her position

as electronic recording impacted on the activities of ACPTs.

- 4.5.1.5 In the above context R took the opportunity to emphasise to C that ACPTs would need to do more ward work in future and there would be less of a requirement for them to do pharmacy based work. R therefore raised the possibility with C of her being redeployed.
- 4.5.1.6 In response C made it clear that she was able to do her duties as had been agreed, and on the basis agreed with R, that she very much wished to carry them on and that she had no personal difficulties with staff at HGH or with the duties at HGH; her problem was over transport and if that could be resolved then she was happy to continue.
- 4.5.1.7 Significantly JN had emailed Jo-Ann Murphy prior to the meeting on 10 November saying that she was able to accommodate adjustments which she referred to as “restrictions” already in place for C “as long as [C] is able to be an accuracy checker, for her whole time, in either the pharmacy department at Warrington Hospital or at Halton Hospital”. She reminded Jo-Ann Murphy that ACPTs are required at ward level to carry out various aspects of their role and that would increase significantly with the implementation of Lorenzo. She foresaw that Lorenzo would in fact free up ACPTs to do more ward work and less pharmacy based work; she could accommodate C in the dispensary/pharmacy provided C worked on both sites because that would assist in further freeing up the ACPTs to do the ward work.
- 4.5.1.8 Following the meeting of 10 November 2015 JN wrote to OH, at pages 282 and 284, summarising measures that were already in place to assist C in completing her duties, setting out what she said was the role of a Band 5 ACPT working across various sites and listing what she considered were the duties of a Band 5 ACPT that C was able to fulfil. Having done that JN wrote to C on 23 December 2015 a letter that appears at pages 298-392. This letter summarises the discussion, and at pages 299 and 300 lists duties that in JN’s view C could not fulfil and a shorter list of those which she could. C does not accept the characterisation in the list of activities she could undertake and challenges the accuracy of that list. C challenges the short list of duties that JN conceded C could undertake, which she considered to be

understated. C's annotations are set out on page 300 and the Tribunal accepts that the annotations are an accurate reflection of C's frustration. Notwithstanding JN's list of duties which she says C could not fulfil, her evidence and that of R's other witnesses was unconvincing insofar as there was any attempt to persuade that C was unable to ensure adequate and timely supply of medicines, to process medicines no longer required by wards, to train more junior staff on all roles of the pharmacy technician or in supporting pharmacy stores duties when required i.e. checking ward stocks. In a similar vein, the Tribunal does not accept the respondent's evidence that the claimant was unable to undertake duties which she has listed and added to what JN said she could do at page 300, namely that C was able to dispense, to liaise with chemists and help with training of new staff in the dispensary.

4.5.1.9 Having heard all the evidence and considered the letter of 23 December the Tribunal concludes that R's emphasis is on restrictions and adjustments made. This emphasis is in priority to positive aspects of the claimant's actual performance and capabilities as supported by Occupational Health advice. The letter is a warning of future changes which will require a review of work. Overall the letter is not a positive view of the claimant's capabilities and contribution to the department's running and it amounts to a focus on the negative. In the light of these findings and the clear wording of the letter the Tribunal concluded that this negative focus is an indication that the respondent was saying to the claimant it can tolerate her for the time being but there were clear adverse implications for the future.

#### 4.5.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 4 in her Schedule of Complaints (C2) are as follows:

##### 4.5.2.1 Harassment –

4.5.2.1.1 Conduct: The unwanted conduct of which C complains are the comments made during the meeting of 10 November 2015 and summarised in the letter that was sent to her on 23 December 2015 drafted by Jo-Ann Murphy and signed by JN emphasising negative

aspects of C's performance and forewarning of the future.

4.5.2.1.2 Purpose/effect: The purpose of the comments made and the letter were to put down a marker for C and to wise her up as to troubles ahead. JN had already indicated to Jo-Ann Murphy prior to the meeting, but unbeknownst to C, that she could accommodate C even with the introduction of Lorenzo, at least for some time, because provided she worked at both WH and HGH it would free up ACPTs to do more ward work. This of course emphasises that the claimant was retained on the rota despite her misgivings, stated reservations and Occupational Health reports, and this feeds into the earlier findings above. That said, the purpose was not to create a harassing effect; it was to inform C of relevant facts and considerations. All that said, however, C received this information in the context of the matters described above. She already felt that she was being undermined. She was a ready, willing and conscientious worker who did not wish to leave her employment but wished to exercise her professional skills in the service of R for the good of her patients. To be given such negative feedback at a meeting and subsequently in writing upset her in the same way that talk of ill-health early retirement had done. In all the circumstances of the case it was reasonable for the conduct of which she complains to have a harassing effect on C heightened by her perception that she was being "got at" and undermined.

4.5.2.1.3 R's focus on the negative was upon the adjustments to her role, seen by R as restrictions, because of C's disability. The harassment was therefore related directly to the protected characteristic of disability.

4.5.2.1.4 This claim is well-founded and succeeds.

4.5.2.2 Discrimination arising from disability –

4.5.2.2.1 "Something": The "something" that arose from C's disability was pain, discomfort and fatigue necessitating reasonable adjustments that were in place and amounting to a substantial

disadvantage in having to travel to and work at HGH.

4.5.2.2.2 Unfavourable treatment: Over and above the harassment finding above the Tribunal concludes that informing C of some stark realities, albeit with a negative slant accentuating the negative over the positive, was not unfavourable treatment. C needed to know the position she was in. She needed to know the thinking of R. R was willing to accommodate C as indicated by JN's email to Jo-Ann Murphy at page 279, and nothing further immediately flowed from the information imparted to C at the meeting and in the follow up letter. It was not unfavourable treatment to merely inform C of the situation as seen by R, as we say notwithstanding that it had a harassing effect as found above.

4.5.2.2.3 Constructive unfair dismissal: R stating its view, however jaundiced, was not a fundamental breach of contract. R was entitled to form a view and state a view even though it did so in a clumsy manner and one which had the harassing effect described. C did not resign immediately because of what she was told at the meeting or what was confirmed to her in the letter, but she never accepted either that the situation was as bleak or that she was as limited and restricted and incapable as was indicated. R's conduct on these occasions, that is in the meeting and in the letter, form another brick in the wall of the constructive unfair dismissal claim in that the relationship was being damaged cumulatively.

4.6 Complaint No. 5 – "Telling only C there might not be a role for her and/or questioning whether she would fit in the pharmacy department after the Lorenzo launch, at the meeting on 10 November 2015".

4.6.1 The Facts –

4.6.1.1 The minutes of the meeting of 10 November 2016 are at pages 276-279. The precursor to the meeting was JN's email to Jo-Ann Murphy at page 280, details of which are given above. The meeting was then summarised by JN in correspondence with Occupational Health at pages 282 and 284 as above and in a letter to C at pages 298-302, which again has been the subject of findings above.

4.6.1.2 At the meeting, it was stated to the claimant that she could only do “a small percentage” of her job description. R confirmed that it could accommodate C and over time had gone as far as it could go; nevertheless, it said there was nothing further it could do for her with the changes that were due (page 278). The need to work on both sites was emphasised and it was said “Lorenzo will result in changes” (page 278). Those changes were to be “more often at Warrington/Halton due to the restrictions in place” which is a reference to “restrictions” on C’s duties. The Tribunal finds based on all the evidence, including those notes and oral evidence, that the position was being made clear to the claimant that there was no place for her in the long-term when Lorenzo was introduced if her duties were restricted further and she did not travel to HGH. R approached the matter negatively to deliver a veiled threat to C in respect of her continued employment prospects and in so doing R did not approach C objectively, constructively and with due regard to its statutory duties in respect of employees with disabilities.

#### 4.6.2 Findings –

The Tribunal’s unanimous findings applying the applicable law to the facts found in respect of each of C’s complaint at number 5 in her Schedule of Complaints (C2) are as follows:

##### 4.6.2.1 Harassment –

4.6.2.1.1 Conduct: It was unwanted conduct on the part of C for R to imply to her that she had no long-term future working at WH once Lorenzo was introduced and that her future was uncertain even working between WH and HGH.

4.6.2.1.2 Purpose/effect: The purpose of R’s comments was to impart information as above. The effect of the unwanted conduct was to demean and intimidate C who felt degraded by it as above. She was upset at the negativity displayed and the implicit threat to her future job.

4.6.2.1.3 It was reasonable of C in all the circumstances to feel that there was a harassing effect as this was yet another blow to her and was contrary to what she believed to be the fact, namely that she could provide good and professional service. The comments substantiated to her the



perception that R wanted rid of her and this upset her.

4.6.2.1.4 As above this was all related to C's disability and the consequential adjustments to her duties.

4.6.2.1.5 This claim is well-founded and succeeds.

4.6.2.2 Discrimination arising –

4.6.2.2.1 "Something": What arose from C's disability was the need for her to work under a series of "restrictions", namely not working on wards and working a reduced working week in a situation where travelling to and from HGH had a detrimental effect on her health causing pain, discomfort and fatigue.

4.6.2.2.2 Unfavourable treatment: It was not unfavourable treatment to emphasise the risks facing C in the situation that pertained or at least it was not unfavourable over and above the findings of harassment above. R was entitled to form a view and was entitled to wise-up C as to the risk that she faced in their view. Nothing further followed from the dissemination of that information, and whilst the Tribunal finds it had the effect of harassment it was not additionally unfavourable treatment.

