Case Number: 2206790/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR S FERNS**
MR P SECHER

BETWEEN:

Ms B Oniha

Claimant

AND

Nursing and Midwifery Council

Respondent

ON: **26, 27, 28, 29 and 30 November 2018**
Appearances:
For the Claimant: **Ms D Oniha, claimant's sister**
For the Respondent: **Ms K Balmer, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that the claims fail and are dismissed.

REASONS

1. This decision was delivered orally on 30 November 2018. The claimant requested written reasons.

2. By a claim form presented on 10 August 2017, the claimant Ms Brenda Oniha claims disability and race discrimination and unlawful deductions from wages. The claimant works for the respondent as a registration officer and her employment is continuing.

3. The respondent is the professional regulatory body for nurses and midwives in the UK and is responsible for registering all nurses and midwives and ensuring that they are competent to work in the UK.

The issues

4. The issues were identified at a preliminary hearing before Employment Judge Goodman on 29 May 2018, and were confirmed with the parties at the outset of this hearing, as follows:

Disability

5. Does the claimant have a physical impairment, namely IIH – Idiopathic Intercranial Hypertension? On 25 June 2018 the respondent conceded that the claimant was a disabled person within the meaning of the Act. Knowledge of disability was conceded from May 2016 onwards, but not before.

Harassment on grounds of race or disability

6. Did the respondent engage in unwanted conduct:

    a. Being called to a discussion with Emma Lacy on 23 November 2016
    b. An episode involving Emma Lacy and an email in December 2016
    c. Being disciplined on 24 April 2017 for breach of confidentiality, when others who also indiscreet were not.
    d. Being denied an annual pay increase that would otherwise have been awarded the reasons given by the respondent being disciplinary warnings: in April 2016 and April 2017 – the claimant says she was not aware this was the case until 24 April 2018 and in April 2018.

7. Was the conduct related to the claimant's race (at the preliminary hearing on 29 May 2018 the claimant identified herself as black) or disability?

8. Did the conduct have the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for her?

9. If not, did the conduct have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for her? In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Direct discrimination because of race or disability

10. Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010, namely any of the treatment listed in paragraph 6 above.

11. Has respondent treated the claimant less favourably than it treated or

would have treated her comparators? She relies on actual comparators being those who also discussed the investigation process in January 2017. We asked on day 1 who were the comparators? The claimant had not notified these names to the respondent. It was common ground that PN was a comparator and that there may be hypothetical comparators. The claimant mentioned other names on day 1 but had not previously notified the respondent of these names prior to day 1 of the hearing (despite being ordered to do so by Employment Judge Goodman on 29 May 2018, Order paragraph 1) so the respondent was not in a position to answer the case on this.

12. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of her race or disability?

13. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability

14. The allegation of unfavourable treatment to something arising in consequence of the claimant's disability falling within section 39 EQA, is that Emma Lacy treated her with hostility as set out in paragraph 6 above.

15. Does the claimant prove that the respondent treated her as set out in paragraph 6 above?

16. Did the respondent treat her as aforesaid because of something arising in consequence of her disability. The claimant says that what arose from her disability was her frequent sickness absence.

17. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

18. Alternatively has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had a disability? The claimant says that Emma Lacy knew of her disability from an email dated 25 May 2016 as well as from a consultant's letter of February 2017 and an occupational health report of 6 April 2017. At the preliminary hearing the claimant's sister told the tribunal that there was also verbal information given to the respondent but this had not been particularised.

Reasonable adjustments

19. Did the respondent apply the following PCP's, namely requiring the claimant to work at her desk to a set pattern and to attend an investigatory meeting of four hours without a break; the requirement to work with the computer screen provided.

20. Did the application of any such provision put her at a substantial

disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

a. She needed flexible breaks at her choice from work rather than fixed breaks and suffered increased stress as a result
b. She needed breaks at least less than four hourly intervals
c. Use of an unadapted screen intensified her symptoms

21. Did the respondent takes such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant however it is helpful to know the adjustments asserted as reasonably required and they were identified as follows:

a. flexible breaks
b. a different screen

22. Did the respondent not know, or could the respondent not to be reasonably expected to know that the claimant had a disability always likely to be placed at the disadvantage set out above?

Time limitation

23. The claim form was presented on 10 August 2017. The Early Conciliation certificate identifies day A as 13 June 2017 and day B as 13 July 2017. Accordingly any act or omission which took place before 14 March 2017 is potentially out of time, so that the tribunal may not have jurisdiction

24. Does the claimant prove that there was conduct extending over a period which is treated as done at the end of the period? Is such conduct accordingly in time?

