EMPLOYMENT TRIBUNALS

Claimant: **Mrs Sian Frazer**

Respondent: **Harrogate & District NHS Foundation Trust**

Heard at: **Leeds**
On: **7-16 and (deliberations only) 17 and 18 November 2022**

Before: **Employment Judge Maidment**
Members: **Mr M Brewer**
Mr R Webb

Representation
Claimant: **Mr D Bunting, Counsel**
Respondent: **Mr N Grundy, Counsel**

RESERVED JUDGMENT

1. The claimant's complaint of discrimination arising from disability and disability related harassment succeeds in respect of the invitation to a final stage sickness review on 19 October 2020.

2. The claimant's remaining complaints of disability discrimination, harassment and victimisation all fail and are dismissed.

3. The claimant's complaint of unfair dismissal fails and is dismissed.

4. The claimant's complaint seeking damages for breach of contract fails and is dismissed.

REASONS

Issues

1. The claimant, it is accepted, was at all material times a disabled person by reason of her being impaired by a rheumatic condition and a form of chronic

inflammatory arthritis. She was employed by the respondent as a GP, with continuous employment commencing on 6 June 2005. Her employment terminated on her resignation on 2 June 2021.

2. She maintains that she was constructively dismissed and brings a complaint of ordinary unfair dismissal. Complaints had been pursued of automatically unfair dismissal for health and safety reasons and for making protected disclosures, but were withdrawn in advance of final submissions at this hearing. The claimant also maintains that her dismissal was in breach of contract and seeks damages arising out of such wrongful dismissal. She brings complaints of disability discrimination and victimisation. It was clarified that no claim of a discriminatory dismissal is pursued.

3. The claims had been identified following a process of case management and were most recently summarised in case management orders issued following a preliminary hearing on 9 February 2022 before Employment Judge O'Rourke. At the commencement of this hearing the tribunal asked Mr Bunting to provide written clarification of the reasonable adjustments it was to be said that the respondent ought to have made, a list of those alleged acts of the respondent relied upon in the complaint of constructive dismissal and further information (now no longer relevant) relating to the claims of automatic unfair dismissal. Those were provided to the tribunal by email of 9 November 2022.

4. The first complaint of a failure to make reasonable adjustments is based on a PCP of expecting staff to carry out telephone triage work from home with no home risk assessment or suitable equipment from July 2020 to August 2020. It is said that this put the claimant at a substantial disadvantage because she was unable to mobilise adequately, leading to a worsening of her symptoms and an inability to sustain normal working hours.

5. It has been clarified now that the reasonable adjustments which it is said should have been made were: providing a hands free headset that worked, providing effective Wi-Fi calling facilities to enable her to use the respondent's telephone in her home and move about while doing so, providing a standing desk, providing shorter shifts, providing weekday evening shifts and providing frequent breaks.

6. The next reasonable adjustment claim is that the provision of the following auxiliary aids would have mitigated the same disadvantage the claimant suffered: providing a headset that worked, providing effective Wi-Fi calling facilities and providing a standing desk.

7. The third complaint of reasonable adjustments is reliant on a PCP of expecting or requiring staff to attend work in the workplace from around September 2020 which is said to have put the claimant at a substantial disadvantage because of the risk to her health from Covid. Whilst the issues identified in the case management process referred to a reasonable adjustment of allowing her to continue working from home or to work in a Covid secure setting, the case is now put on the basis of a suggested reasonable adjustment of agreeing to pay

the claimant the hourly rate for night shifts if she continued to work from home, which Mr Bunting accepts the respondent did from 6 October 2020.

8. There are then complaints of unfavourable treatment because of something arising in consequence of disability.

9. Firstly, the claimant relies as unfavourable treatment on her being wrongly advised by Mrs Reid and Ms Callow from 21 August until 6 October 2020 that her hourly rate of pay would be reduced if she remained in the telephone triage role. In terms of the something arising from disability, it was put in submissions that the claimant had to work remotely due to her disability, because she was on immunosuppressant medication. Her remote working gave rise to her not working on nights, as no nightshifts were available for her.

10. Secondly, the claimant maintains that she was treated unfavourably by the respondent providing delayed, evasive or inaccurate responses in correspondence to her queries regarding health and safety and pay on 9 September (Ms Callow), 11 September (Mrs Reid), 1 October (Mrs Wilkinson) and 6 October (Ms Callow and Mrs Reid). The something arising in consequence of disability is said to have been the claimant's persistence in raising queries about risk assessments and pay because of her concerns about her health arising from her immune suppressed status. It is said that the respondent's treatment of her was deliberate in the hope that she would "go away".

11. The third claim of unfavourable treatment is her being invited to a final absence review meeting which was said to arise due to the claimant's absence from work, which in turn was due to her fears about her health (arising out of her disability) and which led her to her suggesting she apply for ill-health retirement. It is said that the respondent failed to comply with its Managing Attendance Policy after the claimant suggested she apply for ill-health retirement by moving straight to a final stage sickness absence review and/or threatening to move to a capability dismissal.

12. Fourthly it is said that the respondent failed substantively to act on the claimant's grievance in a timely manner from 26 November 2020 until after 17 February 2021. The claimant's case is that the respondent deliberately delayed in the hope that the claimant's ill-health retirement process (which had arisen because of the claimant's disability) would "overtake" the grievance process. Again, the respondent hoped the claimant would "go away".

13. A fifth complaint under Section 15 of the Equality Act 2010 (relating to unreasonable conclusions in the grievance and appeal process) was withdrawn prior to this final hearing.

14. The claimant separately brings complaints of disability related harassment, clarified in final submissions in the terms set out below.

15. Firstly, she relies on Mrs Reid suggesting on or around 21 July 2020 that Dr Shepherd had said, during the claimant's shielding period, that she was at no more at risk of catching Covid at work than when going to the supermarket.

16. Secondly, she refers to Dan Walker emailing her on 2 September 2020 asking if she would be happy to lose 7.5 hours of annual leave to make up for her hours having been less than her 90 contracted hours during August 2020 to ensure that her August pay was not impacted.

17. Thirdly, the claimant complains of Mrs Reid's email to Mr Jackson on 11 September 2020 to the effect that Mrs Reid was under the impression that GPs had been advised to return to normal working practice as far as possible as part of the national recovery plan, effectively placing pressure on the claimant to return to in person working.

18. Fourthly, the claimant raises, as an act of disability related harassment, the invitation to the final stage sickness review on 19 October 2020.

19. The claimant brings a complaint of victimisation. The protected acts relied upon are her communications to the Freedom to Speak Up Guardian on or around 23 October 2020 and her raising of a grievance on 26 November 2020. Mr Bunting recognised in submissions that realistically her complaint relates to the grievance, which is accepted by the respondent to amount to a protected act. In terms then of detrimental treatment because of that protected act, the claimant relies on a failure to act on her grievance in a timely way, inadequate grievance/appeal investigation and, finally, unsupportable grievance and appeal conclusions.

20. In the claim of ordinary unfair dismissal, the claimant relies on a number of matters as separately or cumulatively amounting to a breach of trust and confidence as follows:

    20.1. The 21 July 2020 suggestion from Mrs Reid that Dr Shepherd had said that the claimant was no more at risk of catching Covid at work than when going to the supermarket

    20.2. The respondent advising the claimant from 21 August 2020 until 6 October 2020 that her pay would be reduced if she remained in the telephone triage role

    20.3. Mr Walker asking if she would be happy to lose 7.5 hours of annual leave on 2 September to make up for her shortfall in contracted hours

    20.4. Mrs Reid's email of 11 September saying that she was under the impression that GPs had been advised to return to normal working practice as far as possible as part of national recovery plans

20.5. The respondent using an incorrect risk assessment on the claimant's return to work on 14 September 2020

20.6. The respondent providing delayed, evasive or inaccurate responses to the claimant's queries regarding health and safety and pay

20.7. The respondent inviting the claimant to a final stage sickness review meeting on 19 October 2020

20.8. The respondent failing to act on the claimant's grievance in a timely manner from 26 November 2020 until after 17 February 2021

20.9. The respondent failing to adequately investigate the grievance and reaching unsupportable conclusions

21. The respondent contends that, insofar as the acts of discrimination complained of took place prior to the 3 month time limit (adjusted for ACAS early conciliation), the tribunal does not have jurisdiction to consider them. It was denied that the allegations form part of a continuing act or that it would be just and equitable for the tribunal to extend time. In submissions it was raised, on behalf of the claimant, that there was a form of concession by the respondent in respect of the reasonable adjustments complaint, not only that it had knowledge of disability, but also of the particular disadvantage to which the claimant was placed. Mr Bunting accepted that the email of 25 January 2022 upon which he relied was not clearly worded and the respondent has clearly throughout pursued a defence, to the claimant's knowledge, that the duty did not necessarily arise. Knowledge of disadvantage was clearly a live issue.

Evidence

22. The tribunal had before it an agreed bundle of documents numbering some 1919 pages, including a number of documents added by agreement: a record of shifts worked by the claimant and a letter from NHS England and NHS Improvement dated 24 June 2020.

23. The tribunal spent the first day of the hearing privately reading through the witness statement evidence and relevant documentation. On that basis, each witness was able to simply confirm their written statement and then, subject to brief supplementary questions, be open to be cross-examined.

24. The tribunal heard firstly from the claimant who gave her evidence with reference to a written witness statement and additional witness statement. The tribunal interposed 2 witnesses called on her behalf, Dr Elizabeth Barrett and Dr James Uttley, GPs working in the respondent's out of hours service. Dr Uttley also served as a BMA representative. On behalf of the respondent, the tribunal then heard from Dr Simon Miers, GP and Clinical Lead in the GP out of hours service, Mrs Caroline Reid, Service Manager – Urgent Care, Dr Matthew Shepherd, Clinical Director - Long Term and Unscheduled Care, Ms

Amy Callow, formerly Human Resources Business Partner, Mrs Angela Wilkinson, Director of Workforce Development, Mrs Helen Siewruk-Barnes, General Manager for Urgent and Emergency Care, Michael Forster, Operational Director – Community and Children's Directorate and Dr Sarah Sherliker, Deputy Medical Director.

25. Having considered all relevant evidence, the tribunal makes the findings of fact set out below.

Facts

26. The background to these claims is the coronavirus pandemic which no one would suggest was anything other than unprecedented and, to a significant extent in terms of certainly how the pandemic developed, unanticipated. Those involved in the healthcare sector were most significantly affected by it. They were essentially in the eye of the storm. The respondent is an NHS trust with hospitals and responsibility for some elements of primary care. It reacted by setting up a Covid group dealing with communications across 7 days a week and from 8am to 10pm during weekdays. Governmental bodies and national NHS emergency planning groups generated substantial and inevitably ever-changing rafts of information to the respondent which had to be reviewed and passed on to the managers in relevant areas, but only once assessed so as to ensure a fuller understanding and consistency. Each directorate within the respondent was managed by a triumvirate led by a clinical director. They passed on information through daily briefings. Staff in many areas were under considerable pressure and inevitably taken away from their ordinary primary responsibilities. The respondent employed around 5000 people. A specific Covid HR email inbox was set up for them as a point of contact and was monitored by 2 HR managers, primarily Ms Amy Callow, on an almost constant basis. Staff in HR were unable to take holidays until the Autumn. Mrs Wilkinson was a recent appointment to head up the HR function (and 7 other portfolios), but until 6 October 2020 had to operate as direct line manager of the operational HR managers in the absence of a head of HR, who only took up her post on that date. Mrs Wilkinson worked 60-70 hours per week from the onset of the pandemic with no leave until September 2020.

27. The claimant was employed by the respondent as a GP in its out of hours service ("GPOOH"). Professionally, she was known as Dr Gilchrist. She was based at the Friarage Hospital in Northallerton and worked lone nightshifts there across 29.88 hours per week. The claimant was paid a salary of £131,413.40 per annum. Each 4th week she spent carrying out separate responsibilities as part of the respondent's performance review team, assessing the interactions of other GPs with their patients. This involved listening to a sample of patient calls made by other GPs and the paperwork they generated to ensure quality standards. From 2005, she had served as a workplace representative of the British Medical Association.

28. The claimant reported to Caroline Reid as Service Manager. Dr Simon Miers, a personal friend of the claimant, was Clinical Lead for the respondent's GPOOH service.

29. In August 2016, the claimant was diagnosed with a rheumatic condition and subsequently with a form of chronic inflammatory arthritis. This caused her acute pain and stiffness, especially when she was seated or standing for prolonged periods. She also suffered from fatigue as a result of her condition, which was made worse by disrupted patterns of sleep and stress. Without medication, the claimant's functioning would be severely limited. The medication, however, used to treat her condition causes severe immune suppression which leaves her at increased risk of infection, which may in turn be difficult to detect and treat.

30. In the out of hours service, the majority of patients dealt with by the claimant had been referred to her after their initial phone call to the NHS 111 telephone service. Typically, the GP would be notified electronically by NHS 111 if they considered that a patient who had called needed a GP. The calls were colour-coded as being either routine or emergency. It was then for the OOH GP to call the patient back. There could also be referrals to her from the Urgent Treatment Centre operated by the South Tees Hospital Trust located at the Friarage Hospital, from a district nurse or paramedics. There were a smaller number of un-triaged walk-ins to the centre. Where a patient was unfit to come into the centre, the claimant also had to undertake visits to a patient's home or to, for instance, a care home where a patient might reside. The claimant worked alongside a driver who would take her out on any home visits and who also doubled up as a receptionist for the out of hours doctor.

31. The GPOOH service had its own room to use to see patients located in the x-ray department of the Friarage Hospital. During the Covid pandemic, the service also had access to a room in the Urgent Treatment Centre of the South Tees Trust where GPs could see patients with respiratory issues, known as the "red hot hub".

32. GPs working in the GPOOH service were paid differing hourly rates dependent upon whether the work was being done on weekdays, weekends or overnight. Overnight shifts attracted the highest premium.

33. The claimant's job plan provided for 3 midweek nights, working a 9 hour shift from 11pm to 9am on Tuesday, Wednesday and Thursday. On every 4th week the claimant worked an overnight shift on the Wednesday and then undertook the performance reviews of other GPs (from home) for her remaining hours that week. The claimant accepted that midweek nights were generally quieter than those on Fridays and at weekends. The claimant was allowed to sleep during her shifts, if not busy with patients, albeit the only bed available was that in the treatment room. She was, when working those shifts in Northallerton, the lone GP there. The respondent operated a separate (larger) out of hours service based in Harrogate.

34. The tribunal has seen a breakdown of work undertaken by the claimant in the GPOOH service in Northallerton in January up to 20 February 2020. During that period patient interactions varied from 2 – 14 on each nightshift. In 9 out of the 16 shifts worked, there were 5 or fewer patient interactions. In 9 of those shifts there were no patient visits to the centre. On one shift the claimant undertook 4 home visits but there were 4 shifts when none were undertaken - the average was 2 per shift.

35. The claimant told the tribunal that she had managed working the overnight shifts, despite her physical impairment, as there was a variety of work and, in particular, she was able to get up and wander around. Nevertheless, she said that she had been unwell for the previous 4 years and at times had been in a lot of pain. The claimant had shared with Dr Miers how much trouble her joint pains were causing her, the treatment had not been particularly effective and she felt that it was only a matter of time before she had to retire on health grounds unless her symptoms improved. The claimant confirmed that her rheumatology consultant had mentioned retirement to her as well as Dr Miers. The tribunal accepts Dr Miers' evidence. The claimant's evidence was that after a particular meeting Dr Miers referred to the claimant seeming grumpy and questioning whether it was time for her to think about retirement, to which the claimant replied that her consultant had mentioned that to her. There is no evidence that Dr Miers' comment had been in any way untoward. The claimant raised in cross-examination that it was not a friendly comment and had been made in an open meeting which resulted in her reporting the comment to the previous Clinical Director. The tribunal has seen no evidence of this and no evidence of a deterioration of a friendly relationship she clearly had with Dr Miers. She said that she was unaware of any option other than to go off sick or take retirement. Whilst the claimant had served as a BMA representative, she told the tribunal that she was not familiar with all of the respondent's policies and that rather than advise others with employment queries personally, she would refer them to the BMA. She said that she had never been informed that the respondent could help her remain in work. She said that she did not appreciate the nature of the duty to make reasonable adjustments. The tribunal cannot accept that level of lack of knowledge in someone in the claimant's position.

36. From 25 February 2020, the claimant was absent due to sickness following ACL reconstructive surgery. However, whilst recovering she did undertake performance review work from home. Such work had always been undertaken from home. She had told Mrs Reid once that she was able to mobilise whilst doing this work, including doing the ironing when listening to recorded GP calls.

37. From 26 March, the UK entered into the first period of lockdown due to the coronavirus pandemic. Because of the effect the medication taken by the claimant had on her immune system, she was classed as clinically extremely vulnerable and advised to shield. On 25 March, the claimant emailed Mrs Reid and Dr Miers attaching the "official letter" regarding self-isolation from rheumatology saying that it appeared that she was at high risk and had been

advised to stay indoors. She said that she was happy to conduct remote telephone triage for the GPOOH service. The claimant described herself to the tribunal as desperate to help.

38. The claimant was then living in what she described to the tribunal as her principal residence in the Lake District, describing how ordinarily she would commute over to North Yorkshire to undertake her ordinary GPOOH shifts in Northallerton, but stay at her other home in York in between shifts.