4.6.2.2.3 The comments were made because of the "something" defined above.

4.6.2.2.4 This claim is not well-founded, fails and is dismissed.

4.6.2.3 Constructive unfair dismissal –

4.6.2.3.1 All the Tribunal's findings in respect of the above claims of constructive unfair dismissal apply in this case. Complaint number 5 amounts to yet another brick in the wall.

4.7 Complaint No. 6 – "Providing selective and inaccurate information to Occupational Health" (harassment, discrimination arising from disability and constructive unfair dismissal).

4.7.1 The Facts –

4.7.1.1 C informed her line manager that she was drowsy at work on 24 November 2015 and she was concerned

about this. She reported it out of a genuine sense of professional duty. She did not feel that she had made a mistake with her work or there was any deficiency in the accuracy of her checking of medication; however, she was concerned of the risk.

- 4.7.1.2 Subsequently C was observed by colleagues appearing to fall asleep at work. She was observed sitting outside the pharmacy at HGH prior to her shift appearing to be sleeping in a chair that was not an apparently comfortable one, and the observer considered it was unusual. She was also observed appearing to nod off whilst at her workstation performing her duties and her colleagues expressed concern at seeing her appearing to be drowsy. Those concerns were reasonably expressed and appear to have been genuinely held. It was understood that C was drowsy or sleeping because of her fatigue brought on by her disabling symptoms. At least some of the observations occurred when the claimant had a chest infection unrelated to her disabling conditions and was on medication that may have accounted for some drowsiness, but that was not within the knowledge of the observers of her drowsy state.
- 4.7.1.3 R referred this information on to Occupational Health advisers when seeking advice on C's ability to work.
- 4.7.1.4 It appears that C confirmed to Occupational Health that she had potential difficulties with drowsiness or that she had given that impression, and this is clear from the reading of Occupational Health and GP records. C tried unconvincingly to explain away these references in the records and reports, interpreting what was said and adding words to give the impression that her GP and Occupational Health adviser were merely referring to R's concern rather than C's concern or C being drowsy in fact. The Tribunal finds that there were occasions when C at least gave the impression of being drowsy and at that time she was drowsy, both immediately prior to her shift (which did not affect the provision of a service to patients) and during shifts, which had the potential to give rise to inaccuracy in checking of prescribed medication. There is no evidence to suggest that C made any mistake in her work because of her being drowsy in a state that appeared to be one of sleeping. In fact, on one occasion when she felt that this was a risk she asked her line manager to complete the task in hand and she absented herself from the workplace

temporarily, which was a wise, conscientious and professional decision.

4.7.1.5 R had a genuine concern not only for C's wellbeing but for the safety of her professional practice if she was so fatigued that she was feeling drowsy and/or falling asleep. Concerns were appropriately raised by colleagues to R's line managers. R sought appropriate advice from Occupational Health advisers.

4.7.1.6 Notwithstanding all the above C steadfastly denied falling asleep at work or endangering patient safety by being drowsy.

#### 4.7.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 6 in her Schedule of Complaints (C2) are as follows:

##### 4.7.2.1 Harassment –

4.7.2.1.1 Conduct: The unwanted conduct was R providing information that it had received and observed to Occupational Health about the claimant appearing to be drowsy at work and/or falling asleep.

4.7.2.1.2 Purpose/effect: The purpose of the report was for R to properly inform itself and C of any Occupational Health aspects of the reported sightings. This was part of employee welfare and the legitimate need of the respondent to ensure patient safety. The effect on C was to upset her because it led eventually, as detailed below, to her suspension from work. She felt that R had painted a one-sided picture and had not taken seriously into account or suitably informed Occupational Health of her denials and the fact that she had not made any mistakes and had, on one occasion at least, reported the situation to her line manager as a precaution.

4.7.2.1.3 In all the circumstances and taking into account C's perception, it was not reasonable for R's conduct to have a harassing effect because it was under an obligation to investigate genuine reports that had been made to it, and that investigation was appropriately conducted via Occupational Health advisers provided with

information in the knowledge of R. R accurately reflected to Occupational health the information it had received concerning C's appearance of drowsiness or falling asleep, both prior to and during shifts.

4.7.2.1.4 This claim is not well-founded, fails and is dismissed.

#### 4.7.2.2 Discrimination arising from disability –

4.7.2.2.1 “Something”: C denies that drowsiness arose from her disability but says it was to do with an infection and/or medication for that infection which was not disability related. The Tribunal finds that one of the effects of C's disabling condition was fatigue and that this must have been a contributory factor, whatever about any infections or medications for infections affecting C.

4.7.2.2.2 Unfavourable treatment: It was not unfavourable treatment for R to appropriately refer genuine concerns to Occupational Health advisers for advice. That was required conduct on the part of R for both the good of C and to protect patient safety. Bearing in mind C is a conscientious pharmacist then she can only have wanted such matters of concern to be properly aired, and they were.

4.7.2.2.3 R's treatment of C was because of concerns raised in the light of visual evidence of her being drowsy. Whether the cause was her disabling condition or the cause of drowsiness to her disability is neither here nor there.

4.7.2.2.4 This claim is not well-founded, fails and is dismissed.

#### 4.7.2.3 Constructive unfair dismissal –

4.7.2.3.1 R was contractually entitled to refer C to its Occupational Health advisers. It is under a duty in fact to protect its employees by appropriate referrals to Occupational Health as and when appropriate, and it did so.

4.7.2.3.2 C did not resign immediately upon this referral and whilst she said that selective and inaccurate information was given to Occupational Health, that is not correct. R did

not breach its contract, neither did it undermine the relationship of trust and confidence by the provision of selective and inaccurate information to its Occupational Health advisers to secure a particular outcome. R's conduct on this occasion cannot be said to have seriously damaged or destroyed the relationship of trust and confidence entitling C to resign.

4.7.2.3.3 This claim fails and is dismissed.

4.8 Complaint No. 7 – “Making assumptions about C’s capabilities without inviting her input on 5 December 2015” and “deliberately leaving C out of the discussion and meeting directly affecting her employment on 15 December 2015” (harassment, discrimination arising from disability, constructive unfair dismissal).

4.8.1 The Facts –

4.8.1.1 A meeting was arranged for C to see the Occupational Health adviser and subsequently for management to see the Occupational Health adviser about C on 15 December 2015. C was in fact unavailable on 15 December 2015 and postponed the meeting. This was not known to management when JN and Paula Brennan (“PB”) attended to see the Occupational Health adviser. The representatives from HR did not attend the meeting. The meeting between JN/PB and Occupational Health proceeded in the absence of both C and a representative of HR.

4.8.1.2 It follows from the above that Dr Hui (Occupational Health) received only JN and PB’s views which, as described above, were somewhat negative in respect of C. It was a one-sided meeting. Dr Hui became concerned at what she heard about C’s state and condition at times at work which could adversely affect safety as she was the last checker. In all the circumstances, the Tribunal infers in the absence of any other explanation that JN and PB imparted to Dr Hui the negativity previously displayed. Dr Hui’s conclusion was that C ought not to undertake tasks that required attention to detail because there was a risk if she fell asleep to both herself and patients.

4.8.1.3 Dr Hui telephoned R’s HR department to advise of her conclusion based on what she had been told by JN and PB. R had made assumptions about C’s capability and potential risks to patient safety without on this occasion considering C’s submissions. Dr Hui did not have the opportunity to hear C’s submissions.

Dr Hui was influenced by JN and PB and convinced to go along with the assumptions that they made.

#### 4.8.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 7 in her Schedule of Complaints (C2) are as follows:

##### 4.8.2.1 Harassment –

4.8.2.1.1 Conduct: The unwanted conduct of which C complains was JN and PB making assumptions about her capabilities and persuading Dr Hui of them without inviting C's input and proceeding with the meeting in her absence, although it directly affected her employment.

4.8.2.1.2 Purpose/effect: R's purpose was to attend with Occupational Health, either with or without C, to alert Occupational Health to its concerns and to seek and obtain advice. JN and PB attended the meeting in all innocence expecting C to attend, and they did not deliberately leave her out; C postponed the meeting unbeknownst to them. JN and PB made assumptions about C's capability based on information it had received from observant colleagues and it was not its purpose in making those assumptions to create a harassing effect; it merely wished to investigate a potential risk. That said, however, and again considering all the background to date, C was upset, demeaned, degraded, humiliated and intimidated by JN and PB continuing to meet in her absence and discussing with Dr Hui matters of fundamental importance to her continued employment and which discredited her professionalism. In all the circumstances it was reasonable, considering all the circumstances of the case and C's perception, for the continuation of the meeting based on management assumptions about C's capabilities to have a harassing effect.

4.8.2.1.3 JN and PB believed drowsiness and falling asleep were consequences of C's disability, which is therefore relevant.