25. Was the complaint presented within such other period as the tribunal considers just and equitable?

Unlawful deductions from wages

26. It was argued on behalf of the claimant at the preliminary hearing that even if the disciplinary treatment was not unlawful or did not amount to harassment, the pay increases were nonetheless properly payable as the withholding because of a disciplinary warning was non-contractual or not otherwise recorded in writing.

27. The respondent objected that no notice had been given of this claim which on the claimant's case arose from matters coming to her attention in April 2018. On day 1 the respondent understood this to be a live issue.

Remedy

28. If the claim succeeds, the tribunal will be concerned with remedy. This may include a declaration in respect of any proven discrimination,

recommendations and/or compensation, injury to feelings and/or the award of interest. The parties considered that remedy could be dealt with during this hearing allocation, if applicable.

Witnesses and documents

29. The tribunal heard from the claimant.

30. For the respondent the tribunal heard from four witnesses (i) Ms Emma Lacy, UK Registration Manager and for part of the material time, the claimant's line manager, (ii) Ms Jane Pound, Head of HR (iii) Ms Fiona Berner, Senior HR Adviser and (iv) Ms Alice Hilken who at the material time was the interim Head of Policy and Legislation and heard the claimant's April 2017 disciplinary.

31. A set of documents ran to two lever arch files of about 650 pages.

32. We requested a cast list, a chronology, an organisational chart for the relevant part of the organisation and a proposed timetable for the hearing and asked the respondent to produce these and submit them to the claimant for agreement. We were given these documents. The chronology was agreed save for one item.

33. We had written submissions from both parties to which they spoke and which are not replicated here. All submissions and authorities referred to were fully considered even if not expressly referred to below.

The procedural background

34. A first preliminary hearing took place in this matter on 17 November 2017 before Employment Judge Hodgson. The claimant did not attend. Orders were made including an Unless Order as Judge Hodgson was not clear as to whether the claimant was actively pursuing her claim.

35. A further preliminary hearing was listed to take place on 3 January 2018 it was postponed on the respondent's application and by consent to 5 February 2018.

36. The second preliminary hearing took place before Employment Judge Hodgson on 5 February 2018. It was not considered appropriate to list the case for final hearing at that stage as the parameters of the case remained uncertain.

37. A third preliminary hearing was listed for 29 May 2018, the claimant's request for a postponement having been refused. At the third preliminary hearing the claimant was represented by her sister Ms D Oniha (who represented her before us) and the issues were identified by Employment Judge Goodman. The case was listed for hearing commencing 26 November 2018.

38. An open preliminary hearing was listed for 28 September 2018 to decide whether the claimant was disabled within the meaning of section 6 of the Equality Act. The respondent applied to vacate this hearing as on 25 June 2018 it conceded disability. Knowledge of disability was not conceded prior to May 2016. Accordingly the hearing listed for 28 September 2018 was vacated.

Findings of fact

39. The claimant started work for the respondent on a temporary basis in August 2013 and became permanent in March 2014. She works as Registration Officer dealing with registration and renewal of registrations for nurses and midwives in the UK. The job involves processing applications from nurses and midwives who want to go on the Register or applications for readmission and managing the registrant's information on the database. The claimant's employment is continuing.

40. The claimant accepts that the respondent has a diverse workforce and that just under half of their workforce could be described as coming from a BAME background. The respondent put the figure at about 42%.

41. The claimant accepted that the respondent provides equality and diversity training, not just when employees join, but that they are also sometimes given refresher training. The claimant herself has received equality and diversity training more than once.

Relevant background

42. The claimant had a series of line managers and times when she had no immediate line manager. She developed health problems in June/July 2014. In October 2014 her manager was Ms Kay Boyle. In July 2015 her manager became Mr Kelvin Launchbury. He left in November/December 2015.

43. In June 2015 a registrant raised a complaint about the claimant. The claimant had incorrectly quoted the renewal fee which was 20% higher than it should have been and had also referred to the registrant as 'Mr' when she was female.

44. On 6 July 2015 claimant had a meeting with her then manager Mr Launchbury to discuss this complaint. The note of the meeting was at page 233. The claimant admitted the mistakes and also admitted that she had cut and pasted another response which she had used in sending the message to the complainant. The claimant agreed in evidence that she apologised for this mistake.

45. Mr Launchbury was relatively new to the organisation and he took advice from HR who agreed that this was a breach of disciplinary rules which could be dealt with either under a formal or informal route. Mr Launchbury told the claimant that he had decided to deal with the matter informally.