39. Whilst shielding, the claimant continued to undertake the performance review work, including taking on additional work of that nature to free up other GPs on the team who were still performing face-to-face consultations.

40. On 9 April, the respondent's Covid HR team emailed the claimant confirming that she was recorded as medically isolating and due to return on 19 June (a date when it was then expected that the direction to shield would be lifted). She was told that she would be paid at full pay. A subsequent update sent to the claimant revised the expected return to work date to 1 July. On 26 June, the HR business partner for the GPOOH service, Amy Callow, emailed to Mrs Reid a letter from Angela Wilkinson, Director of Workforce and Organisational Development, referring to an anticipation of shielding ending from 1 August, from which point clinically vulnerable people who were shielding would be able to return to work, if they could not work from home. Ms Callow told the tribunal that when shielding ended, the respondent was looking to a return to business as usual. Mrs Siewruk-Barnes said that the focus for her, looking after 600 employees, including those who reported to her through Mrs Reid, was not to get people back per se, but to ensure that they could work safely. There is no evidence of a pressing need to return OOH GPs to work, not least in circumstances where there was a bank of GPs wishing to undertake that work. Mrs Reid was asked to undertake individual risk assessment with each member of her team to which this applied to support them to return to work, implement adjustments or arrange redeployment. Mrs Reid was given a deadline to complete those assessments by 19 July 2020. An extract from HR's spreadsheet of those shielding included 2 GPs, the claimant and one other. Mrs Reid was told that a webinar had been arranged to take place on 3 July to provide advice regarding the undertaking of those risk assessments. She did not, however, attend.

41. Mrs Reid conducted that assessment with the claimant remotely on 2 July 2020. This was an assessment of risk of the claimant working in the GPOOH service. The risk assessment form used (and which was provided to Mrs Reid for this purpose) specifically referred to BAME staff with potential work-related exposure to Covid-19, but the same form was used for workers aged over 50 and those identified as clinically vulnerable. Where an area of work was identified as one where patients with the coronavirus were unlikely to be assessed or admitted, this signified a low risk with no need to restrict the employee. An area of work where patients with coronavirus were expected to be assessed or admitted was classified as a moderate risk, where

redeployment to a lower risk area was to be considered, if possible. Mrs Reid identified the claimant as falling into both a low and moderate risk work area. She also ticked the box signifying that the claimant had been identified as clinically extremely vulnerable. The form noted that such employees should not attend the workplace and that working from home was permitted, if possible, in their role.

42. Questions attached to the form identified the claimant's physical disability and noted that she had been referred to occupational health that day. It was noted that the claimant was not working in moderate or high risk areas, but subsequently that she could not maintain more than 2m distance from a patient when undertaking patient examinations. It was recorded that the claimant's role could not be done at home, although a more limited number of hours could be – a reference to telephone triage. It was recorded that the claimant had not yet been trained on the use of appropriate PPE.

43. The claimant subsequently on 10 July signed the risk assessment. She told the tribunal that she thought it was a fair assessment at that time.

44. Mrs Reid undertook around 50 similar individual risk assessments for staff under her management.

45. The claimant started, however, undertaking telephone triage work from home from 4 July until 30 August, after a test shift on 27 June. During that period, she undertook 20 shifts typically of 5 hours duration, but including 5 shifts of 7 hours. Mrs Reid emailed the claimant with a list of available shifts covering afternoons and evenings up until 11pm. The claimant also took some days of annual leave during this period.

46. The respondent had not previously operated a system whereby GPs could work from home. The claimant emailed Mrs Reid on 15 June saying that she had received a phone and headset provided for her use and referring to her not yet having had confirmation about "smartcard access". She expressed the hope to be back at work in August, if Government guidance was relaxed. The claimant told the tribunal that her headset did not work and she used the loudspeaker on her phone. Mrs Reid had no knowledge of that. No DSE assessments were undertaken for people working at home. Mrs Reid said that she did not consider it necessary to provide any guidance to more senior colleagues who already, prior to the pandemic, worked from home to some extent.

47. The claimant confirmed that she understood that she would not lose out financially for doing these telephone triage shifts as she would still be in receipt of the overnight allowance regardless of the shifts worked. When the claimant submitted a grievance on 26 November 2021, she described Mrs Reid as supportive and referred to the extensive help of IT. She said that this was not without issues but "we did the best we could at the time". Nevertheless, she described that her working shifts caused a great deal of pain and stiffness due

to her arthritis. The claimant told the tribunal that she believed that Mrs Reid knew that "I'd be ill". In her witness statement she described her pain and stiffness being relieved somewhat through movement and that in 2020 it usually lasted for a few hours after waking. She, however, rejected the proposition that that was why she had preferred to perform the telephone triage work on afternoons and evenings. She then said that the pain and stiffness became worse through sitting in the middle of the day or evening. When put to her that she had the opportunity to stand up and stretch during her shift, she said that depended on what the individual shift was like, referring to urgent calls having to be made within 20 minutes and sometimes having 5 to get through at any one time. She described the work at weekends as relentless.

48. She agreed that the time spent on each individual call varied. Although it could be for half an hour if she was dealing with patients with mental health problems, most were significantly shorter. She used her own chair and confirmed that she did not need any back support, but rather needed to stand up and move for a couple of minutes periodically.

49. The shift records show that the claimant worked 20 telephone triage shifts from 4 July to 30 August. During half of those shifts the number of calls she made was in single figures. The maximum on any shift was 25. The triage service the claimant provided was for the Harrogate GPOOH service. On any one shift the claimant worked, there were a number of other GPs making calls. Through NHS 111, a list of calls for the GPs to make was provided electronically with each call coded as being either routine or urgent. The GPs then picked a call to make to a patient from the list. There were no incoming calls. There was no monitoring of GPs in terms of the number of calls they made or speed of response. In such circumstances, the tribunal does not accept that the claimant was not able whenever she wished to take some time to get out of her chair, move around and stretch. Any GP performing this work at an out of hours centre was able to take periodic breaks and do likewise. Dr Miers, who was well aware of the claimant's arthritis, never got the impression that she was struggling to do this work. He considered that her subsequent suggestion (described below) that she might do 2 longer shifts, meant to him, in all likelihood, her working 10 hour shifts. That, he said, did not suggest that she would struggle to do telephone triage work for 5 hours. He was clear that the claimant was able to take breaks whenever she required with no pressure from himself or Mrs Reid in terms of output. The tribunal accepts that to be the case.

50. On 14 July the claimant underwent a telephone assessment with occupational health, arranged for all those who were thought to be at particular risk from the coronavirus. The occupational health physician, Dr Harris, referred to the claimant as currently carrying out remote triage work. He noted that, with regard to the end of the shielding, the government guidance was that any workers who could work remotely should continue to do so. He continued: "if this is an option that Dr Gilchrist can carry out remote working, this should be given serious consideration as it will be the safest option for her." If that was not felt to be viable, his advice was that the claimant remained based in Northallerton, it

being a quieter role where the claimant would have better control of her work environment and less contact with patients and colleagues. The claimant told the tribunal that she was happy to accept this opinion of Dr Harris. He said that he thought that her working out of Harrogate would potentially increase her risk of coming into contact with Covid patients and would be his least preferred option. The claimant agreed that she did not flag up to Dr Harris any difficulties she was experiencing because of her disability in carrying out the telephone triage work. She said that she thought she was simply being assessed for a Covid risk. Dr Sherliker was strongly of the view that any clinician, including occupational health, would seek to understand the patient as a whole and not limit themselves to any particular aspect of their health. That was standard practice which indeed the claimant herself would have adopted. The tribunal is surprised that the claimant did not raise any difficulties she was experiencing of a physical nature with the at home telephone triage role. It would have expected her to do so.

51. On 21 July the claimant had a relatively brief telephone conversation with Mrs Reid about the possibility of returning to face-to-face work. Mrs Reid asked the claimant what she wanted to do. During the conversation Mrs Reid said that Dr Shepherd, clinical director, had stated that the claimant was at no more risk of catching Covid at work than when going to the supermarket and that he was not aware of any doctors who were shielding. The comment had been originally made by Dr Shepherd at or after a daily briefing meeting (no one can be certain) in response to a query raised by Mrs Reid about the claimant shielding. Mrs Reid believed that the context was with reference to the PPE available in a healthcare setting, but not in a supermarket. Mrs Reid thought this to be a helpful analogy, which is why she repeated it. Dr Shepherd had said that he was not aware of any other doctor shielding in his directorate – on seeing reference to the medication taken by the claimant, he understood that shielding was appropriate for her. Dr Shepherd said that with hindsight he would regret using the supermarket analogy with reference to someone who had been shielding and hadn't been able to go out. For such people, he accepted that the comment could be viewed as insensitive. Mrs Reid's recollection was that she referred to the reason for Mr Shepherd's opinion as being the availability of PPE in the hospital environment. In circumstances where the claimant simply cannot recall whether that was said (that was her evidence), the tribunal accepts that it is more likely than not that it was. The claimant described herself to the tribunal as having been "dumbstruck" from such a comment by her clinical director in circumstances where she had not been in a supermarket for 4 months because of her shielding.

52. Mrs Reid spoke to Dr Shepherd shortly after this conversation and emailed the claimant to relay their further thoughts. She said: "… He is not aware of any doctor shielding, he said my reflection of his thoughts are fair! He acknowledges you are at a significant risk of worse symptoms if you were to get COVID."

53. Mrs Reid's response is indicative of the claimant expressing some surprise at the aforementioned supermarket comment and her feeling the need to seek confirmation of what Dr Shepherd had said to clarify this then to the claimant.

54. Mrs Reid continued in the email that the claimant could be provided with a supply of gowns to wear and that Dr Shepherd had emphasised that PPE was the key to keeping her safe. Mrs Reid maintains that the claimant was told that she could use the resuscitation masks, which provided enhanced protection, as the claimant saw fit. The claimant's position was that she had been told that those masks were for resuscitation purposes only and multiple masks were not in fact provided for at the workplace. The tribunal has not resolved this factual dispute. Mrs Reid then said: "if you prefer to extend remote working it would help part of the frustration if we share with colleagues that you are working remotely due to risk factors if you were happy for us to do so. Just thought I would share to help you come to a decision."

55. The claimant replied on 21 July thanking Mrs Reid for "that information". She agreed in cross-examination that she did not say that she was either astounded or offended by the supermarket comment.

56. The tribunal notes that another clinically vulnerable GP, Dr Barrett, had raised with Mrs Reid her own concerns regarding infection control and PPE on or around 31 March 2020. During a telephone call they held, Mrs Reid had stated that they were no more at risk from coronavirus working in the GPOOH, compared to working at Tesco. On 1 April 2020, Dr Barrett emailed Mrs Reid saying that she was taken aback by her statement to which Mrs Reid responded that it was senior clinical colleagues who had made the supermarket comment and that it was not said to cause offence.

57. The claimant also emailed Dr Miers on the afternoon of 21 July, but without any reference to the supermarket comment. She referred to Mrs Reid having a copy of the occupational health report which suggested that telephone triage was the safest option, but face-to-face work was not ruled out. She expressed the view that unfortunately the risk assessments were all a little vague. She recognised that telephone triage was not a long-term option given the number of hours she worked. She referred to Mrs Reid as "kindly" offering to provide her with a gown to wear as well as other PPE. The claimant said that she thought her main problem might be knowing when to step back from work if there were an increase in Covid cases, especially in the winter. The claimant said that she really didn't want her career to end like this. At the moment, she felt the way to go was to await a more detailed risk assessment and watch the number of cases over August, while exploring retirement. If the Covid cases continued to fall and with a favourable risk assessment, she might be able to plan to do face-to-face work in September.

58. The claimant accepted that, when she lodged her November grievance, she did not refer to the supermarket comment. She told the tribunal that, whilst she

was being legally advised at this point, she had been told to put the grievance in her own words and had thought that she would get an opportunity to give the person conducting the grievance further information. She said that she did not get enough time to raise everything she wanted, however. She said that when she appealed the grievance outcome, she did raise the comment. Whilst the claimant said that her grievance was a brief summary, the tribunal has noted that it took up 10 pages and did go into significant detail about how she had been treated and her areas of concern.

59. On 22 July, Mrs Reid emailed the claimant saying she was happy to extend the option for her to carry out telephone triage work, asking her to call her to agree shifts and to discuss whether she should share with colleagues that the extension of her role was due to additional risk factors. The claimant responded saying that she was happy for Mrs Reid to do the wording of any message to colleagues. She said that she was happy for them to know that she was on a number of immune suppressants. The claimant referred to some ongoing technical issues.

60. On 27 July, the claimant emailed Amy Callow of HR to find out what her options were for retirement. She described her substantive role and that Mrs Reid had "kindly set up remote working me to do telephone triage". She asked how long the respondent would offer telephone triage work rather than face-to-face work. She also asked about the process for ill health retirement, saying that her rheumatologist had suggested this to her pre-Covid.

61. On 2 August, the claimant emailed Mrs Reid saying that she was getting "slightly frustrated" with telephone triage. She firstly raised the poor phone reception despite having tried a booster and with no facility on the phone for making Wi-Fi calls. Mrs Reid forwarded the email to the IT team dedicated to servicing people working from home. The claimant raised that the Electronic Prescription Service was not working and queried whether the laptop, which had been ordered for her, had arrived yet. There was a general issue for everyone regarding the electronic prescription system. It meant that an OOH GP working from home would have to call a colleague and ask them to prescribe any medication. Mrs Reid described GPs as used to being autonomous workers and that the claimant had described her frustration in this respect. The claimant was using an old laptop of her husband. She had been able to download the Adastra system onto it which enabled her to answer calls, in the same manner as she would have had she been if working at the Friarage Hospital. She would type notes on the computer during a call or make notes in writing which she then typed up before she moved on to the next call. She told the tribunal that the only problem was with electronic prescribing.

62. The claimant raised in her subsequent grievance that there had been no risk assessment of her home working environment while she was carrying out this telephone triage work. Before the tribunal, she said that she presumed that this could have been done virtually, appreciating that, given where she had based herself and the fact she was shielding, no one was going to come out to her

home. She accepted that she had no knowledge of the nature of risk assessments or what might have been undertaken for her benefit. She said that she had no knowledge as to what might have been recommended had an assessment taken place, but assumed it would have been something to do with her seating and the computer height. She said that she had tried out to different chairs whilst working from home and did what she could to make the environment comfortable.

63. The claimant agreed that to carry out telephone triage work overnight, this would have had to have been for more than a single GPOOH service to make it viable and that there was a need for anyone working those hours in the GPOOH service to be able to see patients in person. She accepted that the shifts she worked were shorter than those which she previously worked overnight. When put to her that she did not feel that she should only be doing much shorter shifts of 2 – 3 hours, she said that she did what she was asked and tried to do her best.

64. Mrs Reid accepted the claimant's account that in a phone call, probably in late July/early August, the claimant said that her colleagues deserved medals for carrying out the intensity of work and that she herself had to "crawl out of my chair" after being seated for 5 or 7 hours because of her condition. The claimant did not elaborate and this was, on the evidence, an isolated comment made in passing. Mrs Reid (reasonably) did not understand that the claimant was raising an issue of concern. She herself understood how the claimant felt as Mrs Reid sometimes felt pain and discomfort after being seated for a prolonged period due to suffering from a bad back.

65. The claimant agreed that she continued to mull over her options including possible ill-health retirement. In response to a request for information on her options, she received an email from HR on 4 August which included an extract from a section of the respondent's managing attendance policies on retirement on the grounds of ill-health.

66. On 12 August, the claimant emailed Mrs Reid and Dr Miers, thanking them for being patient with her regarding a return to work and saying that she was still mulling over what to do. She attached further guidance from rheumatology suggesting a return to Covid secure cold or super cold areas "which obviously we do not have". She said that the rheumatology consultant suggested telephone triage which was of course the work the claimant was already doing. She asked whether, if she was permitted to continue doing telephone triage, there was a set pattern of work she could do, referring to her having worked all but one weekend in July/August. She referred to Dr Miers having suggested her replacing one of the evening Harrogate GPs doing some telephone shifts. She referred to a forthcoming fit test for a resuscitation mask so that she was ready for face-to-face work, but again asked them to consider whether a more predictable pattern of work was available to her. The claimant accepted in cross-examination that she was not within this message expressing that the

telephone triage work was causing her physical problems or exacerbating her disability.

67. On 13 August, Dr Miers emailed the claimant with a further "thought" which he considered might help her, querying whether she might like to undertake some hours in a GP surgery either on telephone consultations only or a mix of that and seeing patients. Alternatively, telephone consultations might be done from home. Dr Miers referred to the surgery sites as "cold" sites, as potential Covid patients were seen elsewhere. The claimant replied saying that the suggestion was kind of him, but she felt de-skilled given the length of time since she had worked in a GP practice. The claimant did not answer directly a question in cross-examination that she had not said that doing telephone consultations from home or at the surgery would be unsuitable as exacerbating her disability. She had not.

68. The claimant then on 13 August emailed Mrs Reid and Dr Miers with the suggestion that she reduced her hours by half on a temporary basis to 45 hours each month over 5 x 9 hour shifts. She said that she would take half pay for half hours "and then we can see how the next few months pan out over the winter months or until a vaccine arrives or my guidance is altered. I think I would prefer to do this rather than just take unpaid leave…" The claimant referred in this email to an acceptable shift pattern perhaps including 2 long days over the weekend in between the first and second week on the rota. The tribunal considers, on balance, that this was a reference to shifts at least, and more likely than not, longer than 9 hours.