4.8.2.1.4 This claim is well-founded and succeeds.

##### 4.8.2.2 Discrimination arising from disability –

- 4.8.2.2.1 “Something”: It is not altogether clear whether the “something arising” from the disability was drowsiness. There is some evidence that C had an infection which required medication and that that may have had an effect; however, C has consistently confirmed throughout her evidence that she is fatigued because of her disabling conditions, and particularly when having to travel to and from HGH. Fatigue is a factor and fatigue is likely to lead to drowsiness and either falling asleep or giving the impression that one is falling asleep.
- 4.8.2.2.2 Unfavourable treatment: It would have been favourable treatment for R to meet with C either before or with Occupational Health advisers and it would have been favourable treatment for management to innocently meet with Occupational Health advisers after that adviser had seen C. It was not unfavourable to arrange the meeting or for JN and PB to attend it believing C would be present. JN and PB did not treat C unfavourably in reporting its genuine concerns to Dr Hui, who was entitled to draw her own conclusions and make a professional judgment. The only action that followed then was based on Dr Hui’s professional judgment, and that was not unfavourable treatment in this context from JN and PB, at least not with regard to the meeting itself. It ultimately led to C’s removal from duties, but that is the subject matter of another claim.
- 4.8.2.2.3 R had a legitimate aim of ensuring employee welfare and patient safety whilst providing an efficient and professional service to its patients. Referring genuine concerns about C’s capability to Occupational Health was a proportionate means of achieving that legitimate aim.
- 4.8.2.2.4 This claim is not well-founded, fails and is dismissed.
- 4.8.2.3 Constructive unfair dismissal –
- 4.8.2.3.1 The reference to Occupational Health and imparting to Occupational Health advisers the content of information appropriately received was not a breach of contract. Speaking to Occupational Health of negative assumptions

in an innocent way is not a breach of contract, albeit Dr Hui was influenced by it. JN and PB were not acting in a way designed or likely to damage or destroy the relationship of trust and confidence, notwithstanding that their actions had a harassing effect on the claimant.

4.8.2.3.2 The claim of constructive unfair dismissal on this occasion is not well-founded. However, the finding of harassment above was itself another brick in the wall.

4.9 Complaint No. 8 – “Suspending C from her duties on 17 December 2015 and maintaining her suspension when there was no proper reason to do so” and “telling C that she was not fit to work and was a risk to the health and safety of patients on 17 December 2015” (harassment, discrimination arising, constructive unfair dismissal).

4.9.1 The Facts –

- 4.9.1.1 As found above, R had formed a negative impression of C’s capacity for work because of fears of her falling asleep at work or lacking due attention because of fatigue. R had a genuine concern about these matters based on C’s self-reporting and credible reports from colleagues.
- 4.9.1.2 C was in a safety critical role as the last checker of pharmaceutical products and prescribed medication being released to patients.
- 4.9.1.3 When JN and PB raised their concerns with Dr Hui, Dr Hui suggested that C be allowed to undertake alternative duties. R considered this but also concluded that bearing in mind the “restrictions” on C that were already in place, the only alternative work that would be available for her would be of a clerical and administrative nature which R assumed C would find demeaning and upsetting. R did not offer clerical and administrative chores to C for fear of upsetting her.
- 4.9.1.4 Instead of redeploying C on alternative duties, and considering Dr Hui’s conclusion that C could not be allowed to undertake tasks requiring attention to detail which would put her and patients at risk, it was decided that she would have to absent herself from work. Dr Hui suggested that one practical measure to achieve this objective would be for C to obtain a sick note (see below para 4.10). C was informed that she was not to do work that required attention to detail,



and insofar as they were her principal duties she was not fit to work for fear of the risk to health and safety to patients.

#### 4.9.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 8 in her Schedule of Complaints (C2) are as follows:

##### 4.9.2.1 Harassment –

4.9.2.1.1 Unwanted Conduct: Informing C on 17 December 2015 that she was unfit to remain at work carrying out duties that required attention to detail and that the reason for this was her safety and more particularly patient safety as she was the last checker. This led to C being told that she was not to attend work.

4.9.2.1.2 Purpose/effect: The purpose of R telling C these things was to protect her, and more particularly patients, for fear that she would fall asleep or lose concentration in a drowsy state whilst conducting patient critical work. Whilst there was no suggestion that C had made prior errors or jeopardised patient safety, there was a genuine, reasonable and legitimate concern that patients would be at risk if C was to continue, and this was supported by Occupational Health advice based on both reported incidents and a negative outlook on the part of management. Faced with genuine professional Occupational Health advice, however, R was obliged to act and took appropriate action in suspending the claimant and its purpose was not to create a harassing effect. The effect on C was that she was upset but in all the circumstances it was not reasonable for her to feel that effect as there was no realistic option for R in the light of Occupational Health advice other than to give C clerical and administrative duties. R conscientiously and reasonably concluded that C would be even more upset at being given clerical and administrative chores instead of being allowed to carry out her professional duties. They were vindicated in due course when C objected subsequently to having to undertake clerical and administrative chores.

4.9.2.1.3 This claim is not well-founded, fails and is dismissed.

4.9.2.2 Discrimination arising –

4.9.2.2.1 “Something”: As has been found already, it is still a moot point as to whether C was drowsy because of medication for an infection or through the fatigue that she admits to suffering because of her disabling conditions. Fatigue leading to drowsiness and loss of concentration was something that arose from C’s disability; we cannot know whether disability related drowsiness or other drowsiness were observed by colleagues but they reasonably inferred that C’s disabilities were the cause.

4.9.2.2.2 Unfavourable treatment: R was under a duty to act in respect of reported sightings of C being drowsy and/or falling asleep at inappropriate times during the working day or immediately prior to a shift in unusual circumstances. It was not unfavourable treatment in those circumstances for R to act upon Occupational Health advice that C needed to refrain from duties that required attention to detail. It was not unfavourable to consider suspension as an appropriate alternative to offering C clerical and administrative tasks when R knew full well that C would object and be upset by the offer.

4.9.2.2.3 Justification: R’s legitimate aim was to maintain employee welfare, protect patient safety and to provide a professional and safe service for patients. In the light of sightings of C in a drowsy or sleeping condition, supported by Occupational Health advice, suspending C fell within the range of a proportionate means of achieving a legitimate aim.

4.9.2.2.4 This claim fails and is dismissed.

4.9.2.3 Constructive unfair dismissal –

4.9.2.3.1 R did not breach the contract of employment by suspending C from duties when the only suitable duties left for her were in a safety critical role and Occupational Health advice was to the effect that she ought not to be carrying out work that required attention to detail. That was not conduct designed or likely

to destroy the relationship of trust and confidence, as R was acting in all good faith to further the relationship and ensure a safe and professional service.

4.9.2.3.2 This claim fails and is dismissed.

4.10 Complaint No. 9 – “Trying to persuade C to get a sick note when she was fit for work”, “classing C’s enforced suspension as sickness absence despite C not being sick and being fit to work”.

4.10.1 The Facts –

4.10.1.1 Dr Hui suggested to JN and PB that one way of dealing with the situation of C being unable to perform her duties would be for C to obtain a GP fit note saying that she was not fit for work and that this would cover the absence.

4.10.1.2 R told C of this suggestion. C visited her GP but instructed her GP not to issue her with the requested sick note even though C accepted that she had an infection, was diagnosed with antibiotics and that this had contributed to her fatigue and drowsiness.

4.10.1.3 R’s decision to request a sick note following Dr Hui’s suggestion was that it wished to take the easy option to explain away C’s absence and so it could process her pay under the sick pay rules. R informed C that the absence would not count against her in ongoing capability proceedings where C was being managed by PB for earlier absences.

4.10.1.4 C was not unfit for work in general and there was no GP sick note to substantiate her enforced absence from work.

4.10.1.5 R therefore effectively suspended C; it did not allow her to work on advice of the Occupational Health adviser. In the absence of C consenting, and she did not, and in the absence of a sick note, this amounted to a suspension by R.

4.10.1.6 C genuinely and sincerely believed that she had been suspended and that the information would be used against her regarding attendance management policies because of earlier absences. C genuinely believed that this was further evidence of R prising her out of her job.

4.10.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 9 in her Schedule of Complaints (C2) are as follows:

#### 4.10.2.1 Harassment –

4.10.2.1.1 Conduct: The unwanted conduct in this claim was R's suggestion to C that she obtain a sick note from her GP when she did not feel that she was sick or needed such a certificate.

4.10.2.1.2 Purpose/effect: The purpose of the request that C obtain a sick note was an innocent one in that R wished to take an easy option and buy time in having C away from the premises while it considered what to do rather than appearing to be heavy-handed in suspending her formally. R wished to deal with C's pay and welfare issues on the basis of her being ill, but it also stated that the time off would not count in the attendance management proceedings. It was not R's purpose, therefore, to create a harassing effect. The effect, however, was that C was very upset at this course of action. R appeared to be removing C from work without following applicable procedures. It sought a sick note which was unusual, as it could have based any decision on Occupational Health advice without seeking corroboration by way of C's request to her own GP. It was then indicated to C, although C did not believe it, that the absence days would not be counted in the capability procedure. R was therefore disapplying various policies and procedures but at the same time effectively removing C from work. All of this made C upset and suspicious and R's actions caused a harassing effect.

4.10.2.1.3 In all the circumstances, including the background, the unusual request and the R's appearance not to make a firm decision about a formal suspension but at the same time using ways and means to secure her absence, upset C and it was reasonable for her to be suspicious and to feel a harassing effect from this action.

4.10.2.1.4 R made its decision to request a fit note and to suspend in the absence of one was because it believed that C was drowsy at work because of her disability. Its actions were disability related.

4.10.2.1.5 This claim succeeds.

4.10.2.2 Discrimination arising –

4.10.2.2.1 “Something”: As before, the “something arising” at least in part as a result of C’s disabling conditions was her fatigue and risk of falling asleep or giving that appearance.