The claimant accepted that Mr Launchbury was not acting in a discriminatory manner towards her. This could have resulted in more formal disciplinary action and did not.

Health issues and diagnosis

46. The claimant began to have health problems in the summer of 2014. It was not until she saw an optician in August 2015 that she was referred to Moorfields Eye Hospital for tests.

47. On the claimant's own evidence she did not know the name of her condition until she was diagnosed in August 2015. The claimant said even her doctor did not know she had IIH until August 2015.

The December 2015 disciplinary issue

48. On Monday 14 December 2015 an allegation was made against the claimant that she used inappropriate and racist language whilst at her desk in the open plan office. One of the claimant's colleagues, Ms Karen Pounder, complained about the claimant's use of language. The claimant was dealing with a registrant and the allegation was that she said of the registrant that she should "*F*** off back to Ghana*".

49. The claimant was suspended by letter dated 18 December 2015 (page 236) pending an investigation. The suspension was from 17 December 2015 until 14 March 2016. In the suspension letter the claimant was offered support from the Employee Assistance Programme (EAP). Concurrently with the suspension, the claimant was off sick with stress and this was shown in her sickness absence record at page 231.

50. The disciplinary matter was fully investigated by Mr Ian Fuller, Continuous Improvement Manager and we saw his investigation report of 21 March 2016 in the bundle commencing page 262. Mr Fuller took witness statements from those present at the time of the incident. He took a total of 10 witness statements, including from the claimant. The witness statements were in the bundle together with the investigation report. We saw that a number of witnesses heard the claimant say words consistent with the comment forming the basis of the complaint. Examples were from Ms Longe at page 275 and 277 Mr Bezunek at page 291, and Mr Mingle at page 313.

51. There was a typed note of the investigatory meeting between Mr Fuller and the claimant on 9 February 2016. At that meeting the claimant told Mr Fuller that she had read a particular email, leaned back and made a comment which was "*F***ing go home then*". The claimant's case was that subconsciously she was talking to herself (note of meeting page 336). She also told Mr Fuller that she had told the complainant Ms Pounder that she was joking and this was not meant to be taken seriously (note of meeting page 337).

52. The disciplinary hearing took place on 14 April 2016 chaired by Mr Fausto Felice the Head of Legal Services. The outcome letter dated 20 April 2016 was at page 362 of the bundle. Mr Felice found that the claimant "*did make racist remarks that resulted in a heated exchange between [the claimant] and Karen Pounder*". Following a review of the evidence, the claimant's explanation and mitigation he decided that this justified a final written warning to remain on file for a period of two years from 20 April 2016. Mr Felice also directed that the claimant should attend refresher equality and diversity training.

53. The claimant agreed in evidence that under the terms of the disciplinary policy (bundle page 140, point 11) that dismissal was an option open to the respondent. The disciplinary policy at appendix 4 gives harassment, discrimination or bullying as described in the respondent's harassment and diversity policies as a category of gross misconduct. The claimant agreed that the respondent could have dismissed her for this yet still took the view that a final written warning was not a lenient outcome. We find it was a lenient outcome.

54. The claimant was given a right of appeal (page 364) but did not appeal against the disciplinary outcome. The claimant's suspension was lifted and she was given two days of special leave on 21 and 22 April so that she was expected back at work on Monday, 25 April 2016. By this point her new manager was Ms Emma Lacy.

55. The claimant did not return to work until 25 May 2016. She could not remember the reason for the month's gap. We saw the claimant's annual leave request at page 447 which covered part of that period. We accept and find, based on the leave request and the respondent's evidence, that the claimant took a period of annual leave after the conclusion of her disciplinary process and returned to work on 25 May 2016.

Support for the claimant

56. The claimant accepts that prior to 2017, she did not make any written complaint or grievance about how the respondent was managing her health condition. She also said that she did not "blame" the respondent for not knowing about IIH prior to her diagnosis, because she did not know about it herself.

57. Ms Emma Lacy became her line manager in April 2016 and met the claimant in that capacity on 25 May 2016 when she returned to work. Ms Lacy has worked for the respondent since 2003 and became the UK Registration Manager in April 2016. The claimant and Ms Lacy knew each other as they had worked together for a number of years.

58. After their meeting on 25 May 2016 the claimant sent an email to Ms Lacy that same day, explaining that she was diagnosed in August 2015 with Idiopathic Intracranial Hypertension (IIH) and explained that it could cause her to have severe migraines and that she could feel like she was

underwater when having a conversation. She said it could affect her vision and hearing and she sometimes needed Lumbar Puncture to relieve symptoms (the email was at page 368-369).