69. There is a dispute then between the claimant and Mrs Reid as to what Mrs Reid told her this meant to her hourly rate of pay i.e. that it would not attract the overnight premium as previously. Nevertheless, the claimant accepts that she was told that by 21 August. Mrs Reid completed a staff details change form asking for the adjustment for the claimant to 45 hours per month for 6 months until 28 February 2021 (sic). The claimant's evidence was that she did not appreciate that the form provided for a 6 month change and was not told that during her conversation with Mrs Reid on 21 August. The tribunal accepts that Mrs Reid considered that whilst, not exact, the claimant was seeking a change until after the winter months which, from the date of their discussions, represented a 6 month period up to the end of February.

70. The claimant did have a conversation with Mrs Reid on 21 August. Afterwards, that evening, the claimant emailed Mrs Reid, Ms Callow and Dr Miers. She firstly thanked all of them for their time and patience with her. She said it had been extremely difficult to make a decision regarding her work given the risk it placed on her health. She referred to them knowing that the rheumatology consultant had advised that she could return to a cold or super cold area seeing patients with a negative Covid test. She said that her suggested change in hours and roles was an effort to be fair to both the respondent and herself. Unfortunately, she now felt unable to take up this role "due to the huge reduction in income…". She said that she was sorry to cause "all this extra

work" but that she had not been aware that her rate of pay would be reduced so much. She said she was quite happy to take some unpaid leave, but was not aware that her hourly rate would be further reduced. She did not consider her workplace to be Covid secure, but said that she felt she had little alternative but to return to her normal night shifts in Northallerton from 1 September. She was happy to take the first 2 weeks of September as annual leave returning then to Northallerton after being fit tested.

71. The claimant told the tribunal that she was confused regarding the pay position Mrs Reid explained what would amount to a cut of around 30% of her pre-pandemic pay. The claimant said that she had received a BMA briefing which said that shielding staff should not be disadvantaged in terms of pay. She agreed that she had not provided or referred the respondent to these briefing notes, but said she had asked if Mrs Reid had checked the pay position with HR. When asked in cross-examination if she believed that the statement regarding pay was a deliberate act, effectively to cause her to leave, she said that she could not understand why the respondent would reduce her pay when they knew she had been ill and was shielding.

72. Mrs Reid had been advised by Ms Callow that pay protection would not apply. The tribunal also notes that, when interviewed as part of the grievance investigation, Mrs Reid referred to a conversation with Dr Shepherd, who did not ethically feel it right for one OOH GP to be getting paid an overnight rate when others were not. This was, however, after Mrs Reid had received the HR advice. The tribunal accepts Ms Callow's evidence that she understood that a risk assessment had been done such that the claimant could go back to her substantive role, but the claimant had requested that she go into a different role, rather than the respondent itself saying that she must do so. The FAQ dealing with pay protection referred to the respondent redeploying an employee or where an employee couldn't go back to their substantive role because of their clinical vulnerability. She thought that appropriate PPE and support was in place to allow the claimant to return to her substantive role, but an alternative had been identified which the claimant wanted to undertake as her preferred option. Ms Callow understood that this was a permanent arrangement. That was why she advised as she did.

73. In a further email to Dr Miers, copied to Mrs Reid, of 2 September the claimant referred to "doing 90 hours of telephone triage is proving extremely difficult not only because of frustration with the IT but also sitting in a chair for 5 hours at a time is "not good for my arthritis."

74. The claimant was also sent on 2 September an email from Dan Walker, rota coordinator for the GPOOH service. He said that he had looked at her August hours and they were 7.5 hours short of her 90 hours contract. He asked if she would be happy to use up the shortfall as annual leave to ensure her August pay was not impacted. She responded that she would not be happy as she had worked the hours given to her by Mrs Reid. She said she was not offered the opportunity to work her full hours. The claimant's argument was in fact

accepted and she received her full pay for the month of August. She accepts that she raised Mr Walker's email at her grievance appeal but not in her initial grievance of November 2021.

75. On 7 September, Mr Peter Jackson of the BMA emailed Ms Callow on the claimant's behalf. This referred to her being informed that her salary would be reduced and her feeling she had no option but to elect to return to her normal work to maintain her level of pay. He referred to an FAQ document produced by the respondent about pay protection and stating that a person shielding should not suffer any financial detriment. He said that the claimant would need Covid 19 protection measures to facilitate a safe return to work. He asked Ms Callow to confirm if the information given to the claimant was correct regarding her pay and acknowledging that the respondent was aware of the increased risk the claimant was taking in returning to her substantive role.

76. Ms Callow responded on 9 September stating: "Following shielding pausing on the 31st July 2020", an individual risk assessment has been completed with each colleague. Colleagues who had previously been shielding were now able to return to the workplace in some instances. The duties the claimant had been completing had been, she said, purely to support the service when she was shielding, but there was no operational need for those duties on a permanent basis. Nevertheless, Mrs Reid, she said, had been able to agree an alternative role in the same service that the claimant felt able to return to on a permanent basis. The FAQ referred to was purely around temporary roles people were undertaking once they were shielding until they were able to return to their substantive role. If the respondent could not support an individual back into their substantive role, they would consider pay protection and look to implement this for a set period of time. However, in the claimant's case, following a risk assessment, it had been agreed that she could return to her substantive role and it was the claimant's choice to move roles, "hence why pay protection would not be applicable…" She referred to it having been possible to ensure that appropriate PPE would be available to ensure the claimant's safety in her substantive role.

77. The claimant's position before the tribunal was that she could not understand how Ms Callow had thought she was right regarding pay protection. She noted that Ms Callow's response was copied into Mrs Reid who knew that there had been no risk assessment after 30 July. It had been performed on 2 July.

78. On 10 September Mr Jackson emailed the Covid HR team and separately Victoria Godfrey of HR asking them to escalate a number of questions he had raised to HR management in Amy Callow's absence. Ms Callow responded saying that she was asking Mrs Reid to respond to him as the questions raised fell within the management team and not HR.

79. Mrs Reid responded on 11 September, copying in the claimant. One question raised related to whether the respondent had a plan should Covid cases

increase in the community and whether the claimant should follow government advice or the respondent's risk assessments and policy. Mrs Reid responded that the respondent would continue to react to government guidance in the event that those who had been shielding were advised to take additional precautions. She then said (reflecting some draft wording of Mrs Siewruk-Barnes): "I was under the impression GPs have been advised to return to normal working practice as far as possible as part of the national recovery plans. Given there is no sign of Covid 19 going away anytime soon we have to implement ways of working which minimise the risk whilst delivering safe and effective services". The claimant said that she regarded this statement as offensive as it called into doubt her professional integrity. She had been shielding for valid reasons, done all she could to help and wondered how Mrs Reid could now say it was her duty to return to work. She said that she inferred from the comment that as a GP she should be working normally regardless of the risks. The claimant did refer to this comment as part of her November 2021 grievance.

80. On 11 September Dr Miers emailed Mrs Reid saying that he suspected that the claimant thought that her normal role could not be made Covid secure as there was always the possibility of her having to see patients with Covid and that she was seeking to argue, therefore, that whatever role she might do instead should be paid at her usual rate. In cross-examination it was put to him that that was indeed the point the claimant was making. On the issue of pay protection, Dr Miers said that they were totally reliant on HR.

81. Mr Jackson then, on 14 September, emailed Angela Wilkinson as HR director. He referred to Mrs Reid having kindly replied and addressed some of the issues. He referred to the claimant being appreciative of the efforts made by the respondent to respect her shielding status and the efforts made by Mrs Reid to find a way forward. He said that the claimant was looking forward to returning to face-to-face work in a job that she loved. Nevertheless, he felt it should be acknowledged that this work was considered to be less safe than the claimant remaining on a telephone triage role.

82. The claimant's evidence to the tribunal is that she had told Peter Jackson that she felt that Mrs Reid's email had impugned her integrity before he sent this reply. Given what he said about Mrs Reid, the tribunal believes it more likely than not that she did not express those feelings to Mr Jackson.

83. On 1 October, Mrs Wilkinson replied to Mr Jackson apologising for the delay in responding due to her being on annual leave. She said that Amy Callow had returned from her own leave and would pick this up as a matter of urgency. Mrs Wilkinson did not, however, copy Ms Callow into that email which Ms Callow herself subsequently chased Mrs Wilkinson up for.

84. On 6 October, Mrs Reid emailed the claimant to confirm a telephone conversation they had that afternoon. She referred to having reviewed her case

with Amy Callow, who, she said, had originally understood this to be a permanent arrangement. Mrs Reid had, however, reinforced that the proposal was for a 6 month period. On review, Amy Callow had confirmed that they were happy to support the claimant by maintaining her contracted (enhanced) rate of pay for the hours she worked during this 6 month period. If, following this period, the working pattern became permanent, the hourly rate of pay would then be adjusted. The upshot was that whilst the claimant would be paid only for the hours she worked, she would be paid as if doing the work on an overnight shift regardless of the actual time of her shift.

85. Also, on 6 October, Ms Callow responded to a number of questions raised by Mr Jackson on the claimant's behalf. She had recently returned from leave to a backlog of work. She said that following a discussion with Mrs Reid that morning it was clear that there is a misunderstanding. She said that at the time of her previous email she was under the impression that this was a permanent change. However, there was effectively a trial period for the arrangement and, therefore, the claimant's pay would be protected unless and until those arrangements became permanent. There is no evidence that the aforementioned change of employee details form was ever signed and submitted to anyone. Had it been signed off by the claimant, then certainly it would have been sent to payroll, but not as a matter of routine to HR. The tribunal notes at this stage that it was accepted within the claimant's grievance that she had been given the wrong information and that on 21 August she should have been told that, if she went back to the telephone triage work, her hourly rate would be protected.

86. As at 6 October, the claimant, therefore, knew that she could do the telephone triage work and receive the overnight rate for the hours she worked. The claimant in cross-examination described herself as totally confused as she did not feel that her status as clinically vulnerable was behind the reason for the respondent's change of position. She then said that to protect her income she would need to work 90 hours each month on telephone triage and she could not "sit there" for that length of time. As will be described, the claimant was subsequently absent due to sickness with no indication given on her fit note that she could return with adjustments.

87. The claimant had returned to work on overnight shifts at Northallerton on 15 September 2020. In total she worked 10 overnight shifts, all of 9 hours duration ending on 8 October 2020. On 6 of the shifts, she did no home visits with a total of 6 over the period. On 7 of the shifts, no patients attended the centre with 1, 7 and 4 attending on the other shifts. Dr Miers' evidence from his personal experience of working overnight shifts in Northallerton was that overnight shifts were generally quiet with typically no or perhaps 1 face to face patient consultation each shift and limited home visits, given that there was a specialist paramedic working in the service.

88. Before she arrived for her first shift, Mrs Reid had arranged for a fitting of the claimant's resuscitation mask. That was done indeed on her arrival for her first

shift. She also arranged for the claimant's work areas to be cleaned. Mrs Reid emailed the claimant and Dr Miers on 15 September thanking him for agreeing to work alongside the claimant for her first shift and asking him to take a number of steps to address any anxieties and to ensure a safe environment. This included taking the claimant through pathways which had been introduced setting out a procedure for seeing patients. He was also to undertake a workplace risk assessment and a risk assessment tool was attached, which she said was titled non-patient facing, but which HR had said could be adapted for any risk. Dr Miers had received no training on conducting risk assessments. Dr Miers had available to him pathways documents which Mrs Reid had drawn up as the pandemic progressed. These were effectively flowcharts of the stages to progress through in, for instance, a patient visit, including the patient waiting in his/her car until approached by the GP and the hygiene precautions then to be undertaken. Mrs Reid convincingly explained to the tribunal the state of uncertainty and flux in the workplace as the coronavirus hit, as well as the significant pressures of work on her. Essentially, she was having to design practical safety protocols as issues arose and then seek to document them when she had capacity to do so. Whilst Dr Miers may not have shown the pathways to the claimant, they were available at her place of work and he must have gone through their component parts in explaining, as he did, the new ways of working in the GPOOH service. Public Health England had produced their own guidelines on 20 August 2020 which included pathways they had designed for high, medium and low risk areas, with definitions as to how any care facility might fit into those risk categories. This document had not been seen by Dr Miers or Mrs Reid. He agreed that if he had followed it, he may have determined that the risk level was amber where patients had the potential to have Covid and red if the GP was seeing a patient with Covid. He told the tribunal that he was surprised that the claimant was returning to the GPOOH work, despite, in his opinion, the service having returned to a relatively low risk place. He considered that this was her choice despite her knowing that she would "encounter Covid". He believed that the claimant should have remained at home.

89. On this night shift, he based himself at Northallerton together with his driver rather than his usual base of Catterick. Dr Miers and the claimant went through the risk assessment document together and discussed it. Dr Miers typed it up after the meeting. The claimant had little recollection of their discussions and said she only recalled laughing when Dr Miers said that the assessment was for a non-patient facing role. When put to the claimant that nevertheless they were discussing the risks to her working overnight shifts at Northallerton, she said that she hadn't done a risk assessment before herself and had no knowledge of this type of document.

90. Dr Miers told the tribunal that at the time the form was completed, deaths amongst clinicians were much lower than earlier in the pandemic. Because the claimant was working approximately 10 nightshifts a month in the GPOOH service, the likelihood of face-to-face contact with patients with Covid at that point was very low - he estimated less than 5 a month. Further, the length of

these contacts would likely be fairly brief (15 – 20 minutes) so he reasoned that, with very few contacts, each for a short period of time, when wearing full PPE the risk of contracting Covid and dying from it was a "rarely happens" event. He said that the claimant did agree with this at the time of the assessment. Again, the claimant's recollection of the discussion was limited, such that the tribunal accepts Dr Miers' conviction ("she definitely knew it was low risk") that such matters were all discussed.

91. The risk assessment form required a calculation of risk based on severity and likelihood. Dr Miers set out that the hazards involved included the possible infection and spread of Covid due to contact with patients and any surfaces contaminated by Covid-19. The current control measures in place were described as wearing appropriate PPE and cleaning the environment. Further control measures required included monitoring the local prevalence of Covid-19 going forwards as an increasing prevalence would affect the risk rating. There was to be a review in no more than 3 months or sooner if the prevalence of Covid-19 increased to any significant extent. In terms of severity, Dr Miers considered that a rating of 4 out of 5 was appropriate, representing a risk of death. A higher rating would have denoted "multiple fatalities, extreme loss, disaster". In terms of likelihood, as already referred to, his assessment was that this would rarely happen, thus allocating a score of 1 under this factor. A score of 2 would have been appropriate if the likelihood had been assessed as "unlikely". Multiplying those 2 scores gave a rating of 4 which ranked the risk as low or "green" on the form. A moderate/yellow rating would have been appropriate for a rating of 5-11 and a high/red rating if the risk had been assessed with a score of 12-25. Dr Miers was clear that there was no difference in the precautions taken regardless of the risk rating – a low/green rating did not result in fewer precautions or reduced PPE. There is no challenge to this evidence.

92. Dr Miers emailed the typed risk assessment to the claimant and Mrs Reid on 16 September. He noted that, at the present time, because of the very low prevalence of Covid in the locality, this gave a low risk rating, albeit a future increased prevalence could increase risk to a moderate or potentially high level. He described himself at the time as having not seen a suspected Covid case for 4 weeks. He referred to having discussed the most appropriate way to use the gowns suggesting, given the number available, that one should be used for each patient the claimant saw. He estimated that they were, on that basis, likely to last for a year.

93. The claimant saw no patients on that particular (first) shift, but told the tribunal that she was frightened in the workplace and couldn't understand that she had been put somewhere where she would encounter Covid positive patients. However, she understood that other people knew what they were doing. When put that it was her (financial) choice to return to work, she said that she had to return and was told to go to her substantive role, the respondent clarifying that this was necessary if she was to carry out a full-time role. When then put that she knew at this point that she could return to telephone triage work and be

paid at her enhanced evening rate, she said that the respondent said that she could return to work and be safe. The triage work, however, made her back worse and she was better off in her GPOOH role.

94. On 16 September, Mrs Reid emailed the claimant asking how her work had been. The claimant responded thanking her and saying: "All sorted. Nice to see everyone in Northallerton again."

95. The claimant emailed Dr Miers and Mrs Reid during her nightshift in the early hours of 17 September. She said: "To be honest I do not find these forms helpful at all." She noted that the hazards identified should include contact with surfaces in patients' homes and care homes. She also noted that, given that the Urgent Treatment Centre would not see any potential Covid patients for her, she presumed that increased the risk, albeit it didn't really fit in any box. She said that she presumed that the form had been validated for patient facing work areas – a reference to the form stated to be for non-patient facing roles. She asked if they had in mind any particular prevalence of community infection which would trigger a review. She asked if there was any guidance behind the assessment form, as it did appear to be a bit of a guess when assessing the likelihood of an event. She found it difficult to follow, with different terminology being used in terms of risk level and colour coding as well as "cold/super cold" and "Covid secure". Over 5 hours later at 9:05am, she sent a further message apologising if the earlier one appeared a little blunt. She ended saying that it had been lovely to see everyone again at the centre.