4.10.2.3 Unfavourable treatment –

4.10.2.3.1 It is unfavourable for an employee not to be allowed to work, particularly when that employee consistently maintains that she is ready, able and willing to work and has proved that on the one occasion when she conceded she felt drowsy she took it upon herself to report the matter to her line manager. One of the instances reported of her being drowsy was sitting outside the pharmacy at HGH prior to her shift, and yet that was taken into account when it had no effect on patient safety, it merely created an impression in the mind of R’s managers. There was no evidence to suggest to R that C had made any errors because of a want of concentration or because she was sleepy. In all those circumstances not allowing C to work was unfavourable treatment notwithstanding Occupational Health’s reservations about her ability to perform duties requiring attention to detail.

4.10.2.4 Justification –

4.10.2.4.1 R could have formally suspended C which it believed would have upset her. It sought the removal of C from work because of genuine concerns about her drowsiness and it acted on Occupational Health’s advice. It took a soft option by not strictly applying policies and procedures and by making an unusual request that C obtain a GP note. That note was not forthcoming.

4.10.2.4.2 R effectively suspended C in any event. What was most important was to ensure that there was no risk to C’s health or patient safety. R had a legitimate aim to maintain its employees’ welfare and to maintain an efficient and safe service to patients. Taking an informal approach in the way that it did was a

proportionate means of achieving a legitimate aim. R took the soft option and was justified in doing it, albeit C was upset.

4.10.2.4.3 This claim fails.

4.10.2.5 Constructive unfair dismissal –

4.10.2.5.1 R was entitled to suspend C for all the reasons stated, but in the circumstances, it went about it in a clumsy manner and in doing so harassed C. Requesting a sick note, suggesting that C was sick but at the same time saying such “sick days” would not be counted otherwise then to absent her from work and to deal with her pay harassed C. R was misapplying procedures for its convenience and this undermined C’s confidence in R. This is an example of another brick in the wall with conduct that undermined the relationship and cumulatively, eventually, destroyed the relationship of trust and confidence.

4.11 Complaint No. 10 – “Subjecting C to formal attendance management capability meetings and without giving prior notice of the nature of the meetings” and “requiring C to attend a stage 3 meeting under the attendance management policy as a result of absence from work directly caused by R’s decision to suspend C from her duties”.

4.11.1 The Facts –

4.11.1.1 On 5 January 2016 Dr Hui sent a report to JN which is at pages 310-312. In that report, she says that C was unfit to fulfil her role for the foreseeable future, that she had some capacity to work but could not perform duties that involved any safety critical elements and she could not work on a full-time basis.

4.11.1.2 In the light of that report R called a meeting under its stage 3 capability proceedings with C.

4.11.1.3 That meeting was followed up by R in a summary letter of 21 January 2016 at pages 313-314. In that letter C was informed the meeting was held under stage 3 of the attendance management policy. C had made it clear that she was able to do her job to a good standard and that she could work full-time. R and C agreed that further clarity ought to be obtained from Dr Hui as it was unclear whether Dr Hui was happy for C to continue in the role of ACPT. If Dr Hui was not so content then R would have to consider suitable

redeployment opportunities that did not involve safety critical elements.

4.11.1.4 This meeting was not a standard welfare meeting to discuss Dr Hui's report but it was formally called as a meeting under stage 3 of the attendance management policy (long-term absence section). Under the four-stage procedure the next stage would be consideration of supporting continued employment or termination of employment. C's suspicion that R was managing her out of work was corroborated. This also ran contrary to the indication given that the suspension would not count towards ill-health absence.

#### 4.11.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 10 in her Schedule of Complaints (C2) are as follows:

##### 4.11.2.1 Harassment –

4.11.2.1.1 It was unwanted conduct in the circumstances of C's reluctant absence from work brought about by Dr Hui's advice that she should not be doing work that required attention to detail, for R to invoke stage 3 of the attendance management procedures.

4.11.2.1.2 Purpose: There were two purposes in calling the meeting and summarising it in the subsequent letter. R wanted to discuss Dr Hui's report with C, which it could have done in a welfare meeting, but it always wished to apply pressure on C so that she would be aware that stages of policies and procedures were being gone through. R wished to create the situation where C would realise that R's options were reducing and to appreciate the risk to C that her employment would come to an end. The purpose was therefore in part of a welfare nature and in part to create an intimidating working environment applying pressure to C and building a case for eventual termination of employment. Either way C felt intimidated by the meeting and subsequent letter. She was humiliated and found it offensive that she was being driven towards the exit door by way of the attendance management policy and she was very upset by it. Throughout all this period

C wanted to return to work and to perform her professional duty as an ACPT to the best of her ability, and she did not feel that her ability had been compromised.

4.11.2.1.3 In all the circumstances including C's perception it was entirely reasonable for the invoking of stage 3 attendance management policy, both at the meeting and in the subsequent letter, to have a harassing effect.

4.11.2.1.4 This whole situation arose because of what R believed was disability induced drowsiness and it therefore relates directly to the said protected characteristic.

4.11.2.1.5 This claim is well-founded and succeeds.

#### 4.11.2.2 Discrimination arising –

4.11.2.2.1 "Something": The "something" that was believed to arise because of C's disability was her absence because R believed that the drowsiness or falling asleep was because of disability, and disability certainly played a part as fatigue was a feature of the claimant's conditions. C was reluctantly absent from work in consequence.

4.11.2.2.2 Unfavourable treatment: In circumstances where C was reluctantly absent at the behest of R, then to invoke stage 3 of the attendance management policy was unfavourable treatment because it made an informal situation formal with the implication that it could lead to stage 4 and termination of employment. Another way-marker along the route to the exit was being passed and that was unfavourable.

4.11.2.2.3 It was not a proportionate means of achieving a legitimate aim to invoke stage 3 of the attendance management policy. R's legitimate aim is as previously stated to ensure employee welfare and a safe and efficient professional service to patients. That objective was not advanced by invoking stage 3 of the attendance management policy when what was most appropriate and required was a welfare meeting outside of the attendance management policy to discuss Dr Hui's report and agree on what further clarification would be



required. It would have been proportionate not to pass a way marker on the route to the exit in January 2016, and it was disproportionate to suddenly make the matter as formal as that.

4.11.2.2.4 This claim is well-founded and succeeds.

4.11.2.3 Constructive unfair dismissal –

4.11.2.3.1 In the light of the findings of both harassment and unfavourable treatment arising from disability, C's conviction that R was expediting her removal from work was justified and R's actions undermined and damaged the relationship of trust and confidence.

4.11.2.3.2 R was contractually entitled to rely on stage 3 of the attendance management policy, but taking in context doing it at this stage and in the way it was done had a cumulative effect and was a further brick in the wall in respect of this claim.

4.12 Complaint No. 11 – “Requiring C to attend a stage 4 capability meeting” (harassment, discrimination arising from disability, constructive unfair dismissal).

4.12.1 The Facts –

4.12.1.1 C was called to a meeting on 2 March 2016 to discuss a further Occupational Health report and in her evidence C described this as a case conference.

4.12.1.2 At the meeting R and C discussed the Occupational Health report and the information that management had given to Dr Hui to form the report. C complained that she was put at stage 3 of the attendance management procedure when she was actually fit to work, and during that discussion R referred to C being now at stage 4, stage 3 having been passed.

4.12.1.3 There are no minutes of this meeting in the trial bundle. The trial bundle contains several draft outcome letters with various forms of wording. R sent to C a letter dated 8 March 2016 which appears at pages 376-377. R reminded C that she had reached stage 3 of the attendance management procedure and there was a reference in that letter to stage 4 which was the stage that C was led to believe had been reached at the meeting of 2 March 2016. Some of the other drafts of the letter, including those at pages 368 and 369, imply that C was told at the

meeting at the beginning of March 2016 that she had now reached stage 4 of the attendance management procedure, and that in response she asked for redeployment and/or training but was told that a future decision such as that would depend on what Occupational Health advised.

#### 4.12.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 11 in her Schedule of Complaints (C2) are as follows:

##### 4.12.2.1 Harassment –

4.12.2.1.1 Conduct: The unwanted conduct at the meeting on 2 March 2016 was R's references to C having reached stage 4 of the attendance management procedure which could lead to termination of employment.

4.12.2.1.2 Purpose/effect: The purpose of the meeting and letter was to apply pressure to C emphasising the risk that she faced of termination and that she was passing way-markers on the route to an exit from her employment. This was to intimidate C. The Tribunal finds that it was suspicious: there were so many draft letters of various forms of wording around this time which are indicative that R was mismanaging its various procedures and was deliberately attempting to create an atmosphere in which C would be concerned for her future role and was continually made aware that she survived only by tolerance on the part of R for the time being. It was being made clear to her that the exit was fast approaching. This did create a harassing effect for C and in all the circumstances it was reasonable for her to feel that effect.

4.12.2.1.3 Again the situation was directly linked to R's perception that C's disabilities were limiting her capacity for work currently and in the future; those concerns were exacerbated by the belief that drowsiness was a consequence of her disability. This is all therefore related to C's relevant protected characteristic.

4.12.2.1.4 This claim is well-founded and succeeds.

## 4.12.2.2 Discrimination arising –

4.12.2.2.1 “Something”: The “something” that arose in consequence of C’s disability was her absence from work.