96. The claimant told the tribunal that the risk assessment form completed appeared wrong to her. The Salus form (the name of the supplying company, rather than an anacronym), which this was, was a workplace assessment, rather than one for her individually. She said that she was concerned about the risks to her and her colleagues working in the same environment. She did not understand how she could be working in a "green" area a short distance away from a colleague employed by the Tees Trust in an area rated by them as "amber" and a porter working in an area which had been rated as "red". She felt she was in an unsafe workplace.

97. The claimant further emailed Mrs Reid and Dr Miers on 2 October saying that she felt the workplace risk assessment was inaccurate and inadequate. She then said she had no experience or knowledge in risk assessment, so would respect their expertise. She continued that, given on occasions she had to work in the" red hot hub" if a patient with respiratory issues came into the centre, she could not understand why her risk assessment was classified as a low risk. On the earlier individual assessment, she noted that Mrs Reid had classified her work area as low and moderate. She attached again the guidance she had received from Leeds rheumatology. She considered that the respondent was going against that guidance. She also said she was still trying to ascertain if the respondent considered her workplace to be Covid secure as government guidance referred to being able to attend a workplace which was Covid secure, but that she should carry on working from home wherever possible. She said

she been deeply upset by the situation she had found herself in over the last few months. She referred to it being the respondent's responsibility to decide on the level of risk it was happy exposing her to. The claimant referred to her having discussed with her colleagues why there was a low risk rating for the centre in Northallerton, albeit she accepted that she had not referred to the concerns of others in her email.

98. The claimant had a telephone conversation with Dr Miers on 6 October. Dr Miers could not recall the conversation, but the tribunal accepts that he did say to the claimant that she should be working at home. Dr Miers in cross-examination restated that it was his opinion that she was safest at home

99. On the nightshift of 7/8 October the claimant saw a patient in severe abdominal pain who was then sent to the James Cook Hospital. The patient had been triaged by a GP earlier in the evening and could have been Covid positive, exhibiting a number of possible symptoms. In circumstances where the claimant had to get extremely close to him for a prolonged period, she was left "deeply shaken" at the risk she had exposed herself to.

100. The claimant rang her GP on the evening of 8 October, before she started her next shift. The claimant then worked the night shift at Northallerton on 8/9 October. She told the tribunal that she went into work to see if she could cope and in circumstances where, if she had not, there was no other doctor there. Whilst working there, the issue of the patient the previous day all came back to her and she realised how serious it was. When put to her that she had not told her GP that she felt that she was in serious and imminent danger, she said that she had told her GP that she was not sure if she could cope, but that he knew she was going to go into work that night. She confirmed that he did not say anything to her about the risk she was running.

101. At 01:02 on 9 October the claimant emailed Mrs Reid and Dr Miers saying that she had been thinking about her current situation over the last few days and felt that she was no longer fit to perform her role in GPOOH. She said that she would like to apply for ill health retirement and had discussed this in the past with Dr Miers and her rheumatologist, but had been keen to give her medication every last opportunity to work. She referred to the last 4 years having been difficult for her, but that the last few months had been especially hard. The situation she found herself in had caused her distress and insomnia. She said that she was continually aware that she was in a vulnerable position. That had been intensified tenfold by Covid. She referred to the previous night where a patient had collapsed on her and the proximity she came to him in seeking to assess his condition. This had reinforced to her the vulnerable position she was in. She said the telephone triage was not a solution as the role does not exist and sitting for 5 or 7 hours in any chair results in her suffering from stiffness and pain. She said that she did contact HR regarding retirement whilst shielding, but was advised not to make any decisions at that time. She attached a fit note she had received following her GP consultation. She said she was unsure of the process and timescale involved or even if the application

would be successful, but said she would be obliged if they could initiate that application for retirement for her.

102. Mrs Reid emailed Amy Callow and Victoria Godfrey of HR on 9 October forwarding the claimant's message and asking if they could progress matters "as smoothly and swiftly as possible". The claimant suggested that the swiftness of Mrs Reid's response was noteworthy. When asked if she was suggesting that Mrs Reid was not acting good faith, the claimant said that she was not saying that Mrs Reid shouldn't have sent the form to HR, but it went very quickly and she did not know how long it normally took. She agreed that she would be critical of Mrs Reid if she had delayed the referral. When put to the claimant that she had said that Mrs Reid had been supportive, she agreed that she had been "from a friendly point of view". When asked if there was any reason to believe that Mrs Reid was not now helping the claimant to achieve her aims, she replied that she was happy for Mrs Reid to make the referral. At the time the email was sent, she assumed that this was "due process". On the other hand, the claimant then said in cross-examination that she was not in a rush. She was pursuing ill-health retirement, because there was no other option as she understood matters.

103. Dr Miers separately replied to the claimant on 9 October saying that he suspected that ill-health retirement might be the best step for the claimant to take. He sent this without any prior conversation with Mrs Reid. He said that he was agreeing with her proposal "purely as a friend". He said that the claimant had told him previously that her rheumatologist had said her illness would allow ill-health retirement at some point and Dr Miers therefore considered that the claimant was likely to get it.

104. As at 8 October 2020, the claimant was certified as unfit to work and the position did not change until she left the respondent's employment. She agreed that she had access to BMA advice and certainly in the period from November 2020 was being advised by solicitors. There was no indication within her fit note that the claimant would benefit from altered duties. The claimant sought to give an impression to the tribunal of a lack of awareness of the options open to a GP completing that type of fitness to work form, which was not credible. The claimant told the tribunal that she said to her GP that she considered her workplace to be unsafe.

105. Ms Godfrey of HR emailed Mrs Reid and Ms Callow on 13 October regarding the request for ill-health retirement and attaching some necessary forms for the respondent and claimant to complete. She said that they also needed to arrange a long-term sickness/final review meeting in the context of the claimant saying she was not fit to return to her role. She said it was likely that they would review employment options relating to her current medical situation, rather than await the outcome of the decision of the Pension Agency, referring to there being 2 separate processes. After receiving advice from HR, Mrs Reid wrote to the claimant on 19 October using the template letter Ms

Godfrey had provided inviting her to attend a "final sickness absence review" on 9 November. The possible outcomes listed included the termination of employment, entry into a redeployment process, consideration of reasonable adjustments or an adjournment to allow for further advice to be taken. As part of the claimant's grievance, it was firstly determined that whilst the process adopted had been reasonable, the standard of communication with the claimant was not acceptable. On appeal it was accepted that a final review letter should not have been sent.

106. The claimant queried with the respondent the purpose of the sickness review meeting to which she had been invited in an email of 20 October and subsequently. She said that she understood that there were earlier stages prior to any final meeting. She asked why the respondent considered it necessary to invite her to this meeting and potentially terminate her employment prior to any decision on her ill-health retirement application. She said that she found the letter upsetting. She chased up a response on 23 October saying that the invitation had caused her a great deal of distress and sleepless nights. Mrs Reid tried to contact the claimant by telephone and the claimant responded by email of 27 October saying that she felt too upset to think or talk coherently at the present time. Mrs Reid forwarded that correspondence to Ms Callow saying: "Feels like it is going to be messy again." In cross-examination, Mrs Reid said that it was messy in the sense of not being straightforward. In subsequent correspondence, Mrs Reid said that Ms Godfrey was away on leave, but the date of the meeting would need to be moved until after the claimant had seen occupational health. The claimant was unclear whether the meeting to be moved was the sickness review or Mrs Reid's necessary conversation with Ms Godfrey. On 2 November, Ms Godfrey emailed the claimant saying that the purpose of inviting her to a final review meeting was in line with the managing attendance process where she had had a period of absence and upon her return had stated that she was no longer able to undertake her current substantive role. The meeting was described as intended to be supportive to review her current situation. She confirmed that the meeting would be rescheduled for a later date. The claimant responded on 3 November with questions raised including how this meeting fitted into the respondent's attendance management policy. Ms Godfrey responded on 5 November expressing an appreciation at the concerns the final review meeting invite had caused the claimant. The respondent still wished to proceed with a meeting to discuss the situation and review reasonable adjustments. However, in recognition of the final review meeting causing her to feel anxious and the concerns she had raised, the invitation would be to an absence review meeting only. The claimant when asked about any ongoing criticisms of the attendance management procedure in cross-examination said: "… As long as I wasn't going to get sacked was the main thing".

107. On 23 October, the claimant had contacted the respondent's Freedom to Speak Up Guardian. The respondent's Speaking Up Policy said that concerns raised through that route will be treated confidentially, unless otherwise agreed. The claimant said that she had not understood that at the time. She said that the Guardian had said that she was going to raise the claimant's concerns with

a senior manager. The claimant had asked her not to go to Angela Wilkinson as the BMA had already raised the safety/risk assessment issues with her and she had referred the matter back to Amy Callow. She understood that the Guardian had, therefore, spoken to the Chief Nurse. The claimant then had no idea who the Chief Nurse, Jill Foster, had spoken to. There is no evidence that any of the respondent's witnesses in these proceedings were aware of this particular disclosure to the Guardian.

108. By letter of 4 November 2020 the claimant was once more advised to shield as a clinically extremely vulnerable person. She agreed that, as a result, her period of full pay during sickness absence was extended.

109. The claimant discussed her concerns regarding risk assessments with another OOH GP, Dr Uttley, who was another BMA representative. They sought by email of 5 November a copy of the workplace risk assessments for the GPOOH service and received a response from Mrs Reid on 11 November saying that it was now classified as "amber" in the centre and "red" in the red-hot room. She supplied a Salus risk assessment form completed for the centre and separately for home visits. Both workplaces were classified as low risk on those forms, neither of which was signed and dated. The claimant and Dr Uttley responded on 17 November asking whether the amber/red classification had been from the outset of the pandemic and whether there were any earlier risk assessments used during the individual risk assessment process. They also contested the low risk rating and pointed out that home visits were potentially a high risk given an inability for the GP to control the environment.

110. Mrs Reid arranged a meeting with them on 4 December. Mrs Reid explained the low risk assessment, including with reference to the relatively low number of patient interactions and limited usage by OOH GPs of the red room. However, on 14 December, further workplace risk assessments were provided by Mrs Reid dated 11 December, where the risk had been increased to moderate. That was now in line with the claimant and Dr Uttley's expectations and other settings run by South Tees at the Friarage Hospital. They felt now that this adequately classified the risk to staff and formed the backbone from which safer risk mitigation could be put in place for clinically vulnerable staff.

111. On 18 November, Mrs Reid sent to the claimant ill-health retirement forms for her to complete. Mrs Reid had already completed Section A. The claimant in cross- examination commented that this was before she had had any occupational health assessment.

112. On 26 November 2020, the claimant's solicitors sent an open letter by email to Mrs Siewruk-Barnes and Mrs Wilkinson raising the claimant's status as a disabled person and a number of complaints covering her being pressurised to return to face-to-face work, a lack of understanding regarding her risk level, inadequate risk assessments and a failure to follow the managing attendance policy. It was said that the claimant felt she was pushed into considering ill-

health retirement and that her trust in the respondent had been undermined. The email also attached a "formal grievance" with 5 appendices covering the same concerns. The claimant said in cross-examination that she wrote the letter of grievance herself. Given the language used, reference to legal causes of action and the claimant's evidence of her lack of knowledge and experience of matters such as employee relations and risk assessments, the tribunal can only conclude that her solicitors had a significant input into the content of this grievance. The claimant's evidence was that she wanted to give the respondent an opportunity to address her issues and potentially remedy them.

113. A separate email from the solicitors of 26 November attached correspondence marked "without prejudice and subject to contract".

114. When asked why the claimant did not decide to leave her employment at that stage, she said she wanted to find out why she had been treated as she had and if there was anything else she could do.

115. The claimant explained that it was her case that the respondent then adopted a deliberate strategy of delay and ignoring her grievance in the hope that she "would go away". When asked who had formulated this strategy, she firstly said that she could not say and then named Dr Shepherd, Mrs Wilkinson, Mrs Siewruk-Barnes and the Chief Nurse, who had been told of the claimant's issues by the Guardian. Certainly, the first 3 named were involved in that strategy, she said.

116. An occupational health report was produced on 30 November after a telephone assessment on 10 November. Dr Harris referred to them having talked about various adaptions that might potentially help but said: "… In reality, I think it is highly unlikely Dr Gilchrist is going to be able to return to her role as an OOH GP. She is going to apply for ill-health retirement…" He asked for the necessary forms to be sent to him so that he could process them.

117. The claimant attended an absence review meeting on 30 November 2020 where the options discussed were working from home undertaking telephone triage. It was said that the issue of electronic prescribing had been resolved. The claimant reiterated that sitting for 5 hours continued to be difficult and would require increased pain medication. The next option was an altered working pattern giving the claimant more opportunity to rest. However, she said that due to the number of contracted hours she worked, it would be difficult for her to consider an alternative working pattern. The final option was of working alternative shifts alongside other colleagues to support her with not having to see patients face-to-face. The claimant explained that this would involve working with a larger staff group, thus adding to her risk. The claimant agreed that she could not say what role she might be able to do. She said that by now she realised there was such a thing as reasonable adjustments, but accepted that those indeed had been discussed at this review meeting.

118. Mrs Siewruk-Barnes emailed Mrs Wilkinson on 30 November to ask whether she had time to discuss the grievance and without prejudice correspondence. Mrs Wilkinson replied saying that she would ask Samia Hussain, who had only recently taken up a position as Head of HR, a vacant position which acted as a bridge between Mrs Wilkinson and the HR business partners, to have an initial look and see what they needed to do in response. The tribunal has seen subsequent emails passing the matter to Ms Hussain.

119. Later on 30 November, Mrs Siewruk-Barnes emailed the claimant's solicitor acknowledging, amongst other things, the grievance letter and saying that she would liaise with the relevant HR person and respond as soon as possible.

120. Mrs Siewruk-Barnes spoke to Ms Hussain on 1 December. Mrs Siewruk-Barnes refers to a telephone conversation with Ms Hussain. Ms Callow had the meeting in her diary also, but had no recollection of it. She had a conflicting medical appointment and it is likely that she went to that instead. Ms Callow's evidence was that she was only aware of the "without prejudice" letter. She rejected the accusation that she had decided to "park" the grievance until the outcome of any "without prejudice" discussions. Ms Callow emailed the claimant's solicitors responding to their email which attached the "without prejudice" correspondence only, acknowledging "receipt of this" and saying they would write back shortly with a formal response. On 11 December the claimant's solicitors chased a response to the "without prejudice" letter. Mrs Siewruk-Barnes replied saying that she had confirmed receipt and the respondent would provide a full response in due course. This correspondence was copied into Mrs Wilkinson.

121. Ms Callow emailed Mrs Siewruk-Barnes on 11 December saying that she had sent this over to the respondent's external solicitor, but due to absences on leave it wouldn't be until the end of the week that they could get back to the claimant's solicitors.

122. On 23 December 2020, the claimant's solicitors again chased a response, including to the claimant's grievance. Ms Callow had taken the "without prejudice" letter to be the grievance and that was what she was taking external advice on. Mrs Siewruk-Barnes forwarded this to Mrs Wilkinson, Ms Godfrey and Ms Callow saying that she understood the solicitors were responding to the grievance letter and asking if they could chase them. She referred to the respondent having already missed the deadline in their own policy. Ms Callow responded on 24 December saying that she had spoken to the solicitor the previous day "… and he has fully reviewed the letter, which is just that a letter and not a grievance." Ms Callow emailed the claimant's solicitor on 24 December saying that they needed to take time to ensure the matters were looked into carefully before sending a response and that they would endeavour to respond in full by the following Thursday. On 29 December, Mrs Siewruk-Barnes replied to Ms Callow: "you know there are 2 letters? One asking about the payment and one stating it's a grievance."

123. Ms Callow emailed the claimant's solicitor on 31 December saying that they needed a little more time before responding in full and saying that the response would be sent through the following week. She accepted that she did not own up to there having been an error. Ms Callow's evidence to the tribunal was that she still hadn't seen the second (grievance) letter at this point.

124. The claimant attended a further absence review meeting on 8 January. The claimant confirmed that she did not feel able to make a decision regarding her health and was waiting the outcome of an MRI scan. She said that she found the situation difficult and upsetting. Mrs Reid summarised that the claimant did not feel that the telephone triage position would be suitable and that the review meetings were to explore how the claimant might be supported in any prospective return to work. The claimant told the tribunal that the best role for her was her substantive GPOOH role, but she was very worried about the Covid risk and her unvaccinated status. She had her first Covid vaccination on 12 January albeit its effectiveness was not immediately ascertainable given her reduced immunity.

125. On 11 January 2021, the claimant's solicitors chased Mrs Siewruk-Barnes and Mrs Wilkinson for a response. They referred to the respondent's policy providing for a grievance meeting to be arranged within a month. There was said to have been an unexplained and unreasonable delay of over 6 weeks.

126. The solicitor's letter had also been copied into Ms Callow. She messaged Mrs Siewruk- Barnes and Ms Wilkinson on 12 January to say that she had forwarded the letter to the respondent's external solicitor and was seeking a conference call with him that day to finalise a response.

127. The claimant's solicitor chased Ms Callow further on 18 January and she replied apologising for the delay and saying that she was taking advice. On 19 January the respondent's solicitors replied to the claimant's solicitors. In that reply, they said that as a result of some miscommunication only the "without prejudice" letter was sent to the relevant HR business partner and she was unaware that the claimant had raised a formal grievance until 31 December. The Christmas period then led to a further slight delay, but the grievance process they said was now underway.