4.12.2.2.2 Unfavourable treatment: It was unfavourable treatment to intimidate C by repeated reference to C being at stage 4 of the attendance management procedure. C had received reassurances that the time spent during the medical suspension would not be held against her, but it seemed to her, and it appears on the face of it, the time was being held against her in some shape or form. That was unfavourable because there are only a limited number of stages before termination, and the impression at least was being given formally to C that she was on a slippery slope. C was willing to work; there was no sick note to say that she was unfit and Dr Hui had advised that she was capable of some of her duties. She ought to have had a welfare meeting. R however created some confusion by repeated references to the formal attendance management procedure and this was unfavourable.

4.12.2.2.3 Justification: Whilst the Tribunal has repeatedly acknowledged above R’s legitimate aim, its handling of this meeting and letter were not proportionate means of achieving that aim. R caused confusion and intimidated C applying pressure upon her, indicating formal proceedings, hinting that they were not the case but all the time maintaining the pressure so that C would believe that she was on a fast track to termination of employment. It would have been a proportionate means of achieving R’s legitimate aim for it to have held a welfare meeting outside the attendance management procedure and to deal properly with the medical suspension it had imposed.

4.12.2.2.4 This claim succeeds.

## 4.12.2.3 Constructive unfair dismissal –

4.12.2.3.1 C had been reassured that the time spent absent from work under what we have termed a suspension in the absence of a GP fit note would not count against her under any formal

attendance management proceedings. Nevertheless, R has confused matters whilst maintaining pressure on C by repeated references to stage 4 of the attendance management procedure. This was conduct that was likely to seriously damage or destroy the relationship of trust and confidence. R was giving a clear impression that rather than deal with the matter appropriately and clearly within procedure it was mixing and matching procedures to suit itself, and all the time with the intention of undermining C's stability at work. This was a breach of the implied term of trust and confidence. C did not resign immediately but sought to rectify the situation and through the grievance procedure.

4.12.2.3.2 This allegation comprises a further brick in the wall and adds to the cumulative effect of other breaches of contract leading to C's resignation.

4.13 Complaint No. 12 – “Subjecting C to condescending, insulting and degrading comments” and “conducting meetings with C in an intimidating and derogatory manner” and “telling C she was being unhelpful, was not moving things forward as the Trust wanted to on 2 March 2016” (harassment, discrimination arising from disability, constructive unfair dismissal).

4.13.1 The Facts –

4.13.1.1 Having considered all the witness evidence and documentary evidence the Tribunal finds that there is nothing to support the allegation that R's managers acted in an overtly intimidatory manner or used derogatory language or aggressive behaviour. The managers did not behave in that way and any intimidation was implicit.

4.13.1.2 On 2 March 2016 R said to C that she was “not moving things forward” as “the Trust wanted to”. The Tribunal finds that this was a reference to C either returning to full duties or leaving her employment. That is how C understood it. She was upset by it because she felt R was making clear it wanted her to leave in circumstances when she did not wish to leave and that R was becoming impatient. She found that this was intimidating, degrading and offensive albeit the Tribunal finds it was not said overtly aggressively or in a hostile manner but rather out of frustration and exasperation.

## 4.13.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 12 in her Schedule of Complaints (C2) are as follows:

## 4.13.2.1 Harassment –

4.13.2.1.1 Conduct: The unwanted conduct found was that R said C was not moving matters forward the way it wanted. They were unwanted words as C wished to return to work but reasonably believed that the way R wanted to progress was through termination of C's employment.

4.13.2.1.2 Purpose/effect: The purpose of the comment was to give warning to C that R's patience was wearing thin. It felt frustrated and exasperated. These emotions so expressed were designed to intimidate C and they were hostile, despite not being delivered in an aggressive, forceful manner. R had expectations that C would cooperate in its efforts towards securing her departure and she was not prepared to do so, and she felt under pressure as a consequence. The effect of the unwanted words was to upset and intimidate C who felt again that doors were closing behind her and she was being ushered out.

4.13.2.1.3 It was reasonable for C to feel the harassing effect in all the circumstances described to date and specifically in respect of the meeting of 2 March 2016 when R was referring to "moving forward" and its wishes as to how they move forward. R considered that C was not cooperating in its aims. C was firmly of the view that she was doing everything she possibly could to get back to work and therefore R's aims must be contrary to that. In those circumstances, it was reasonable for the unwanted words to have the harassing effect.

4.13.2.1.4 This claim succeeds.

## 4.13.2.2 Discrimination arising –

4.13.2.2.1 "Something": The "something" arising as a consequence of C's disability was her need for the reasonable adjustments that were in place

and her fatigue causing drowsiness leading to absence from work under R's suspension.

4.13.2.2.2 Unfavourable treatment: It was unfavourable treatment for R to become exasperated and frustrated at C and to accuse her of not moving things forward as they wished. It was unfavourable for R to have such an expectation that C would move things forward as they wished when their wishes were diametrically opposed, C wishing to return to work.

4.13.2.2.3 It was not a proportionate means of achieving R's legitimate aim for it to intimidate C, harassing her and subjecting her to unfavourable treatment when all it needed to do was handle her condition, her need for reasonable adjustments, and their fears over lethargy in the context of welfare advice and assistance rather than seeking her exit from employment. A welfare meeting would have been a proportionate means of achieving the legitimate aim provided R went into it with good intent and sought solutions rather than pressurising C to accept that there was nothing further it could do as stated in an earlier meeting.

4.13.2.2.4 This claim succeeds.

4.13.2.3 Constructive unfair dismissal –

4.13.2.3.1 R was putting pressure on C. Its attitude had hardened over time and was continuing to harden to the extent that it foresaw fairly imminent termination of employment. The accusation that C was not assisting in this implied aim seriously damaged the relationship of trust and confidence between R and C and was another brick in the wall with the cumulative effect leading to a situation when C felt she had to resign.

4.14 Complaint No. 13 – “Downgrading or changing C's grievance to a matter to be dealt with under the Dignity at Work policy” (harassment, discrimination arising from disability, constructive unfair dismissal).

4.14.1 The Facts –

4.14.1.1 R operates a Dignity at Work policy that appears at pages 160-186 and a grievance procedure at pages

194-208. Both allow for employees to raise matters of concern and both set out procedures to address concerns so raised. In short, the Dignity at Work policy is to be used when employees feel that they are being bullied, harassed or intimidated and it is for R to promote a working environment free from such matters. The grievance procedure is said to be to encourage free communication between employees and managers to ensure that questions and problems that arise through the course of employment can be aired, dealt with fairly and, where possible, resolved quickly to the satisfaction of all concerned. In the executive summary/introduction to the grievance procedure at page 196 R makes clear that concerns raised ought to be dealt with under the appropriate policy or procedure, be it Dignity at Work, whistle-blowing, health and safety or grievance; subject to that, however, where grievances are raised appropriately the grievance procedure must be followed, and this is stated at page 199.

- 4.14.1.2 The grievance procedure says that grievances must be dealt with without unreasonable delay, anticipating a five-day response at stage one, a five-day decision at stage two and an appeal decision within ten days. It is made clear that deadlines are “strict timescales” and it is expected that managers will adhere to them, albeit recognising that in extreme circumstances that may not be possible; although in the latter circumstances an employee must be given an explanation for the delay and advised when the response can be expected. Under the terms of the grievance procedure there is an appeal process. There is a three-stage procedure which applies when a formal grievance is raised, and they are formal stages. The emphasis is on resolving the issue.
- 4.14.1.3 Under the Dignity at Work policy at pages 160-186 the respondent envisages, following an informal procedure initially, and the timescale at page 169 to conclusion is eight weeks. There is a right to appeal an outcome at page 170. The formal procedure is effective when attempts to resolve a situation informally have not been successful. The emphasis appears to be an attempt to mediate first and foremost.
- 4.14.1.4 The evidence heard by the Tribunal and its consideration of the documentation leads it to conclude that the grievance procedure was more formal than the Dignity at Work procedure, would

involve disclosure of witness statements and allow the opportunity to a grieving complainant to question witnesses within a hearing. Furthermore, the impression gained by the Tribunal is that the Dignity at Work policy was effected more flexibly looking at words and actions of the managers against whom complaints were made to see whether allegations could be corroborated in the view of the person investigating the complaint, with the aim of an informal mediated reconciliation.

- 4.14.1.5 On 27 January 2016 C's solicitors wrote a lengthy grievance letter to R which appears at pages 322-328. There are references within that letter to it being a formal grievance, and it clearly is one from its content. It raised several issues including the requirement of C to be on the HGH rota, the request for details on ill-health early retirement and the like, all of which are detailed above. It contains a request for specific documentation.
- 4.14.1.6 On 25 February 2016 the investigating officer, Maria Keeley ("MK") with a representative of HR, Andrea Orme ("AO") met with C and notes of that meeting are at pages 353-357. MK and AO summarised seven bullet points that they had extrapolated from the lengthy grievance letter. C confirmed that those seven bullet points "pretty much" summarised her grievances. At that meeting MK and AO questioned whether it might be appropriate to deal with the matter under the Dignity at Work policy. C considered that she had raised a grievance to be dealt with under the grievance procedure.
- 4.14.1.7 Having heard nothing further, C sent a reminding email to AO and MK on 19 April 2016. She stressed that she had not received the requested documents and that no progress had been made albeit eight weeks had elapsed. C was concerned and frustrated that no progress had been made with her grievance. C's email is at pages 381-383; it is detailed; she says in it that she feels she is being punished, demeaned and demoralised. Referring to the suggestion that the matter could be dealt with under the Dignity at Work policy, C says at page 382 that she would "like to formally add this to my formal grievance which still stands as my discriminative treatment". This was C's consistent position and it remained so up to and including the date of her resignation, namely that she was pursuing the formal grievance of 27 January 2016 in all aspects, added to which R could consider



allegations of bullying and harassment which were included in the grievance under the Dignity at Work policy. At no time did C withdraw any aspect of her grievance. If anything, she emphasised and reiterated it.

- 4.14.1.8 Following that reminder from C on 19 April 2016, the first of the investigatory interviews took place on 25 April 2016. On 26 April 2016 C put forward the names of additional witnesses for interview. The last of the investigatory interviews was held on 14 June 2016 when Dr Hui was interviewed.
- 4.14.1.9 C's solicitor had sent a chasing letter to R on 27 April 2016 indicating potential claims of disability discrimination, and that letter is at pages 396-398. It was not until 3 May 2016 that AO, at page 399, explained R's delays, which were put down to diary commitments, staff-side availability and the introduction of Lorenzo which appears to have been taking up a lot of AO's time.
- 4.14.1.10 R failed to meet the timescales of both the Grievance and Dignity at Work policies and by the date of C's resignation had not concluded an investigation under either procedure. R dealt with the matter ostensibly under the Dignity at Work procedure, and eventually concluded in respect of allegations of bullying and harassment. It did not make the disclosure that C had requested. Specifically, it did not disclose the emails from C's colleagues alerting management to their concern at C appearing drowsy or asleep at work. It took no action in respect of disclosure or preparation of, or the holding of, grievance hearings. It dealt with the matter through a series of interviews and the preparation of a report addressing bullying and harassment specifically.
- 4.14.1.11 C believes the Dignity at Work Policy and procedure to be less formal than the grievance procedure with less opportunity for her to obtain disclosure of evidence and to challenge it. She believes that her complaints were demoted by R. She believes that the Dignity at Work Policy was inappropriate for dealing with complaints about working conditions as it concentrated only on whether managers had infringed C's dignity and how relationships could be restored and maintained. R's decision to substitute unilaterally its Dignity at Work procedure for its Grievance procedure upset and demoralised C. C felt ignored

and undermined. She was frustrated that R chose its own route regardless of C's clearly stated wishes.

#### 4.14.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 13 in her Schedule of Complaints (C2) are as follows:

##### 4.14.2.1 Harassment –

4.14.2.1.1 Conduct: The unwanted conduct was R substituting the Dignity at Work policy for the grievance policy when C had not asked it to do so. C had specifically and repeatedly emphasised that she had raised a grievance or grievances. She was prepared to add Dignity at Work complaints of bullying and harassment but she did not replace one with the other, and doing so was unwanted conduct. C wanted consideration of, and if possible resolution of, her grievances as set out in her solicitor's formal grievance letter.

4.14.2.1.2 Purpose/effect: The purpose of R's action in substituting Dignity at Work was to take control of a situation and to concentrate on part only of C's complaints. It sought to control how C's complaints could progress, limiting the scope and providing a procedure more likely to result in a favourable outcome for R to the continued frustration and annoyance of C. R therefore sought to intimidate and degrade C by not dealing appropriately with her complaints but by preferring its chosen method of dealing with the matter administratively. The effect on C was to create an intimidating, hostile, degrading and humiliating working environment, and her dignity was violated because she was not being listened to or heeded.

4.14.2.1.3 It was reasonable for C in all the circumstances, including her perception, to feel the harassing effect of R's actions, particularly as despite sidelining the grievance and opting for the Dignity at Work procedure it did not complete either up to the date of C's resignation, and as time progressed it was no wonder that C felt harassed.

4.14.2.1.4 R's actions were related to C's disabilities. R considered that her disability restricted duties coupled with further such foreseen difficulties when Lorenzo was introduced would render her supernumerary. With this in mind, it decided to treat her grievance as it preferred and at its own pace as C, being a disabled person and absent from work for reasons R believed were disability related, was not a priority and her future management was likely to prove problematic.

4.14.2.1.5 This claim succeeds.

4.14.2.2 Discrimination arising –

4.14.2.2.1 “Something”: The “something” that arose in consequence of C's disability were her complaints about a requirement for reasonable adjustments, the involvement of management in obtaining Occupational Health advice and her suspension from work.

4.14.2.2.2 Unfavourable treatment: It was unfavourable treatment for R not to deal with C's grievance and the additional matters which fell appropriately in the Dignity at Work policy. C was entitled to believe that her grievances would be dealt with under the grievance policy and her complaints of bullying and harassment would be dealt with under the Dignity at Work policy in a timely and reasonable fashion. She was treated unfavourably in respect of both the procedure and the application of policies.

4.14.2.2.3 Justification: The Tribunal has already made a judgment as to R's legitimate aim. Subverting C's grievance to a different policy and then not dealing appropriately with either the grievance or the Dignity at Work complaints was not a proportionate means of achieving C's legitimate aim. It did nothing to further full employment, C's welfare, patient safety or the provision of a professional and efficient service.

4.14.2.2.4 This claim succeeds.

4.14.2.3 Constructive unfair dismissal –

4.14.2.3.1 R breached C's contract of employment, and specifically the implied duty of trust and

confidence, by not dealing with her grievance as such, by substituting the Dignity at Work policy, and when C said that was an additional matter, not dealing with C under that procedure or the policy in a timely manner. That was conduct likely to, and designed to, seriously damage or destroy the relationship of trust and confidence. C's resignation was specifically linked to this conduct on the part of R, albeit some months later when the lack of progress became even more evident. R's actions with regard to this complaint were a substantial contributory factor to C's resignation because of R's conduct.

- 4.15 Complaint No. 14 – “Repeatedly refusing to provide C with evidence relevant to the allegations made against her despite numerous requests” and “refusing or neglecting to provide C with details of why she was allegedly not safe to work or of errors she had allegedly made”.

4.15.1 The Facts –

4.15.1.1 In her grievance letter C's solicitor requested disclosure of certain documents which were never disclosed to C. The requested documents included statements of colleagues who had reported their concerns that C was drowsy and/or falling asleep. R refused to make that disclosure. C was deprived of the opportunity to explain her situation, to put that to her colleagues and to test out their recollection and opinion as to what they saw.

4.15.1.2 R did not provide C with details of why she was allegedly not safe to work or of errors she had allegedly made. There is no evidence that she had made errors. She was told that there were concerns that she had slept at work but she was unable to challenge them in the absence of the requested information.

4.15.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 14 in her Schedule of Complaints (C2) are as follows:

4.15.2.1 Harassment –

4.15.2.1.1 Conduct: C had requested documentation and repeated her requests for a considerable length

of time. The refusal was therefore obviously unwanted conduct.

4.15.2.1.2 Purpose/effect: The purpose of the refusal was that R did not wish to deal with the matter in a comprehensive and fair manner. It had got itself into a managerial mess and it was easier not to disclose the information. Its purpose was obfuscation and cover up rather than to create a harassing effect. It was trying to deal with matters in a variety of different and conflicting ways, applying again a principle of “ways and means” to lead to the eventual departure of C. The effect of the wilful and repeated refusal was to undermine C and to reinforce to her the view that there were unsubstantiated allegations with a view to forcing her exit from employment. This, therefore, violated her dignity and had a harassing effect.

4.15.2.1.3 It was reasonable for the conduct to have a harassing effect considering all the circumstances of the case including C’s perception, because it was a simple and straightforward request for documentation that ought, under the grievance procedure, to have been made available to her and which she could test under the grievance procedure at a formal hearing. R’s obfuscation and prevarication undermined the claimant and upset her greatly because she could see no way forward. She was trapped in respect of what were to her unsubstantiated allegations that had led to her suspension and she could not properly challenge the situation or see a way back into work. However, the harassment was not related to C’s disability. R wished to protect the identity of C’s colleagues who had reported her and were in an administrative muddle. It felt it did not have to disclose the information and preferred not to, but its conduct was not related to the protected characteristic of disability.

4.15.2.1.4 This claim fails.

4.15.2.2 Discrimination arising –

4.15.2.2.1 “Something”: As before what arose in consequence of C’s disability, at least in part, was fatigue and the risk of her falling asleep or

appearing drowsy in respect of which she therefore requested evidence.

4.15.2.2.2 Unfavourable treatment: Without the requested information C was not properly able to defend herself and that amounts to unfavourable treatment when she was faced with allegations that had led to her suspension from work.

4.15.2.2.3 Justification: The legitimate aim of R was to protect the identity of C's colleagues and not to foment mistrust and ill feeling, which is a legitimate aim for an employer dealing with difficulties arising between colleagues. R had disclosed that there were reports and it could have disclosed those reports but with the names of the reporting colleagues redacted. That would have been a proportionate means of achieving a legitimate aim. However, having alleged that C was falling asleep and saying it was based on reports received it was disproportionate to withhold from C the exact wording of the reports so that she could put them in context and so defend herself.

4.15.2.2.4 This claim succeeds.

4.15.2.3 Constructive unfair dismissal –

4.15.2.3.1 R was dealing with matters outside its established procedures. It was obstructing C's preparation and personal investigation with a view to defending herself and obtaining a return to work. The wilful continued refusal to disclose even the terms of the reports received from C's colleagues undermined the relationship and this was a further contributory factor in C's resignation and a brick in the wall.