128. The claimant's grievance was initially to be investigated, as arranged by Ms Callow on or around 20 January 2021, by Sara Moore, a chief pharmacist, together with Lisa Whiteley of HR. However, due to capacity issues, Dr Sherliker, Deputy Medical Director, took over from Ms Moore (sometime after 17 February). Thereafter, Ms Callow assumed that the handling of the grievance had been passed to Ms Hussain, because of Ms Callow's workload. Ms Callow confirmed the appointment of the original investigators to colleagues on 20 January referring misleadingly to the timeframe starting from when the

grievance landed with her "last week". Mrs Wilkinson described her own view of the delay as "cock up not conspiracy."

129. The claimant raised a further grievance dated 17 February 2021 in respect of the delay it had taken to progress the first grievance.

130. On 5 March, Ms Whiteley emailed the claimant regarding a grievance meeting to be held with her on 8 March and describing this as an initial meeting with the aim of agreeing terms of reference, mindful that there would be a requirement for a further meeting with her as part of the process. The meeting would be predominantly an opportunity for her to clarify her fundamental concerns and desired resolution.

131. The claimant duly attended that meeting and read out a typed summary of her complaints. Dr Sherliker asked for and was provided with a copy from the claimant. The claimant expressed herself in cross-examination as delighted that someone from the respondent was speaking to her and that they might get to the bottom of the reasons for her treatment. She said that Dr Sherliker seemed very kind and approachable. However, she said that the meeting only lasted an hour and she assumed that the panel would come back and ask further questions after they had spoken to witnesses.

132. The claimant provided a significant amount of additional documentary evidence after that meeting and responded to requests from Dr Sherliker for other specific documentation.

133. Dr Sherliker spoke to Ms Callow on 9 March, Mrs Reid on 12 March and Dr Miers on 12 March. She also, together with Ms Whiteley, spoke to Ms Husain and Mrs Siewruk-Barnes, but no notes of those meetings were retained. Ms Whiteley has since left the respondent's employment.

134. Dr Sherliker then discussed each aspect of the grievance with Ms Whiteley and reached a view on her concerns. Dr Sherliker wrote to the claimant on 26 March explaining in significant detail the grievance outcome. The claimant believes the conclusions reached to be inaccurate and inadequate.

135. The claimant remained dissatisfied regarding the lack of provision of a definitive risk assessment. Dr Sherliker, however, conducted a very detailed review of the risk assessments undertaken and set out her conclusions in an appendix. She concluded that there ought to have been a review of the claimant's initial individual risk assessment as soon as she alerted the respondent to her intention to return to work face-to-face, by which time information from occupational health and Leeds rheumatology was available. She, however, noted that Mrs Reid had made attempts to speak to the claimant in circumstances where the claimant requested that she simply emailed her plan and was not inclined to hold a verbal conversation. This element of the

grievance was nevertheless upheld, including the use of an incorrect form of risk assessment on 15 September.

136. Dr Sherliker noted that Public Health England Guidance of August 2020 classified untriaged GP surgeries and walk-in centres as “high-risk” and areas where patients could be triaged before entry as “medium risk”. The Urgent Treatment Centre operated by South Tees Trust and the GPOOH service shared a high risk “red hot hub” for seeing high-risk patients. The GP on shift would be expected to see patients face-to-face in both the high and moderate risk areas if necessary.

137. The Salus workplace risk assessment form used by Dr Miers presented an overall risk score for the workplace without taking into account individual employee risk factors. A quiet clinical area with low staff density which rarely handled Covid positive patients and with robust mitigation in place to minimise exposure, could therefore carry a lower risk than a service where those factors were not present.

138. Dr Sherliker had found during her investigation undated risk assessments for the GPOOH service covering patient visits to the centre and home visits, both of which were classified as low-risk areas. Subsequent assessments in her possession dated 11 December scored the areas as moderate risk during a time of high community prevalence which she considered would explain the increase in overall risk. South Tees on 2 October also scored the Urgent Treatment Centre as moderate risk with a “slightly higher risk area” contained within the Department – assumed to be a reference to the shared “red hot hub”. She recorded that the panel had failed to locate any guide/training for Salus assessments with regard to Covid.

139. Dr Sherliker noted that individual risk assessments were introduced “for the essential triangulation of individual risk factors alongside the workplace areas”. Initially this was for employees deemed to be in particularly vulnerable categories. The target date for those assessments to be completed had been 17 July in time for the pause in shielding from 31 July. Training had been delivered through a webinar alongside information available on the intranet. A risk assessment was said to be a supportive discussion with both parties required to sign the form. It was noted that, unsurprisingly due to the speed of change in national guidance, there was unhelpful variation in the terms used to describe risks in various clinical areas. Given the prevalence of Covid at the time of the pause in shielding and the low-frequency of face-to-face patient contact overnight in the Northallerton GPOOH service, the overall risk of a GP contracting Covid from a patient probably was low. However, due to a lack of available cover from any other clinician, it could not be zero. When this was balanced by the claimant’s clinically extremely vulnerable status, it was understandable that the claimant felt a low risk was still an unacceptable risk.

140. As regards the claimant's first individual risk assessment, the claimant's status as a clinically extremely vulnerable person meant that she should not attend the workplace. The workplace was recorded as both low and moderate risk, i.e. an area in which patients with Covid were both "unlikely" and to be "expected". Dr Sherlker described this as confusing and unhelpful. The statement that the claimant was not working in moderate or high risk areas was in contradiction to the workplace assessment at the start of the form. No further individual risk assessment was undertaken with the claimant despite further information available from occupational health on 14 July regarding consideration being given to the claimant working from home and guidance from rheumatology on 24 July stating that the clinically extremely vulnerable should only return to work after shielding in green/super cold i.e. very low risk areas and the claimant returning to work in an area which could most likely be summarised as moderate/amber risk.

141. The claimant's position before the tribunal was that she still wanted to see physical risk assessments which had been undertaken. Dr Sherliker, however, summarised in some detail the assessments which had been carried out. The claimant appeared to be criticising the respondent for not having conducted assessments and then for not providing her with risk assessments which (she knew) had not been done. Clearly, the claimant doubted that the undated workplace risk assessments referred to above were in existence at any time where she was considering a return to work in the GPOOH service or prior to her raising a grievance.

142. Nevertheless, the claimant accepted in cross-examination that Dr Sherliker was acting in good faith. Rather, she believed that others had not been open, honest and truthful with Dr Sherliker.

143. The grievance panel upheld the claimant's complaint about the lack of offer of pay protection despite the temporary change in her role. They considered that the decision of Ms Callow had been made in part based on the misunderstanding regarding the temporary nature of the redeployment and hours and their relation to Covid. They recognised an unacceptable delay in resolving the situation and an apology by the respondent was issued for the incorrect original decision and the delay in its reversal which contributed to the claimant's decision to return to face-to-face working and for the uncertainty and stress which this undoubtedly caused. The respondent should have offered pay protection as per the FAQ document for temporary redeployment due to Covid. Queries made on several occasions regarding the accuracy of the decision should have led to a review, without the need for an escalation to the HR director. The escalation then should have resulted in a more rapid conclusion.

144. The claimant had raised concerns of a failure to allow reasonable adjustments. This element of her grievance was not upheld. In the absence of provision of any reason why the claimant's medical conditions made undertaking the telephone triage role from home more difficult than doing her usual job, consisting mainly of telephone consultations during the much longer

nightshift, her request to reduce her hours was treated as a personal request rather than an issue that required handing in accordance with the managing attendance policy, in accordance with the Equality Act 2010.

145. The claimant's grievance of a failure to follow the managing attendance policy was not upheld. In order to progress the claimant's ill-health retirement request without taking her through the lengthy and unnecessary first stages of the managing attendance policy, it had been thought that a structured final review meeting was the appropriate step to take. However, a full explanation of the reasons for this and its various outcomes should have been given with the opportunity for the claimant to ask questions. It should not have taken from 19 October to 5 November for the claimant to gain clarification as to the purpose of the final review meeting. It was acknowledged that, although the process itself was reasonable, the standard of communication with the claimant was not acceptable and caused unnecessary further distress for which the panel unreservedly apologised.

146. The claimant finally complained of a failure to resolve her 26 November 2021 grievance. That grievance was upheld. There were found to have been human errors in the lack of recognition that there was a separate grievance and further unacceptable lapses in the swift progression of the grievance. Whilst the original investigators were appointed on 20 January, discussions regarding the process were delayed and Dr Sherliker had then only been appointed as investigator on 2 March. Whilst the errors and lapses were described as inexcusable, they were considered by the panel to be explainable in part because of the impact of Covid in terms of increased work demands. The panel described that many of the HR team were working 7 day weeks and had not taken annual leave until the autumn. When that leave was taken, it appeared that there was not the capacity for work to be progressed by other team members. There had been, as a result, an inability to attend to matters which had led to the claimant's concerns not being dealt with in accordance with the respondent's values.

147. The claimant raised an appeal against the grievance decision by letter of 29 March 2021. Again, the tribunal considers, on balance, that the claimant was assisted by her solicitors in the wording of this. She thanked the panel at the earlier grievance stage for their time, reassuring nature and kindness. She, however, felt that she had not had enough time at the meeting on 8 March to cover all of her concerns. Whilst in cross-examination she made comments to the contrary, she agreed that she was not complaining that she had not been given sufficient time then to ventilate her concerns at the appeal stage.

148. In terms of additional complaints, she included in her grounds of appeal that the grievance panel had not fully addressed her concerns. She noted that her complaint about a return to face-to-face work had been upheld, but that the respondent's explanations regarding the pay protection issue should have been looked at more. The claimant did not believe the explanation which had been given. She complained that whilst her grievance regarding the risk

assessments had been upheld, she was seeking a more detailed explanation. She believed that the risk assessments she had been seeking did not exist. The tribunal has already referred to the rather circular nature of this complaint.

149. She complained that the reasonable adjustments grievance had not been upheld. She was dissatisfied with the conclusion on the invite to the final sickness review meeting and complained about the delay in the grievance and, in particular, a lack of sufficient investigation in that Mrs Wilkinson and Dr Shepherd had not been interviewed.

150. The stage 3 grievance appeal was heard by Michael Forster, Operational Director and Mr Wakelin, a trade union representative from the Society of Radiographers. The claimant accepted that they acted in good faith, but said that the resolutions she requested were not met. She confirmed nevertheless in cross-examination that they reached conclusions which were reasonably open to them, saying that she would expect nothing else from a professional colleague. Nevertheless, she thought that their findings were wrong.

151. The claimant's appeal was heard on 30 April. The panel's outcome was provided at a further meeting on 21 May where their reasons were explained. This was followed up by a detailed letter of the appeal outcome of 26 May.

152. The panel found in the claimant's favour regarding it being potentially beneficial for a further grievance meeting to have been held. It was established then that the claimant's complaint regarding the lack of investigation related to not interviewing Mrs Wilkinson and Dr Shepherd. The appeal panel agreed with Dr Sherliker that it was not necessary to speak to these individuals to be able to answer the claimant's grievance. However, the panel had spoken to them and their comments were set out in the outcome. The claimant noted that it did not appear that Dr Shepherd had been asked about the supermarket comment. Nor had they asked Mrs Wilkinson why she had not intervened in September 2020 when the BMA escalated the claimant's concerns regarding pay.

153. The grievance panel's finding, in terms of the explanation given for the pay protection issue, were accepted by the appeal panel. They saw no evidence of a deliberate delay in addressing the claimant's concerns accepting that workload pressures and miscommunication were the causes of the delays and considering that the apologies given by those involved had been sincere. When put to the claimant in cross-examination that there could have been miscommunications, she agreed. She also said that she was sure that the apologies given were sincere.

154. As regards the issue of risk assessments, the appeal panel agreed with the grievance panel that there should have been a further individual risk assessment. They concluded also that there was no requirement for the use of the Salus forms in clinical areas and that appropriate systems were and are in place to manage workplace risk. The appeal panel explained that they had

spoken to Dean Parker, head of facilities, and Angie Gillet, head of planning who had confirmed that the Salus forms were designed for use specifically in non-clinical areas. They could be used in a clinical departments, but only for an area that was permanently non-clinical such as an office or staffroom. They had also spoken to Lauren Heath, consultant microbiologist and Sonya Ashworth, matron for infection, prevention and control. They had also confirmed that the forms were for non-clinical areas. This was on the basis that non-patient facing staff in these areas would not be wearing full PPE and an assessment was needed as to how risk could be minimised in other ways, e.g. by reducing the number of people in an office or ensuring good ventilation or cleaning.

155. The panel noted that, as the coronavirus pandemic progressed, clinical areas were designated into red, yellow and green areas based on the level of risk in those areas. “Red” denoted definite positive Covid patients as identified by a test or an area in which aerosol generating procedures took place. “Yellow” denoted a risk of Covid positive patients being indeterminate. The panel understood that the GPOOH service had been designated as a yellow area and that processes had been agreed to maximise telephone assessments and triaging for patients who had to attend in person. “Green” denoted a very low risk where patients had been tested and isolated prior to admission.

156. The panel noted that the respondent had met guidance regarding use of PPE and that the same level was provided regardless of whether an area was designated as red, yellow or green. Enhanced PPE was only provided for staff undertaking aerosol generating procedures. The reason for providing the same level of PPE irrespective of the area, was to provide the maximum protection possible to members of staff irrespective of any ability to pre-screen patients. Individuals’ risk was then managed through the individual risk assessments which provided an additional review of risk for an individual and what adjustments if any could be made.

157. The claimant found this conclusion to be a surprise as she said she had spent months asking for Salus forms. She said that to this day she did not know who was telling the truth. She said that the respondent’s health and safety policy referred to Salus forms being used in clinical areas, just that they were not used for Covid assessments. There appeared to her to be a confusion within the respondent and it was important that there was a safe environment for herself and colleagues. She agreed that it had been found in her favour that there ought, however, to have been a further individual risk assessment.

158. As regards a failure to allow reasonable adjustments, the panel concluded that consideration had been given to reasonable adjustments based on the information available. However, there had been missed opportunities to identify further adjustments with a holistic view of the claimant’s health. Had this happened, the realisation, the panel said, that the claimant needed to remain out of the workplace on pay protection may have occurred earlier. The panel concluded that any individual undertaking work should have a DSE assessment in place for wherever they were working, including at home. It was

acknowledged that this had not been undertaken for the claimant. It was said that the respondent had set up a homeworking group to review issues like this. A policy was being put in place and reference was made to a draft policy including the elements the claimant had raised in her grievance. The claimant accepted in cross-examination that her issue in this regard had been remedied and the reasonable adjustment complaint had been upheld in her favour.

159. She also agreed that her complaint regarding the use of the managing attendance policy had been upheld in her favour. The panel concluded that a conversation should have taken place to ascertain the reason for the claimant's request for ill-health retirement independent of the policy. The panel could understand the reasoning behind using the policy to address the request for ill-health retirement, but did not believe it had been appropriate to be used. They understood that there was no intention to dismiss the claimant at the final review meeting and no authority had been sought on this basis. However, they acknowledged that wording about dismissal was left in the letter and no explanation was given to the claimant, causing her significant and unnecessary stress.

160. Finally, as regards the delay in progressing the claimant's grievance, the appeal panel did not believe that there was an error in certain individuals not being interviewed and no evidence of a deliberate delay. Workload pressures and miscommunication were the causes of the delays. Due to the failure to identify the 2 separate emails regarding the grievance and "without prejudice" discussion, Ms Callow's continued involvement was on the basis of progressing the "without prejudice" discussions. She was not aware of the grievance which would have flagged a conflict of interest. When the error regarding the grievance was realised, she had no further involvement save as to make arrangements for the grievance to be heard.

161. When put to the claimant in cross-examination that she could not have got much better than this as an appeal outcome, she said she had no experience in such matters. She did not believe that people had been fully open and honest. She agreed, however, that there was a judgement call to be made as to whether or not people were telling the truth. When put to the claimant that she had given the respondent a chance to remedy the situation, she said that the respondent had not done the best they could because she still not believe that she had been given open and honest answers.

162. The claimant resigned from her employment by letter of 2 June 2021. She said she had not taken advice on her resignation or the letter. The tribunal does not accept that. The claimant conceded that her solicitor may have reviewed it. She referred to having been subjected to a series of actions since August 2020 culminating in the grievance appeal outcome which had destroyed her trust and confidence and left her no option but to resign with immediate effect. She said that she now intended to take action to bring legal claims against the respondent.

163. The respondent had in the meantime continued to hold sickness review meetings with the claimant on 1 March, 12 April and 14 May 2021. The claimant conceded that she was still signed off as unfit to work without any indication of any alteration to her duties enabling a return to work. She agreed and told the tribunal that any alternative of telephone triage would make her condition worse, albeit she said that she had been told that such a job did not exist anyway. There were no vacant roles of a non-clinical nature which might be undertaken by a GP.

164. The claimant's application for ill-health retirement was accepted, after her employment ended, on 26 October 2021, pursuant to which the claimant described herself as being able to earn up to £80,000 per annum.

Applicable law

165. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate without notice by reason of the employer's conduct. The burden is on the claimant to show that she was dismissed

166. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".*

167. Here no breach of an express term is relied upon. The claimant asserts there to have been a breach of the implied duty of trust and confidence.

168. In terms of the duty of trust and confidence, the case of **Mahmud v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance

clarifying that there is imposed on an employer a duty that he "will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee". The effect of the employer's conduct must be looked at objectively.

169. The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by the employer. The claimant brings her case, in the alternative, on such basis.

170. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

171. In the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978**, Underhill LJ provided the following helpful guidance to Tribunals

> *"45. Thirdly, even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. I have thought it right to spell out this theoretical distinction because Lewis J does so in his judgment in Addenbrooke which I discuss below; but I am bound to say that I do not think that it is of practical significance in the usual case. If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so……*
>
> *" I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been*

constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:

What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
Has he or she affirmed the contract since that act?
If not, was that act (or omission) by itself a repudiatory breach of contract?
If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)
Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

172. The tribunal has also derived assistance from the Court of Appeal decision in the case of **Buckland v Bournemouth University [2010] EWCA Civ 121** which, amongst other things, addressed the question of whether a repudiatory breach could be cured before acceptance. It concluded that it could not. As Sedley LJ said:

"To introduce into this relatively clear pattern of law an exception where amends have been made or offered for a fundamental breach is to open up case after case to an evaluation of whether the amends constituted an adequate cure of the breach. The present case is not a bad example of the factual niceties which the necessary judgement may involve. Legal niceties would also lie in wait: for example, whether a subjective or an objective evaluation is called for and, if the latter, whether factors personal to the wronged party count as objective or subjective factors. I do not think we are justified in releasing the contents of this Pandora's box into the general law of contract."

173. He went on that this did not mean that tribunals of fact could not take a reasonably robust approach to affirmation stating that a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends.

174. Jacobs LJ whilst agreeing with that conclusion did not share any regret in holding that *"a repudiatory breach of contract, once it does happen, cannot be "cured" by the contract breaker. Once he has committed a breach of contract which is so serious that entitles the innocent party to walk away from it, I see no reason for the law to take away the innocent party's right to go. He should have a clear choice: affirm or go. Of course the wrongdoer can try to make amends – to persuade the wronged party to affirm the contract. But the option ought to be entirely at the wronged party's choice."*

175. Commenting on affirmation in the context of employment contracts he said:

"When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."

176. In Prof Buckland's case it was entirely reasonable for him to wait and see what an inquiry said before exercising his right to accept the repudiation. Jacobs LJ considered that the fact that it takes rather a lot to find affirmation on the facts in any employment contract is itself another good reason for refusing to recognise any doctrine of "cure" in that context. He went on: *"Once an employee has committed a repudiatory breach there will generally be some time to make for him to try make amends, for tempers to cool and for the employee to make a rational decision as whether he or she should to stay on."*

177. The tribunal has been referred to the case of **Gordon v J and D Pierce (Contracts) Limited [2021] IRLR 266**, where Lord Summers resolved conflicting authority in favour of the use of internal procedures not normally constituting affirmation. If the employee succeeds in having their dismissal overturned or the outcome in some other way enables the employee to resume employment, it is open to the employee to then affirm the other terms of the contract.

178. The duty to make reasonable adjustments arises under Section 20 of the Equality 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…..
(5) The third requirement is a requirement where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

179. The tribunal must identify the provision, criterion or practice applied/auxiliary aid, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. 'Substantial' in this context means more than minor or trivial.

180. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

181. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

182. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

183. If the duty arises, it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP/lack of auxiliary aid creating the substantial disadvantage for the claimant. This is an objective test where the tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

184. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if –*
> *A treats B unfavourably because of something arising in consequence of B's disability, and*
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim.*

185. The tribunal must determine whether the reason for any unfavourable treatment was something arising in consequence of the claimant's disability –

this involves an objective question in respect of whether "the something" arises from the disability which is not dependent on the thought processes of the alleged discriminator. Lack of knowledge that a known disability caused the "something" in response to which the employer subjected the employee to unfavourable treatment provides the employer with no defence – see **City of York Council v Grosset 2018 ICR 1492 CA**.

186. Any unfavourable treatment must be shown by the claimant to be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. The EHRC Code at paragraph 5.9 states that the consequences of a disability "include anything which is the result, effect or outcome of a disabled person's disability". It has been held that tribunals might enquire as to causation as a two-stage process, albeit in either order. The first is that the disability had the consequence of "something". The second is that the claimant was treated unfavourably because of that "something". In **Pnaiser v NHS England 2016 IRLR 170 EAT** it was said that the tribunal should focus on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious for process of that person, but keep in mind that the actual motive in acting as the discriminator did is irrelevant.

187. Disability needs only be an effective cause of unfavourable treatment - see **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893**. The claimant need only establish some kind of connection between his or her disability and the unfavourable treatment. In that case sickness absence was as a result of stress and a heart condition. A tribunal had held that the cause of the unfavourable treatment was the police force's genuine but erroneous belief that the claimant was falsely claiming to be sick. The EAT considered nevertheless that disability had a significant influence on or was an effective cause of the unfavourable treatment. On the other hand, any connection that is not an operative causal influence on the mind of the discriminator will not be sufficient to satisfy the test of causation. If an employee's disability-related absence, for instance, merely provided the circumstances in which the employer identified a genuine non-discriminatory reason for dismissal, then the requisite causative link between the unfavourable treatment and the disability would be lacking. The authorities are clear that a claimant can succeed even where there is more than one reason for the unfavourable treatment. As per Simler J in the Pnaiser case: "The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it". Further, there may be more than one link in a chain of consequences.

188. The complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which states:

"(1) A person (A) harasses another (B) if -

A engages in unwanted conduct related to a relevant protected characteristic, and
the conduct has the purpose or effect of—
violating B's dignity, or
creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(i) the perception of B;
(ii) the other circumstances of the case;
(iii) whether it is reasonable for the conduct to have that effect."

189. Harassment will be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

190. A claim based on "purpose" requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the tribunal to draw inferences as to what the true motive or intent actually was. The person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

191. Where the claimant simply relies on the "effect" of the conduct in question, the perpetrator's motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect. The fact that the claimant is peculiarly sensitive to the treatment accorded him does not necessarily mean that harassment will be shown to exist.

192. Pursuant to Section 27 of the Equality Act 2010:

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

B does a protected act; ….

193. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. There is an initial burden on the claimant to prove facts from which the tribunal could conclude, in the absence of any other explanation, that the respondent has contravened Section 27. The burden then passes to the respondent to prove that discrimination did not occur. If the respondent is

unable to do so, the tribunal is obliged to uphold the discrimination claim. The question for the tribunal to ask is why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test.

194. It is again clear from the authorities that a person claiming victimisation need not show that the detrimental treatment was meted out solely by reason of the protected act. If protected acts have a "significant influence" on the employer's decision making, discrimination would be made out. It is further clear from authorities, including that of **Igen Limited –v- Wong [2005] ICR 931**, that for an influence to be "significant" it does not have to be of great importance. A significant influence is rather *"an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial."*

195. The time limit in complaints of discrimination is provided for at section 123 of the Equality Act 2010. It is a period of three months starting with the date of the act complained of, but also "such other period as the employment tribunal thinks "just and equitable". Conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the expiry of the period in which the person might reasonably have been expected to implement the adjustment.

196. The tribunal reminds itself that in the case of **Robertson v Bexley Community Centre [2003] IRLR 434** it was stated there was no presumption that a tribunal should exercise its discretion to extend time and in fact the exercise of the discretion would be the exception rather than the rule.

197. The factors to be taken into account when deciding whether to exercise the discretion to extend time in discrimination claims include those which are set out in the Limitation Act 1980, section 33(3). That approach was endorsed by the Employment Appeal Tribunal in the case of **British Coal Corporation v Keeble and Others [1997] IRLR 336** although subsequent authorities make it clear that it is merely a useful guide, but should not be adhered to slavishly. The tribunal was intended to have the widest possible discretion. The best approach for a tribunal is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay. The ultimate consideration is the balance of prejudice.

198. Applying the legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

199. The tribunal addresses firstly the complaints of disability discrimination

200. The first complaint of a failure to make reasonable adjustments is based on a PCP of expecting staff to carry out telephone triage work from home with no home risk assessment or suitable equipment from July 2020 to August 2020. It is said that this put the claimant at a substantial disadvantage because she was unable to mobilise adequately, leading to a worsening of her symptoms and an inability to sustain normal working hours.

201. It has been clarified now that the reasonable adjustments which it is said should have been made were: providing a hands free headset that worked, providing effective Wi-Fi calling facilities to enable her to use the respondent's telephone in her home and move about while doing so, providing a standing desk, providing shorter shifts, providing weekday evening shifts and providing frequent breaks.

202. The tribunal accepts that the respondent had a practice of expecting staff to carry out telephone triage work from home with no home risk assessment. That is of course what happened in the claimant's case from July 2020. However, whilst not telephone triage work, the claimant already worked from home when she carried out her GP performance review work. There had never been a question previously as to the need for the claimant's working conditions and arrangements at home to be risk assessed. Mrs Reid's evidence was that DSE assessments were not carried out for those who worked from home during the coronavirus pandemic and she had not felt the need to give advice, in particular, to more senior colleagues about any arrangements they adopted for homeworking. Homeworking was not widespread within the respondent pre-pandemic and it was recognised at the grievance appeal stage that issues raised by the claimant ought and were to be adopted in a homeworking policy which the respondent was developing. There was a general practice of not carrying out these assessments.

203. The tribunal does not, however, accept that the respondent operated a practice of requiring employees to undertake telephone triage work with no suitable equipment. There was a shortage of sources of supply of laptops to be provided to staff working from home due to global supply issues. Otherwise, the tribunal has no evidence of any lack of provision of equipment and certainly not of that resulting from any practice adopted by the respondent. The only evidence the tribunal has is of what was provided to the claimant. She was supplied with a telephone and headset. Whilst she may maintain that the individual telephone, which she was supplied with, was inadequate (as she could not find a way of connecting it wirelessly to her Wi-Fi network) and may assert that her headset was broken, that is not in itself indicative of a practice of providing unsuitable equipment or that these issues were experienced by anyone other than the claimant herself. The respondent had set up a team to deal with employees and any issues regarding their homeworking, including the provision of IT support. This is indicative of the respondent seeking to enable those working from home to function effectively, to everyone's benefit.

204. The tribunal does not then accept that the claimant was at a particular disadvantage in terms of not being able to sufficiently mobilise, whether arising out of a lack of risk assessment or indeed any equipment failures. The tribunal's conclusion, on the evidence, is that the claimant could in fact mobilise during her telephone triage shifts. The claimant was at no stage working in anything which approximated to a typical call centre environment, where she was confined to her workstation and having to field a succession of incoming calls. There were no incoming calls. The claimant was provided electronically with a list of patients to call. She selected the outbound calls to make and could certainly take time between calls to get up, walk around or stretch as required to try to ease any arthritic symptoms. During the shifts she worked, she was not the only GP making those calls - a number of GPs servicing the Harrogate out of hours service had the same log of calls to select from. The claimant had no targets and was not monitored in terms of the number of calls she made. Furthermore, in 10 out of the 20 shifts she worked in the period, the number of calls she made were in single figures. During the very busiest of her shifts she made an average of 5 calls in an hour. Whilst these would be of varying lengths, on the tribunal's findings, the claimant had a significant amount of time during each telephone triage shift worked from home to mobilise.

205. Had the claimant suffered the disadvantage contended for, she would have more likely than not made the respondent aware of it. She did not raise that her work was exacerbating her impairment or symptoms save as to on one occasion referring to herself as "crawling out of her chair" as an unspecific aside in a telephone conversation with Mrs Reid in late July/early August 2020 and in an email of 2 September to Dr Miers and Mrs Reid referring to her requested change in role (after she had already ceased the home working) and saying, as a point subsidiary to IT issues, that sitting in a chair for 5 hours was "not good for my arthritis".

206. In an email to Mrs Reid of 15 June before the claimant started the work, the claimant referred to receiving her phone and headset safely, then referring to her shifts without any indication as to any concerns of a physical nature in carrying out telephone triage work. The claimant knew exactly what this sort of work involved. In an email to Mrs Reid on 2 August 2020, the claimant referred to frustration with telephone triage, but then went on to refer to equipment and technology issues with no reference to any exacerbation of her physical impairment. As at 13 August 2020, she was in fact suggesting as a potential change in working pattern, one where she worked 2 longer days, a reference which the tribunal has found was more likely than not to be to a shift in excess of 7 hours' duration.

207. Indeed, the tribunal must conclude that (if there had been any substantial disadvantage) the respondent did not know and, in the circumstances, ought not reasonably to have known, that the work which the claimant was carrying out exacerbated her symptoms (and put her at that disadvantage). Again, the claimant already within her working pattern as an OOH GP worked from home

without raising any difficulties in terms of the working environment at home. The claimant had previously told Mrs Reid that she would listen to calls whilst standing up doing the ironing. The claimant was an individual of significant seniority, who was used to working autonomously and with a significant degree of insight into how her environment might affect her health given her knowledge as a GP. Her lack of knowledge of concepts such as the duty to make reasonable adjustments cannot be accepted. It was reasonable to assume that the claimant was capable of arranging or taking her own breaks or stand up/move around on occasions to manage any pain or discomfort. She might reasonably be expected to have had access to a suitable comfortable chair at her home including in the circumstances where she already worked from home to an extent. She told the tribunal that there were 2 chairs which she tried whilst performing the telephone triage work. The respondent was left unaware of any difficulty the claimant was experiencing.

208. The claimant could again mobilise, even when making a call, given that she used the speaker facility on her phone. She had to make a note of each patient consultation, but could do so either by typing a note onto the system during the call or by making handwritten notes to be inputted immediately after the call ended. It is noted that the claimant's asserted disadvantage was not being able to mobilise, rather than being unable to sit or stand, where being immobile in a standing or seated position might exacerbate her condition.

209. In terms of suggested adjustments, it is said that the claimant should have been provided with a headset that worked. She chose, as a workaround, to put her phone on loudspeaker, but fundamentally she ought reasonably to have told the respondent that her headset was defective. Mrs Reid, on the tribunal's findings, had no knowledge of this. The claimant says that effective Wi-Fi calling facilities ought to have been provided. The tribunal has heard that the claimant's mobile phone reception, where she was working in the Lake District, was poor and that the phone she was using did not have the facility to accept Wi-Fi calling or at least the claimant had been unable to get this function working. This adjustment had nothing to do with any alleviating of her symptoms of arthritis nor involved a disadvantage relating to the pain she suffered. The claimant was able to and did use her own telephone (on speaker).

210. A provision of a standing desk might have provided a workstation which allowed the claimant better movement and positioning, but again without her raising the issue there was nothing to reasonably alert the respondent to the need to provide such equipment. Again, it is wholly insufficient for the claimant to point to the respondent's knowledge of her arthritis. Mrs Reid was oblivious to the claimant struggling in the way she now maintains in evidence before the tribunal. The provision of a standing desk as a reasonable adjustment would in any event have entailed considerations of cost and practicability, not least given the claimant's home location and the need, in all likelihood, for access to her home to complete an installation in circumstances where she was shielding there.

211. The claimant maintains that she should have been given shorter shifts, but the tribunal's findings are that the shifts were not overlong in circumstances where the claimant was able to mobilise and where, again, on 13 August 2020 she asked for a potential alternative which involved her working 2 longer shifts. The claimant worked the majority of her shifts at weekends which were busier than on weekday evenings, but the evidence is that the claimant could cope with those busier shifts (which were not so busy as to not allow her time to take breaks and mobilise) and she did work some weekday shifts in any event.

212. Finally, the claimant maintains as a reasonable adjustment that she ought to have been provided with frequent breaks. She could, in fact, take whatever breaks she needed. Had she raised a need for longer breaks with Mrs Reid, all the evidence suggests that they would have been provided for her.

213. The next reasonable adjustment claimed is that the provision of the following auxiliary aids would have mitigated the same disadvantage the claimant suffered: providing a headset that worked, providing effective Wi-Fi calling facilities and providing a standing desk.

214. This claim indeed involves the same pleaded disadvantage already relied upon in the claimant's first reasonable adjustment complaint. The tribunal has neither found that such disadvantage was suffered by the claimant from any practice applied, nor that the failure to provide the aforementioned auxiliary aids would have alleviated the claimed disadvantage. It has not concluded that the respondent ought reasonably to have been aware that she was so disadvantaged.

215. The third complaint of a failure to make reasonable adjustments is reliant on a PCP of expecting or requiring staff to attend work in the workplace from around September 2020, which is said to have put the claimant at a substantial disadvantage because of the risk to her health from Covid. Whilst the issues identified in the case management process referred to a reasonable adjustment of allowing her to continue working from home or to work in a Covid secure setting, the case is now put on the basis of a suggested reasonable adjustment of agreeing to pay the claimant the hourly rate for night shifts, if she continued to work from home, which Mr Bunting accepts the respondent did do from 6 October 2020.

216. The tribunal cannot accept, on the evidence, that there was any such practice. The respondent's staff, or the vast majority of them, had continued to attend work throughout the coronavirus pandemic. There was no practice of requiring those who were clinically extremely vulnerable to return back to their normal workplaces. The evidence is not that the respondent was seeking to pressurise or force people back to their ordinary workplaces, but rather that it wanted staff to return to work if, and only if, it was safe for them to do so.