4.16 Complaint No. 15 – “Allocating menial tasks to C and preventing her from carrying out her normal duties upon her return to work (and in particular carrying out dispensing duties) in the period 7 March to 3 May 2016” (harassment, discrimination arising, constructive unfair dismissal).

4.16.1 The Facts –

4.16.1.1 Upon C returning to work from a period of absence on 7 March R did not allow C to do work that required attention to detail. This was in accordance with Occupational Health advice received with a view to ensuring patient safety. Occupational Health had by

now also reported that C ought not be involved in patient safety critical work, and these “restrictions” were recommended in addition to the other restrictions on duties and the provision of adjustments.

- 4.16.1.2 C had complained that she was not allowed to work in any capacity and on an earlier occasion R had refused to allocate to her tasks which she describes in complaint number 15 as “menial” because they feared she would be disgruntled. C insisted on returning to work. There were only “menial” tasks available and they were allocated to her.

#### 4.16.2 Findings –

The Tribunal’s unanimous findings applying the applicable law to the facts found in respect of each of C’s complaint at number 15 in her Schedule of Complaints (C2) are as follows:

##### 4.16.2.1 Harassment –

- 4.16.2.1.1 Conduct: C did not want to have allocated to her what she considered to be menial tasks but she wanted to do her full duties notwithstanding Occupational Health advice.

- 4.16.2.1.2 Purpose/effect: The purpose in allocating to C administrative chores was to give her gainful employment because she wished to return to work, and in a situation where owing to many Occupational Health reports and recommendations she could not carry out the full ACPT duties or even the reduced ACPT duties that she had conducted prior to her suspension. The purpose was not to create a harassing effect but it was to give her gainful employment. The effect of C being allocated the administrative tasks was that she became upset, felt degraded and humiliated and she was offended.

- 4.16.2.1.3 It was not reasonable in all the circumstances, including C’s perception, for the conduct in question to have a harassing effect because C had insisted on returning to work in circumstances where R could not allow her back to the duties that she had carried out prior to her suspension. All that was left for her to do were the administrative chores which she resented. R had foreseen that she might and

had not offered these duties to her sooner and she has, in these proceedings, complained about that too. It is unreasonable of C to make this claim of harassment in all the circumstances.

4.16.2.1.4 This claim fails.

4.16.2.2 Discrimination arising from –

4.16.2.2.1 “Something”: The “something” that arose in consequence of C’s disability was that she could not, on Occupational Health advice and in the light of its recommendations, perform substantial parts of her substantive role.

4.16.2.2.2 Unfavourable treatment: C was allocated administrative or what she considered to be “menial” tasks. She was in fact allocated the only roles available to her where the alternative was that she could not return to work as of 7 March. C wanted to return to work on 7 March. R allocating to C the only other available tasks which it could on advice give her to do in circumstances where she wanted to return to work is not unfavourable treatment.

4.16.2.2.3 Justification: R’s legitimate aim remains as previously defined. Allowing C to return to work and to work from 7 March to 3 May 2016 doing the tasks that were allocated to her at that time in place of the principal duties of an ACPT which she could not do in line with Occupational Health recommendations, was a proportionate means of achieving R’s legitimate aim. This claim fails and is dismissed.

4.16.2.3 Constructive unfair dismissal –

4.16.2.3.1 R allowed C to return to work because she wished to do so and to work on for the period from 7 March to 3 May 2016. It paid her in accordance with her contract and it allocated work to her in accordance with the contract, being duties broadly within her remit but not those duties where Occupational Health advised she should be curtailed for her own good and for the sake of patient safety. This does not amount to a breach of contract. If anything, this is an example of R supporting the continuation of the employment relationship by



allowing C to return to the working environment with colleagues and to work in and around her substantive ACPT role without holding it against her. This claim fails and is dismissed.

4.17 Complaint No. 16 – “The events of 3 May 2016 (her last at day before going off sick)” (constructive unfair dismissal).

4.17.1 The Facts –

4.17.1.1 On 26 April 2016 AO asked C to annotate the notes that had been prepared from the investigatory meeting with MK and AO. C went home to do this annotation in peace and quiet and she could not get on with the job at work. AO and C’s immediate line manager, PB, were aware that C was going home to work on the annotation of notes in accordance with the instruction/request given to her by AO. It took C longer to complete the task than she had anticipated.

4.17.1.2 On 3 May 2016 MK asked C whether she was taking that time when she had been at home as annual leave and made the comment “when at work behave accordingly”. C complained of this situation and the comments made and the length of time it was taking to conclude the outstanding interviews (specifically with JN and Jo-Ann McCreedy (HR) in an email of 3 May 2016 at page 400). On 3 May 2016 AO replied (page 399) confirming that C had been allowed to go home although AO had not appreciated how long she had been out of the department. AO explained part of the reasons for the delay in concluding matters, particularly with JN’s interview. AO at this stage (3 May 2016) anticipated concluding the investigation into the grievance (being dealt with under the Dignity at Work policy) of 27 January 2016 “pretty swiftly now”. AO said that a further referral would be made to Occupational Health.

4.17.1.3 C felt completely demoralised by this response which gave no firm indication of when she could expect the next stage of the grievance procedure to be reached or a report on the aspects of her complaint that amounted to bullying and harassment that were dealt with under the Dignity at Work policy. She felt that she was being fobbed off again. She felt that she was not a priority and was unimportant to R who had no genuine concern for her welfare or for resolving her difficulties and seeing to her return to work.

- 4.17.1.4 C left work on 3 May 2016 and visited her GP who provided her with a sick note saying that she was unfit to work. C did not return to work from 3 May 2016 until after the date of her resignation with notice on 3 June 2016. She did work the notice period from 1 July 2016 until 31 August 2016 but not doing the full range of duties.
- 4.17.1.5 C's resignation letter of 23 June 2016 is at page 447. Prior to writing it she had a chance encounter with somebody who in conversation alerted her to the possibility of employment elsewhere. She pursued that opportunity because she saw no progress being made with her grievance and complaints and felt that she was not getting anywhere. C had by now the firm view that she was never going to be allowed to return to work with R and it was that that made her seek alternative employment when the suggestion was made to her. The final straw as far as C was concerned was the lack of any real progress on R's part in resolving her grievances.
- 4.17.1.6 In answer to a question from Ms Worthington in cross examination C explained her feelings and her decision to leave R's employment (21 November 2017 at approximately 10:45am) when she said, "There was no moving forward. They said they hadn't even finished witness statements. It was over six weeks. I felt I was getting nowhere. MK said had other witness statements against me so I knew that however long it took I was not going to get my job back. I even asked if I could have a technician checking job and was pushed away". When asked in cross examination what was the "final straw" the claimant replied, "Delay. Not moving forward. No structure of where it was going. Just re-hearing and re-hearing". The Tribunal finds as a fact that C accurately described the situation as it existed in May and June 2016 and her feelings at that time. There had been no substantive progress. There was significant delay. C's grievance and complaint was not prioritised. R was continuing with the implementation of Lorenzo and all other matters over and above any concern for C and everything else was a priority over her seeking a return to work. The Tribunal has inferred from all the facts found that by this stage R did not see any way for C to return to work.

#### 4.17.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 16 in her Schedule of Complaints (C2) are as follows:

4.17.2.1 The events of and surrounding 3 May 2016, being the exchange of emails between C and AO, illustrated to C conduct on the part of R and inactivity that seriously damaged and was designed to seriously damage or destroy the relationship of trust and confidence. C was being fobbed off. She felt that R was acting as if it had no real regard for C's welfare or for securing her return to work so that she could provide a safe and efficient service to patients. This was a breach of the implied term of trust and confidence entitling C to resign with notice. This was the final straw and a significant part of the decision of C to resign. C did not delay too long before confirming her decision to resign. She did so because of R's conduct and not because she sought alternative employment. This claim succeeds.

4.18 Complaint No. 17 – “Quoting from the Pharmacist Code of Ethics and Fitness to Practice in the grievance outcome” (harassment and discrimination arising from disability).

4.18.1 The Facts –

4.18.1.1 On 29 July 2016 MK (Chief Pharmacy Technician and investigating officer in respect of C's complaints) sent to C the outcome of her Dignity at Work investigation. By this stage C had resigned. The investigation report is at pages 460-479. The report refers amongst other things to the relevant Code of Ethics and Fitness to Practice. It is in part guided by the standards dictated by that Code which applied at all times to C as an ACPT.

4.18.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 17 in her Schedule of Complaints (C2) are as follows:

4.18.2.1 Harassment –

4.18.2.1.1 Conduct: The claimant did not want R to refer to the Pharmacist's Code and felt that in doing so R was insulting her and undermining her professionalism.

4.18.2.1.2 Purpose/effect: The purpose of the quotation was to bolster the credibility of the report by

making it relevant to factors governing C's professional practice and it was not to create an intimidating or otherwise harassing effect.

4.18.2.1.3 It was not reasonable in all the circumstances, including C's perception, for her to find the reference to the Code to have the harassing effect. She was subject to the Code, was aware of it, ought to have been aware of it and R was entitled to remind the readers of the investigation report of the provisions of the Code. It was a completely neutral reference and one that was an appropriate one to make in the context of C's complaints and the investigation carried out by MK. This claim fails and is dismissed.