217. The claimant maintains that she was disadvantaged as she was less safe at her normal workplace as she was more at risk of catching Covid there. Originally, as a reasonable adjustment, she maintained that she ought to have been allowed to work from home. Of course, the claimant was able to work from home. She chose not to, but to instead return to work at the Friarage Hospital. She had already suggested a reduction in her hours by 50% arising out of her expressed frustration at carrying out the telephone triage work from home, a frustration not simply arising out of any exacerbation of her symptoms of arthritis. If the claimant was disadvantaged by not receiving the overnight allowance premium, any such disadvantage disappeared on the respondent's confirmation, on 6 October 2020, that she would continue to enjoy this premium on account of her temporary redeployment. Pay, however, did not address her disadvantage in circumstances where she took the decision to seek to change her hours of work at home and then, in any event, to return to her substantive role. Maintaining her overnight shift enhancement would not have been sufficient to prevent the claimant from returning to this substantive role. She would still have suffered financially given that she had determined that she was not able to work 90 hours per month at home, including in circumstances where the available shifts interfered, she felt, with her work/life balance. This inference can be drawn by the claimant's suggestion in evidence that it would have been a reasonable adjustment to ensure that her overall monthly pay was protected – not just the hours she worked. This helps to explain why the claimant did not choose to return to work at home after 6 October or suggest thereafter that this was a viable option.

218. There are then complaints of unfavourable treatment because of something arising in consequence of disability.

219. Firstly, the claimant relies as unfavourable treatment on her being wrongly advised by Mrs Reid and Ms Callow from 21 August until 6 October 2020 that her hourly rate of pay would be reduced if she remained in the telephone triage role. In terms of the something arising from disability, it was put in submissions that the claimant had to work remotely due to her disability, because she was on immunosuppressant medication. Her remote working gave rise to her not working on nights, as no nightshifts were available for her.

220. The tribunal concludes that there was no unfavourable treatment arising from disability. The reason for the claimant being told that she would not receive the overnight premium (which advice accorded with her contractual entitlement) was Ms Callow's genuine misunderstanding of the arrangement. The claimant had, of course, been in receipt of the additional overnight allowance when working weekend and evening, but not overnight shifts. The trigger to a consideration of the claimant's pay was her request by email of 13 August to reduce her hours by half, take half pay for half of her normal hours and then see how the winter months panned out, the vaccine arrived or the guidance for the clinically vulnerable was altered. At the forefront of Ms Callow's mind was this proposed change, rather than the disability issues which formed the background to the claimant's proposal. She believed that the claimant had

been assessed as able to return to her substantive role, but that the claimant had put forward an alternative proposal that was not merely a temporary expedient. This then resulted in a mistaken interpretation of the respondent's practice in terms of maintaining pay in such circumstances. Given that Ms Callow would have advised that the claimant should maintain her overnight shift pay, if she had understood the circumstances, the circumstances themselves cannot have been the reason for her decision and treatment of the claimant. The nature of Ms Callow's responses are discussed further in respect of the next allegation.

221. Secondly, the claimant maintains that she was treated unfavourably by the respondent providing delayed, evasive or inaccurate responses in correspondence to her queries regarding health and safety and pay on 9 September (Ms Callow), 11 September (Mrs Reid), 1 October (Mrs Wilkinson) and 6 October (Ms Callow and Mrs Reid). The something arising in consequence of disability is said to have been the claimant's persistence in raising queries about risk assessments and pay because of her concerns about her health arising from her immune suppressed status. It is said that the respondent's treatment of her was deliberate in the hope that she would "go away".

222. The tribunal has reviewed the aforementioned correspondence. Ms Callow's email to Mr Jackson of 9 September referred to, following shielding pausing on 31 July, an individual risk assessment having been completed with each colleague. She then referred to the FAQ relating to pay which was said to be purely around temporary duties which employees were undertaking whilst shielding and until they were able to return to their substantive role (supportive of the aforementioned misapprehension she was working under). Where the respondent could not support employees back into their substantive role, it would look to implement pay protection for a set period of time. However, she described the current situation as being one where the claimant could return to her substantive post following a risk assessment, but had chosen to move to the new role. This was in reply to an email of Mr Jackson of 7 September. The reply was therefore prompt. The claimant was aware that individual risk assessments were being carried out in advance of an anticipated end to shielding after 31 July 2020. She knew that she had not had an individual risk assessment following that date (only the one on 2 July which had been in anticipation of the end of shielding in any event). Whilst the tribunal is clear that there was no attempt to mislead, the claimant could not in any event have been misled as she obviously would have had to have been involved in any such assessment of risk.

223. Mrs Reid responded at length to Mr Jackson on 11 September repeating accurately the advice she had received from HR that the claimant would need to be paid the hourly rate for the shift she was working rather than the overnight hourly rate. In response to a request for the individual risk assessment following the pause in shielding, the individual risk assessment completed on 2 July was attached. There was no attempt to mislead or be disingenuous. She referred to

the low assessment of risk in the claimant's GP OOH's role, as that was the genuine assessment of risk she thought she had made on 2 July, the tribunal recognising that the assessment had been in part of moderate risk.

224. On 1 October 2020 Mrs Wilkinson responded to an email of Mr Jackson of 29 September chasing a response from an email raising his concerns about the claimant on 14 September. She responded on 1 October apologising for the delays caused by her annual leave and that amongst those in the team. She referred to Ms Callow having returned from leave and that she would pick up the dialogue as a matter of urgency. The tribunal notes, therefore, delayed correspondence (albeit it accepts the explanation for the delay), but does not consider that this constitutes an evasive response. Mr Jackson may have wished the matter to be dealt with at a higher level, but the tribunal has noted Mrs Wilkinson's seniority and broad responsibilities such that it can understand why she would wish the matter to be dealt with by the relevant HR business partner who was already closely involved in the management of the claimant's situation. Realistically, if Mrs Wilkinson had responded directly, she would have been simply relaying information she had then obtained from Ms Callow.

225. On 6 October 2020, Mrs Reid confirmed that the respondent was happy to support the claimant by maintaining her overnight pay for the hours she worked in a 6 month period. If the working pattern then became permanent, the hourly rate of pay would be adjusted. She referred to Ms Callow originally understanding this to have been a permanent arrangement. This provided the resolution to the claimant's pay issue and gave the claimant what she was seeking. Providing a clarification on 6 October constitutes a delayed resolution, but was not in itself evasive, stating the accurate position and the genuine reason for the earlier understanding (now reversed) that the claimant would not receive pay protection.

226. Ms Callow emailed Mr Jackson on the same day apologising for the delay in coming back to him and referring to her having just returned from annual leave, which was again accurate. She did not attempt to assert that a risk assessment had taken place other than the one which the claimant had participated in and was well aware of. She referred to it being clear, following a discussion with Mrs Reid that morning, that there had been a misunderstanding, saying that she was under the impression that this had been a permanent change and confirming now that the claimant's pay would be protected unless the arrangement became permanent at some future date.

227. In summary therefore, an inaccurate statement was made regarding the claimant's pay entitlement. It took over a month to resolve this. The statement regarding individual risk assessments might be read as suggesting an individual risk assessment after 31 July, but the claimant knew there had not been one and the responses in that regard were certainly not evasive or intending to mislead. The delays and inaccuracies were, on the tribunal's findings, due to Ms Callow's misunderstanding of the situation, in particular regarding pay, and the pressures of work on the respondent's managers and,

in particular, within the HR team which have been described in some detail and where, in this period, there were holiday absences in circumstances where members of the HR team had not been able to take leave since the commencement of the coronavirus pandemic.

228. It is put that the reason for the alleged unfavourable treatment was the claimant's persistence in pursuing the issue of her pay and individual risk assessment. The tribunal does not agree. Again, the reason arose out of pressure of work, lack of availability and an element of misunderstanding. That is why the claimant suffered any disadvantage, not for a reason arising from disability. The claimant's persistence itself arose with her health issues and disability as a relevant background, but not from her disability in terms of the necessary causal link. There was no deliberate mistreatment of the claimant in the hope that she would "go away".

229. The third claim of unfavourable treatment is her being invited to a final absence review meeting which was said to arise due to the claimant's absence from work, which in turn was due to her fears about her health (arising out of her disability) and which led her to her suggesting she apply for ill-health retirement. It is said that the respondent failed to comply with its Managing Attendance Policy, after the claimant suggested she apply for ill-health retirement, by it moving straight to a final stage sickness absence review and/or threatening to move to a capability dismissal.

230. The invitation of the claimant to the final review meeting was unfavourable treatment in the sense that it put her at risk of the termination of her employment and certainly caused her concern that that might be a potential outcome, in circumstances where she had only had a brief absence from work and had been given no warning that such a procedure might be commenced separate from any ill-health retirement process which she had just recently triggered. It must further be viewed as unfavourable treatment, when the respondent's own policies provided for at least one prior meeting to discuss an employee's situation before progressing to a final review meeting.

231. It cannot be said that the invitation was part of and/or as a consequence of the claimant's application for ill-health retirement, an application made, as it had to be, on the basis that she was not going to be able to return to work. Ms Godfrey of HR was clear in her advice to Mrs Reid that the respondent needed to consider next steps from a management of attendance perspective and this was a separate process from ill-health early retirement. It was said that they would review employment options relating to her current medical situation sooner, rather than awaiting the outcome of that application. She provided the template letter inviting the claimant to the final review meeting accordingly. The claimant's disability impairment of arthritis was the reason both for her ill-health retirement application and her absence from work.

232. The claimant was therefore treated unreasonably in the invitation arising from her disability. The respondent cannot rely as a legitimate aim on a desire to assist the claimant in her ill-health retirement application, given that it was viewing the managing of the claimant's absence as a separate issue/process. Whilst it might have been legitimate to seek to review the claimant's health situation from the perspective of future attendance at work, it was not proportionate to commence the process with an invitation to a final review meeting where one of the options under consideration could be the termination of employment and in circumstances where the claimant reasonably did not understand that such possibility was not under immediate consideration. It cannot have acted proportionately in circumstances where it failed to follow its own procedures regarding managing attendance. Subject to the issue of time limits, the claimant's complaint of disability discrimination in this regard succeeds.

233. Fourthly it is said that the respondent failed substantively to act on the claimant's grievance in a timely manner from 26 November 2020 until after 17 February 2021. The claimant's case is that the respondent deliberately delayed in the hope that the claimant's ill-health retirement process (which had arisen because of the claimant's disability) would "overtake" the grievance process. Again, the respondent hoped the claimant would "go away".

234. There was undoubtedly delay in progressing the claimant's grievance. The tribunal, however, rejects the claimant's contention that the delay was deliberate in the hope that events would be overtaken by her ill-health retirement application (which the respondent was well aware was unlikely to be resolved quickly - it is noted that the application was not successful until October 2021) or in the hope that the claimant would, in her words, "go away".

235. There was no deliberate delay. The claimant and her solicitors knew that the claimant had raised a separate grievance and were chasing up a response. In no sense could the respondent hide the grievance or avoid turning its mind to it. Nor can the tribunal conclude that the respondent was hoping to seek to resolve matters on the basis of the claimant's separate "without prejudice" letter or any settlement discussions which that might lead to. Had the respondent been seeking to explore "without prejudice" discussions first, it could easily have sought the claimant's agreement to pursue those discussions first and, dependent upon the genuineness of any prospect of an amicable settlement, that would not necessarily have been an unreasonable position to take.

236. It is absolutely obvious, from the chain of correspondence, that the cause of the initial delay was Ms Callow not appreciating that a separate grievance had been submitted. Ms Callow was only provided with the "without prejudice" correspondence and was not aware of the grievance. The tribunal agrees with Mrs Wilkinson's genuine assessment of the situation as being one of "cock up, rather than conspiracy". The email correspondence cannot be reasonably interpreted in any other manner. Ms Callow's lack of awareness is palpable until a sudden realisation by Mrs Siewruk-Barnes that there were 2 letters and

Ms Callow appeared to be talking about only one. Again, there is no reason why the respondent would wish to delay dealing with the grievance. Why would it not want its own solicitors to see this grievance, to have the full picture and to be able to advise accordingly? Clearly, they were not aware of anything other than a "without prejudice" letter for some time. If Ms Callow had realised that a grievance had been submitted, she would certainly have provided that to the external solicitors. There is again some delay after the realisation of the omission, but one explainable then by the need to get advice on what was a very substantial grievance and again the obvious pressures of work on all those involved in very difficult continuing times. Once investigating officers were appointed to deal with the grievance, the matter moved with as much speed as one would anticipate to be likely and practicable in an employer in this sector and where involvement in a grievance and grievance appeal inevitably took people away from their own frontline roles.

237. The claimant separately brings complaints of disability related harassment, clarified in final submissions in the terms set out below.

238. Firstly, she relies on Mrs Reid suggesting on or around 21 July 2020 that Dr Shepherd had said, during the claimant's shielding period, that she was at no more at risk of catching Covid at work than when going to the supermarket.

239. There was no attempt by Mrs Reid to dispute that the supermarket comment was made as alleged. It was clearly, in terms, related to the claimant's shielding status and, therefore, to her disability. The tribunal also concludes that it was unwanted. The claimant had not herself been to a supermarket for some months because of her shielding status such that it was insensitive to suggest that she was no more at risk of catching Covid at work than when going to the supermarket. At the very least, the comment displayed a lack of understanding on Mrs Reid's part (and at some unidentifiable earlier stage by Dr Shepherd) of the claimant's situation. Dr Shepherd appreciates in hindsight that the comment might be regarded as insensitive and, indeed, it was so on its repetition by Mrs Reid to the claimant on or about 21 July. Mrs Reid did not make the comment with the purpose of causing the claimant upset. She had a very good relationship with the claimant, as the claimant indeed continued to recognise after the comment itself had been made. She was generally supportive of the claimant.

240. However, it did have the effect of causing upset to the claimant. The tribunal has had to carefully weigh up what this upset actually amounted to. The claimant was concerned about the comment as illustrated by her wish to have it clarified and Mrs Reid immediately reverting to Dr Shepherd and then back to the claimant to explain herself. The claimant described herself to the tribunal as having been "dumbfounded" by the comment and the tribunal accepts that evidence. On the other hand, the claimant did not raise this in her grievance and would have done, regardless of the (allegedly short) time allowed to her in any initial grievance meeting, had it been regarded by her as a particularly serious matter which had enduring concerns for her.

241. On balance, whilst the tribunal must be careful not to devalue the test set out in Section 26 of the 2010 Act in terms of the necessary effect on the claimant, the comment is one which, it considers, violated her dignity. The tribunal would not, however, conclude that in the alternative it had created an overarching environment which was, for instance, hostile, offensive or otherwise intimidating. Nevertheless, in terms of the necessary effect, the claimant has surmounted the hurdle.

242. Finally, the tribunal does not consider it unreasonable for the claimant to have taken the comment in the way that she did. The tribunal notes that Dr Barrett reacted (understandably) in a similar manner when that terminology was used against a background of her own shielding due to the coronavirus.

243. Subject to issues of time limit, this complaint of harassment related to disability succeeds.

244. Secondly, the claimant refers to Dan Walker emailing her on 2 September 2020 asking if she would be happy to lose 7.5 hours of annual leave to make up for her hours having been less than her 90 contracted hours during August 2020, to ensure that her August pay was not impacted.

245. This complaint of harassment fails. Mr Walker was making a straightforward query regarding a factual shortfall of actual hours worked against her contracted hours. The background to that shortfall may well have been her now working on telephone triage from home in circumstances of her shielding and having continuing concerns regarding her vulnerability to the coronavirus, but that must be seen, in the full context, as background only. The comment itself was unrelated to disability. It certainly would have been made in respect of any individual whose hours fell short of those they were contractually expected to work in order to receive full payment of salary. The tribunal is mindful of Mr Walker's particular employment role and his lack of involvement/interest in managing the claimant otherwise during this particular period. This communication did not form part of the claimant's grievance. She did not indicate at the time it was received that she found anything offensive in it.

246. Thirdly, the claimant complains of Mrs Reid's email to Mr Jackson on 11 September 2020 to the effect that Mrs Reid was under the impression that GPs had been advised to return to normal working practice as far as possible as part of the national recovery plan, effectively placing pressure on the claimant to return to in person working.

247. When that email was written the claimant was already due to return to work. Having proposed a reduction in her hours and learned of the lack of pay protection, the claimant had decided that she would now wish to instead return to her substantive position. The comment again needs to be seen in context.

Mr Jackson was putting a number of detailed questions to Mrs Reid where, in one particular question, he was exploring the issue of risk in a return to work and whether the claimant should follow government advice or the respondent's own assessment of risk. Mrs Reid responded that the Trust was itself reacting to government guidance and would continue to do so, including in the event that those who had been shielding were advised to take additional precautions. She then stated that she was under the impression that GPs had been advised to return to normal working practice as far as possible as part of the national recovery plans. She was simply here stating her understanding as to the way in which GPs were providing GP services after a period where face-to-face consultations with GPs had been minimised. The response indeed was lifted from an email from Mrs Siewruk-Barnes, which was clearly just trying to express her own understanding in querying how Mr Jackson's email might appropriately be responded to. It was not a comment related to the claimant's disability. Nor can, the tribunal accepts, it have had the necessary effect in circumstances of the claimant's evident lack of reaction to it either directly or through Mr Jackson who was clearly still at pains to be appreciative directly to Mrs Reid of her involvement in the claimant's case and the efforts she was making to support her.

248. Fourthly, the claimant raises, as an act of disability related harassment, the invitation to the final stage sickness review on 19 October 2020.