#### 4.18.2.2 Discrimination arising from –

4.18.2.2.1 "Something": Neither the terms of the Code, its applicability to C or its relevance to the report had anything whatsoever to do with C's disability. What arose in consequence of C's disability were the symptoms of pain, discomfort and fatigue which contributed to absences from work.

4.18.2.2.2 Unfavourable treatment: It was not unfavourable treatment for R to refer to or rely upon the Pharmacist Code of Ethics and Fitness to Practice in considering C's complaints about her working conditions. The unfavourable treatment was not because of anything that arose in consequence of C's disability but because it was appropriate to quote from it.

4.18.2.2.3 Justification: R's legitimate aim was to investigate a complaint about C's working conditions. In that context, the Code was an appropriate source of reference and it was entirely proportionate to quote the Code in the manner in which MK quoted it. This claim fails and is dismissed.

4.19 Complaint No. 18 – "Failing to follow the timing set out in the grievance procedure which caused C stress" and "failing to address C's complaints of discrimination and ill health in a timely or urgent manner and using 'diary commitments, staff-side availability, working on Lorenzo matters and other competing priorities' as reasons for lengthy delays". Both of these allegations relate to the grievance and first stage grievance appeal

(claims of indirect discrimination, harassment, discrimination arising from disability and constructive dismissal).

#### 4.19.1 The Facts –

4.19.1.1 The Tribunal has already found as fact that R failed to follow the grievance procedure, and specifically the timescales set out therein. R failed to address C's complaints within reasonable timescales as indicated in the procedure and the timescales are as set out in the above findings such that MK did not send the Dignity at Work investigation to C until 29 July 2016 in respect of a complaint made on 27 January 2016, and following C's resignation despite repeated reminders.

4.19.1.2 R did not prioritise C's complaints but rather procrastinated, prevaricated and obfuscated, prioritising many other matters above C's complaints because C was eventually seen by R as being supernumerary.

#### 4.19.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 18 in her Schedule of Complaints (C2) are as follows:

##### 4.19.2.1 Indirect discrimination –

4.19.2.1.1 C has established that R did not deal properly with her complaint but has not proved facts from which the Tribunal could conclude, having considered all the facts and circumstances, that R was operating a PCP in this regard. The actual PCP was the terms of the grievance procedure. It did not follow it. That is not the same as saying that it had a PCP of not following the procedure. For all the Tribunal knows, R's failure to follow its grievance, or indeed its Dignity at Work procedure, and to deal with the matter in the way it dealt with C's grievance was a one-off and does not amount to a PCP.

4.19.2.1.2 C has not proved facts from which the Tribunal could conclude, and there are no facts in general from which the Tribunal could conclude, that R's PCP with regard to grievances and Dignity at Work complaints puts or would put disabled people at a particular disadvantage when compared with persons

who are not so disabled, or that it put C particularly at that disadvantage.

4.19.2.1.3 The claim of indirect discrimination fails.

4.19.2.2 Harassment –

4.19.2.2.1 Conduct: The unwanted conduct was delay and failing to deal with the matter in a timely or urgent manner in accordance with the procedures.

4.19.2.2.2 Purpose/effect: The purpose of R's mismanagement of C's grievance was that it did not wish to deal with it properly and efficiently or to resolve it. It was content to let matters lie whilst C was away from work and it wished to get on with other matters in priority and to the exclusion of C, thus creating a harassing effect for C. The effect upon C was that she was frustrated, exasperated and upset to the point that she gave up the career that she wished to pursue. She felt a harassing effect. R's conduct was related to C's disability in that it was struggling to cope with her requirement for reasonable adjustments, including the difficulties she faced on the rotation to HGH, the restrictions on her activities and the complaints that she raised in respect of those matters. This was exacerbated by the implementation of Lorenzo which R considered necessitated further change and made C's position riskier despite earlier reassurances.

4.19.2.2.3 It was reasonable for C to feel a harassing effect in all the circumstances taking into account her perception. This was the end of a lengthy procedure of undermining and sidelining C and giving her the impression that she was surplus to requirement. That was R's impression and that is how they made C feel. Therefore, it was reasonable for her to feel the harassing effect.

4.19.2.3 Discrimination arising from disability –

4.19.2.3.1 "Something": The "something" that arose in consequence of C's disability was her need for reasonable adjustments which in turn led to her raising grievances about them.

4.19.2.3.2 Unfavourable treatment: It was unfavourable treatment for R not to deal with C's grievances as has previously been covered in the judgment above. C was entitled to expect R to deal with her grievance conscientiously and in a timely fashion but it did not do so.

4.19.2.3.3 R's legitimate aim as previously defined would have been served by R dealing appropriately with C's complaints by way of grievance and the additional complaints by way of the Dignity at Work policy. Doing nothing or doing what it did so lowly and without priority or due diligence was not a proportionate means of achieving R's legitimate aim.

4.20 Complaint No. 19 – This has been withdrawn and dismissed.

4.21 Complaint No. 20 – “The refusal to provide C with information about the types of errors she had allegedly made” (harassment, discrimination arising from disability).

4.21.1 The Facts –

4.21.1.1 Upon leaving R's employment C required information for her new employer and to support her re-registration. She required information and requested information regarding sample errors in her checking of pharmaceutical products and prescriptions. These records are routinely kept and relied upon for information, training and registration purposes. R had the information in its possession.

4.21.1.2 Had the information been provided to C she would have been better and sooner able to satisfy her new employer and registration requirements. R initially refused to disclose the documentation and eventually submitted it in a redacted form. The refusal had been ostensibly on the grounds of patient confidentiality. The redacted format obscured the identity of patients. The wilful refusal to make timely disclosure was a deliberate act on the part of R because of all the events that had occurred before. There were no significant or substantial errors shown on the report and that was the information that C needed. R was wary of making the disclosure as to how C would use the information and it also wished to protect the identity of patients.

4.21.2 Findings –

The Tribunal's unanimous findings applying the applicable law to the facts found in respect of each of C's complaint at number 20 in her Schedule of Complaints (C2) are as follows:

4.21.2.1 Harassment –

4.21.2.1.1 Unwanted conduct: The refusal to disclose the error report in a timely fashion.

4.21.2.1.2 Purpose/effect: The purpose was to protect the identity of patients and as a safeguard owing to uncertainty as to the purpose to which C would put the information, possibly with a view to litigation. The effect was to frustrate and exasperate C and to upset her. It did not create an intimidating, hostile, degrading, humiliating or offensive environment for C because she was not in the working environment, nor did it affect her dignity, and in any event, it was not related to C's disability. It was not related to the relevant protected characteristic of disability.

4.21.2.1.3 This claim fails.

4.21.2.2 Discrimination arising from disability –

4.21.2.2.1 "Something": What arose from C's disability has already been defined above and it was nothing to do with the error report or the requirements of C's new employer or professional registration.

4.21.2.2.2 Unfavourable treatment: It was unfavourable to withhold information initially and then favourable for it to be disclosed in a redacted format.

4.21.2.2.3 The unfavourable treatment was not because of anything arising because of C's disability.

4.21.2.2.4 The initial refusal and subsequent provision of the information in a redacted format was a proportionate means of achieving a legitimate aim, being the protection of patient confidentiality.

4.21.2.2.5 This claim fails and is dismissed.

5. Summary of successful claims/unsuccessful claims: Harassment s.26 EA – "H"; Discrimination arising s.15 EA – "Arising"; Indirect discrimination s.19 EA – "Indirect"; Constructive unfair dismissal – "CUD".



<b>Successful Claims – Claims Numbered in C2:</b>	<b>Unsuccessful claims – Claims Numbered in C2</b>
1 Indirect	1 RA
3 H	3 Arising
4 H	4 arising
5 H	5 arising
7 H	6 All CLAIMS
9 H	8 All CLAIMS
10 H/arising	9 arising
11 H/arising	14 H
12 H/arising	15 All claims
13 H/arising/CUD	17 All claims
14 Arising	18 indirect
16 Arising	20 H
18 H/arising	20 arising
CUD – several complaints were upheld in that R’s conduct seriously damaged the relationship of trust and confidence which cumulatively destroyed it.	

6. There were repeated incidents of discrimination from June 2015 until and after the date of C’s resignation; these acts were in and around the difficulty C experienced in fulfilling the full role of an ACPT, and one required to be part of a rota serving HGH, who displayed signs of fatigue that were at all times believed by R to be related to her disability (which was at very least likely to have been a contributory factor); the tribunal finds that there was an established course of conduct by R. The final act of discrimination in the series was R’s provision of the delayed investigation report which did not address C’s grievances appropriately and in a timely manner such that there was a continuing failure beyond its provision on 29<sup>th</sup> July 2016 and to the effective date of termination. C’s successful claims were presented in time; the tribunal would have found it just and equitable to extend time if C had been late in her presentation as problems arose over the rota which R failed to deal with and manage effectively despite C’s consistent efforts from June 2015, supported by OH advice. R let that matter linger and fester. Over time its inadvertent and unintentionally harassing behaviour changed to a more intimidating and intransigent stance and managerial inactivity, where C was considered supernumerary and a problem. R wanted to get on with the implementation of Lorenzo and to working its fully operational ACPTs under and with Lorenzo. C did not fit easily into R’s plans. In time R just wished to get on without her and this was apparent to C.

09.01.18  
Employment Judge T Vincent Ryan

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
19 January 2018

FOR THE TRIBUNAL OFFICE