249. Whilst the tribunal considers that this complaint is perhaps more appropriately framed as one of discrimination arising from disability, it succeeds also as one of disability related harassment. The invitation, regardless of it falling outside the respondent's own procedures, was clearly unwanted conduct. It invited the claimant to a meeting 10 days into a period of sickness which, it was stated, could potentially lead to the termination of her employment. It was related to her disability in that it was triggered by her absence due to her disability impairment, and not simply, as above, by her application for ill health retirement. It was issued by Ms Godfrey of HR. The tribunal does not conclude that she had any purpose of causing the claimant upset, but the invitation certainly had that effect. It can properly, on the evidence, be considered as violating her dignity and creating an intimidating environment in that the claimant thought she was going to be dismissed. It was not unreasonable for the conduct to have that effect on the claimant. This complaint of disability related harassment succeeds, again subject to time limits.

250. The claimant brings a complaint of victimisation. The protected acts relied upon are her communications to the Freedom to Speak Up Guardian on or around 23 October 2020 and her raising of a grievance on 26 November 2020. Mr Bunting recognised in submissions that realistically her complaint relates to the grievance, which is accepted by the respondent to amount to a protected act. In terms then of detrimental treatment because of that protected act, the claimant relies on a failure to act on her grievance in a timely way, inadequate

grievance/appeal investigation and, finally, unsupportable grievance and appeal conclusions.

251. The tribunal accepts that the claimant's disclosures to the Speak Up Guardian constituted a protected act. The claimant's evidence, which has not been challenged, is that she discussed with the Guardian, the respondent's failures in relation to the Equality Act 2010. Certainly, in any event, her grievance is accepted by the respondent to be a protected act raising complaints, not least, of a failure to make reasonable adjustments.

252. There is, however, no evidence from which the tribunal could conclude that relevant decision makers within the respondent were aware of the disclosure to the Guardian.

253. In terms of detrimental treatment, the tribunal has concluded that there were failures on the respondent's part in acting in a timely manner on her grievance. There is, however, no evidence from which the tribunal could reasonably conclude that the failure to address it was in any sense whatsoever influenced by the claimant having made a protected act. The suggestion was not squarely put to Ms Callow or other of the respondent's witnesses. It is clear, and the tribunal accepts, that she was genuinely unaware of the existence of a separate grievance letter until some weeks after it had been lodged. There was then time taken to take legal advice and then to start the grievance process. However, again, once investigating officers were in place, the grievance was dealt with within a reasonable timeframe from an initial grievance meeting, to a grievance outcome to then an appeal meeting and grievance appeal outcome.

254. Indeed, it cannot be said that the claimant's grievances were not adequately investigated at either the initial or appeal stage. Stepping back, the evidence is of Dr Sherliker and Mr Forster taking their responsibilities to resolve the claimant's concerns extremely seriously and conscientiously. Both produced very detailed and reasoned conclusions, clearly genuinely reached and after a careful balancing of all the information before them. The majority of the claimant's points of grievance were upheld.

255. The lack of investigation suggested by the claimant appears to relate to a failure to interview Mrs Wilkinson and Dr Shepherd at the initial grievance stage. Dr Sherliker has, however, explained completely to the tribunal's satisfaction her reasoning that she had enough material before her to reach a conclusion without interviewing those individuals. The claimant may not agree, but has shown no facts from which the tribunal could conclude Dr Sherliker to have been influenced by the fact that the claimant's grievance included complaints of discrimination. It cannot be said that Dr Sherliker sought to duck or obfuscate on any of the claimant's complaints related to her disability or of discriminatory treatment. Mr Forster went further in his findings in favour of the claimant, but that is not suggestive of any deficiency in Dr Sherliker's conclusions. He did interview Dr Shepherd and Mrs Wilkinson. It is noted that

he did not ask Dr Shepherd about the supermarket reference which was then repeated to the claimant by Mrs Reid. Nor did he ask Mrs Wilkinson expressly why she had referred an attempt to escalate matters of the claimant's pay to her, back to Ms Callow. Reference to such omissions again ignores the overall thoroughness of the exercise Mr Forster undertook and his willingness to make further findings in the claimant's favour. Again, there is no evidence from which the tribunal could conclude that he was influenced by the fact that the claimant was complaining of discrimination. That was not indeed put to Mr Forster and understandably so.

256. The conclusions indeed cannot be termed as inadequate. The claimant may not, agree with some of the explanations put forward by people involved in the process, including Mrs Reid, Mrs Wilkinson and Ms Callow, but Dr Sherliker and Mr Forster had evidence before them which reasonably allowed them to arrive at conclusions such as the claimant's being told of a lack of pay protection being related to a misunderstanding on Ms Callow's part and the delay in the grievance to a failure to appreciate that there was a separate grievance letter. Indeed, Mr Forster went further in concluding at the appeal stage that the invitation to a final sickness review meeting ought to be classified as more than an issue of miscommunication and was a failure to follow due process. Nevertheless, at the earlier stage, Dr Sherliker's conclusion that the issue was one of poor communication was fully reasoned and a view which could on the facts have been reasonably arrived at. Again, the claimant does not impugn her good faith. Mr Foster concluded that the Salus workplace assessment should not have been used in a clinical area as regards a Covid risk and, whilst this may have come as a surprise to the claimant, she herself would not describe the process of risk assessment as straightforward and one not open to differing interpretations. The claimant, in respect of this issue, has throughout been as concerned with process as with substance and the debate as to the form to be correctly completed has become somewhat otiose. Surely, for her, the assessment of the nature of the risk and precautions to be taken were of primary importance. As regards reasonable adjustments, Mr Forster was willing to find that there had been missed opportunities and concluded that a DSE assessment ought to have been concluded in respect of the claimant's work location – a conclusion objectively harsh on the respondent given the prevailing and particularly difficult circumstances arising out of the unforeseen nature of the coronavirus pandemic.

257. The claimant herself does not suggest bad faith on the part of the grievance decision makers and concedes they reached conclusions which a person in their position might reasonably have reached. While she maintains that they may have been duped by those they interviewed, there is no evidence that they were and indeed the tribunal's own factual findings are not of any conspiracy or concerted attempt to disadvantage the claimant which the grievance decision makers were unable to uncover.

258. The complaint of victimisation must fail. Save in respect of the supermarket comment and invitation to a final sickness review meeting, all of the claimant's complaints of discrimination and harassment must fail and are dismissed.

259. In the claim of ordinary unfair dismissal, the claimant relies on a number of matters as separately or cumulatively amounting to a breach of trust and confidence.

The 21 July 2020 suggestion from Mrs Reid that Dr Shepherd had said that the claimant was no more at risk of catching Covid at work than when going to the supermarket.

260. The tribunal has considered this issue in the separate complaint of disability related harassment which has been upheld in the claimant's favour. Whilst meeting the definition of harassment, the tribunal concluded that it was insensitive and a clumsily made comment, albeit made in a particular context and not gratuitously, for instance, with the purpose of upsetting the claimant. Whilst appreciating that many acts of unlawful discrimination will amount to breaches of trust and confidence and fundamental breaches of the contract of employment, that is not necessarily the case and the test of a repudiatory breach must be separately applied as was done in **Amnesty International v Ahmed [2009] ICR 1450.** There, it is accepted on very different facts, the EAT could not say, despite a finding of direct race discrimination, that the claimant was entitled to feel that the relationship of trust and confidence between herself and Amnesty was destroyed or seriously damaged: even if those were in fact her feelings. It repeated that it is well-established that the test is objective. It could well understand how the claimant may have been very disappointed and upset, but that, it said, is not the same thing. Reverting to the claimant's case, in this instance of harassment, the tribunal cannot categorise the comment made as on its own surmounting the necessary hurdle. The claimant, certainly, did not react as if that might be the case at the time the comment was made. It was not her subjective view that the obligation of trust and confidence was broken.

The respondent advising the claimant from 21 August 2020 until 6 October 2020 that her pay would be reduced if she remained in the telephone triage role

261. There was here no breach of an express contractual term (and none is alleged), but rather a mistake and misunderstanding which was rectified, perhaps not as quickly as it might have been, but still in reasonably short order and where there were reasons for the delay already explained. The tribunal cannot categorise this incident as singularly amounting to a breach of trust and confidence.

Mr Walker asking if she would be happy to lose 7.5 hours of annual leave on 2 September to make up for her shortfall in contracted hours.

262. There was no breach of trust and confidence in an innocent and factual enquiry in circumstances where the claimant had not worked her contracted hours. The claimant did receive her full pay for the month in question.

Mrs Reid's email of 11 September saying that she was under the impression that GPs had been advised to return to normal working practice as far as possible as part of national recovery plans.

263. Again, the tribunal has already considered this issue fully in the separate complaint of harassment and the context in which it was said to Mr Jackson. It does not amount to a breach of trust and confidence.

The respondent using an incorrect risk assessment on the claimant's return to work on 14 September 2020

264. The respondent concluded itself that the incorrect Salus workplace risk assessment was used for the claimant's GPOOH work. Nevertheless, the risk assessment was conducted with the claimant to discuss and see what the particular risks were for the claimant on her return to the Friarage Hospital, with reference to the number/type of patients using the service and the precautions which were being taken. Dr Miers categorised the risk as low based on the scoring system contained within that document. He did, however, carry out a legitimate assessment of risk, reaching conclusions which had logic and were supportable. Other forms of risk assessment would on the evidence have pointed to a rating of risk as amber/medium, rather than the green/low assessment. The claimant had already been subject to an individual risk assessment where the risk had been categorised as low and medium. The claimant ought correctly to have had a further individual risk assessment on her return to work in September 2020. However, in terms of a breach of trust and confidence, the tribunal notes that, whatever the assessment of risk, the same protection was in place for the claimant in a workplace which could not be made or categorised as risk-free, of which the claimant was well aware. The claimant was not maintaining that if she had known that the assessment of risk was medium/amber she would not have sought to return to her substantive role. Dr Miers was not requiring that the claimant did so and expressed his personal view that the claimant should remain at home for her own safety. By 6 October, the claimant was clear that she could remain at home on protected pay. There was no fundamental breach of the contract of employment.

The respondent providing delayed, evasive or inaccurate responses to the claimant's queries regarding health and safety and pay

265. Again, the tribunal has already dealt with the issue of delayed, evasive or inaccurate responses in its consideration of the claimant's complaints of disability discrimination. These have not been upheld in her favour. Responses were not evasive. There was delay (but explainable delay) and inaccuracy which arose from genuine mistakes. The context again was of very busy people

in exceptionally strained circumstances making genuine errors. Viewed objectively, the respondent's actions cannot be classified as destroying or seriously damaging the relationship of trust and confidence.

The respondent inviting the claimant to a final stage sickness review meeting on 19 October 2020.

266. This invitation should not have been issued, certainly not without prior explanation to the claimant. The tribunal has found that it amounted to discrimination arising from disability and disability related harassment. Nevertheless, in the context of a fundamental breach of contract, the tribunal must note that the full context here was of the claimant wishing to apply for ill-health retirement, the whole basis of which was that she was not and would not ever be fit to work for the respondent - her fit note indicated no adaptations which might allow a return to work. If that was her assertion in the context of the ill-health retirement application, as it indeed had to be, whilst the claimant may have been legitimately concerned and disquieted by a speedy initiation of sickness management proceedings, the respondent taking such steps cannot be viewed as breaching trust and confidence. Furthermore, the respondent quickly recognised the inappropriateness of an invitation to that stage of meeting as an initial step and clarified that the claimant was now to be expected to attend straightforward sickness review meetings rather than ones which might result in the termination of her employment. That is what then occurred.

The respondent failing to act on the claimant's grievance in a timely manner from 26 November 2020 until after 17 February 2021

267. Again, the tribunal has already found there to have been a delay, but one where, viewed objectively, there cannot have been said to have been a breach of trust and confidence.

The respondent failing to adequately investigate the grievance and reaching unsupportable conclusions

268. The tribunal's findings do not support there having been any failure to adequately investigate the grievance or that any unsupportable conclusions were reached. This can add nothing to the claimant's complaint of constructive dismissal. Certainly, insofar as such argument may come to be engaged, the grievance appeal outcome cannot be categorised as a last straw, either a fundamental breach of contract or something which adds anything at all to a previous act or serious of adverse acts.

269. The tribunal is careful to stand back and view the cumulative effect of its findings in terms of a fundamental breach of contract. The tribunal has identified an insensitive comment, a mistake regarding pay protection, the use of incorrect risk assessment tools, a delay in resolving the claimant's queries regarding pay and risk assessments, an invite to a final sickness review

meeting which was outside process, albeit quickly remedied, and a grievance which was not dealt with in a timely manner albeit due to mistake.

270. Nevertheless, on the facts of this case, the tribunal cannot view those matters as, in their full context, cumulatively amounting to a breach of trust and confidence. At all times the respondent sought to properly engage with the claimant and her concerns. There may have been mis-steps, but not acts which viewed objectively destroyed or seriously damaged trust and confidence. Whilst the respondent in the latter stages of the claimant's employment pursued the ill-health retirement application, she had herself made, it still properly and very thoroughly, particularly in the context of everything that was going on within the respondent, sought to provide a genuine and thorough resolution of her grievance. Again, it still wanted to engage with her in a meaningful way. There might have been delays, mistakes and a single clumsy comment, but this was not an employer which, viewed objectively, on the totality of the evidence behaved in a way such as to evince an intention no longer to be bound by an essential term of the claimant's contract of employment. The claimant was not dismissed, so that her claim of unfair dismissal must fail and is dismissed.

271. It follows also that the claimant was not dismissed in breach of contract, so that her claim for damages must also fail.

272. Finally, whilst the tribunal has made findings in the claimant's favour in respect of disability discrimination, it must as a point of jurisdiction deal with the issue of whether or not those complaints have been brought within time. The tribunal does not consider that the supermarket comment and the invitation to the final sickness meeting form part of a continuing course of conduct. They are 2 distinct, isolated and unconnected acts. Mrs Reid was responsible for the supermarket comment made to the claimant. Whilst she was involved in the invitation to the sickness review meeting, it was not, on the tribunal's findings, her decision to invite the claimant to a final meeting. That was a genuine decision of Ms Godfrey of HR. The 2 matters are in any event unrelated.

273. The tribunal notes that the claimant was a BMA representative and had access to BMA advice. At a point shortly before her submitting her grievance, she was being legally advised, although the tribunal is unaware of the content of any advice regarding bringing subsequent employment tribunal proceedings.

274. The supermarket comment is around 10 months out of time and the invitation to the sickness meeting in excess of 7 months out of time in the context of early conciliation commencing on 2 June 2021 and concluding on 14 July, with the claimant's complaint submitted to the tribunal only on 8 October 2021. Mr Bunting did not disagree.

275. As regards the supermarket comment, it was not part of the claimant's initial grievance although it was raised at the grievance appeal stage. The claimant has not in evidence sought to put forward an explanation for her delay in

bringing a complaint about this or any other discriminatory act. It is, however, discernible from contemporaneous correspondence and her evidence that she wished to raise a grievance to give the respondent an opportunity to deal with her issues of concern and remedy them. That cannot, however, be said as regards the supermarket comment, when it was never part of the initial grievance. Looking at the balance of prejudice, there is clearly prejudice to the claimant if an otherwise well-founded complaint of disability related harassment cannot be upheld in her favour for reasons of jurisdiction. However, the tribunal has made a finding in the claimant's favour where it was clear that Mrs Reid was significantly disadvantaged in recalling exactly what she said, in what context and when. Dr Shepherd does not recognise making the comment at a daily update meeting contrary to Mrs Reid's memory. Mrs Reid's witness evidence was unclear (including in her written statement) as to what Dr Shepherd had said about the claimant shielding in the context of the exact medication she was taking. The email correspondence between Mrs Reid and Dr Shepherd at the time Mrs Reid made the comment does not alter the tribunal's view. In this complaint, it is clear to the tribunal that the respondent was significantly prejudiced by the passage of time and given the length of delay involved, the lack of the claimant seeking to advance a satisfactory explanation and sources of advice open to the claimant, it declines to exercise its discretion to extend time on a just and equitable basis such as to allow the tribunal jurisdiction. This claim must, therefore, be dismissed.

276. That leaves the invitation to the final sickness review meeting. Again, the claimant did not advance a positive explanation for her delay in bringing proceedings. Again, however, the tribunal can conclude that she wished to pursue her grievance in order to give the respondent an opportunity to remedy the situation. The invitation to the final review meeting, in breach of the respondent's own managing attendance policy, did form part of the initial grievance. This was a complaint where there was contemporaneous documentary evidence as to the rationale adopted by the respondent and where indeed the length of delay was somewhat (a little) shorter than in the aforementioned complaint of harassment. The prejudice to the respondent in dealing with this complaint at this late stage was simply not there. The respondent has been able to fully answer it and, of course, had already done so through the internal grievance and grievance appeal process where a conclusion was firstly reached of miscommunication and then of a more substantive breach of process. Balancing all these factors, including that the claimant was able to take expert advice, the tribunal does consider it just and equitable to extend time such that it has jurisdiction to hear such complaint and to make the finding of unlawful discrimination arising from disability and disability related harassment in respect of the invite letter to a final sickness review meeting. Such complaint of harassment and discrimination arising from disability succeeds.

Case No: 2501602/2021

Employment Judge Maidment

Date 28 November 2022