59. The claimant and Ms Lacy agreed in that meeting that the claimant's disciplinary issue would be placed in the past.

60. The claimant did not raise her health issue in her face to face meeting with Ms Lacy on 25 May, but set it out in her email after the meeting. The respondent admits knowledge of disability from May 2016.

61. Ms Lacy replied by email on 25 May 2016 asking the claimant to let her know if she was suffering at all with the symptoms or if there was anything that she could help with so that they could discuss it (page 368). We find that Ms Lacy was being supportive. In a later email on 16 December 2016, page 390, Ms Lacy offered further support including pointing her in the direction of the Employee Support Line and an offer to arrange counselling if she thought this would be helpful.

62. The claimant found the counselling very helpful. She initially declined the offer but subsequently took it up. The counselling service suggested she contact ACAS which she did.

63. On 1 February 2017 Ms Ojeifo the Head of Registrations, sent an email to HR saying that the claimant had arrived for work that morning, when she was not expected and they had a return to work meeting which we also find was supportive.

Breaks

64. The claimant's case was that there were two adjustments that the respondent should have made and did not. These were (i) flexible breaks and (ii) a different computer screen.

65. The claimant's case was that she was not given flexibility with her breaks. In August 2016 Ms Laura Bell, a Senior Registration Officer, circulated a request for preferred lunchbreaks across the team (page 374). The timetable gave lunch breaks and a mandated 10-minute break in the morning and again the afternoon. It was part of the respondent ensuring that its employees took proper breaks and that these were fairly distributed. The claimant did not object to this at the time. The formal breaks for the claimant were from 10:10am to 10:20am and from 2:30pm to 2:40pm (break rota page 407). In addition there was a lunch break. We find that the formal rota for breaks did not require the claimant to work for more than four hours at a stretch.

66. From May 2016 the claimant occasionally asked to leave early because she was not feeling well. In May 2016 Ms Lacy also exempted the claimant from helping out with the call centre during busy times. By way of example on 1 September 2016 the claimant emailed Ms Lacy to say

that she was not feeling well and Ms Lacy immediately replied "*feel free to head off home now or whenever you're ready*" (page 376). On 25 May 2017 Ms Lacy confirmed to another manager that she had offered the claimant the opportunity of going home if she was suffering from a migraine (page 574). On 6 December 2016 the claimant emailed at 8:16am asking for a 20 minute lunch break and the opportunity to leave work early because she did not feel well (page 389). By 9:10am she had left work (email from Ms Laura Bell, page 388, confirms this). This was the date upon which the claimant alleges she was mistreated by Ms Lacy and we make further findings on this below.

67. The claimant was clear, following a meeting with her temporary line manager Ms Obaye on 6 February 2017, that if she needed a break or to leave work early she could do so (note of meeting page 454). The claimant accepted in evidence that every time she said she felt unwell and needed a break or to go home she was allowed to do so. She agreed that there was never an occasion upon which Ms Lacy refused her a break. There was no contemporaneous complaint about a failure to give her a break or allow her to go home. She agreed that she was never required to finish work before she was allowed to go home if she was not well.

68. The claimant said she thought that Ms Lacy's "demeanour" indicated that she was not happy about the claimant taking breaks. We find that this was not mirrored in practice. Whatever breaks the claimant needed or required she was given.

Computer screen

69. Senior HR Adviser Ms Fiona Berner was asked in cross-examination why she did not arrange for a screen protector or some sort of adjustment to the claimant's computer screen given that the condition of IIH (by reference to material produced in the bundle from the charity IIH UK at page 178 and a letter from Dr Plant a consultant neurologist dated 6 February 2017 page 229) could cause temporary loss of vision and that high pressure inside the head caused headaches and "*can result in visual loss*".

70. Ms Berner said that the reason this was not done was because it was neither requested by the claimant nor recommended either by the OH physician or within the workstation assessment (page 185).

71. It was put to respondent's witnesses that they should have researched the claimant's condition and found out all about it. We do not agree. The managers in question are not medical experts. They rely on advice from medical professionals. We find that it is not part of their job to research the medical conditions of all those whom they manage. This is potentially a large task if they manage a number of people with medical conditions and not part of their role. There are other professional advisers from whom they can and did seek advice.

72. We find that where there was no indication at all that the claimant required an adapted computer screen or that it was in any way necessary to avoid any substantial disadvantage it was not a reasonable adjustment. The respondent is not expected to guess, when it has medical information, has conducted a work station assessment and is not told by the claimant, that this is something that might be required.

23 November 2016

73. The claimant complains that it was an act of both race and disability discrimination either as to direct discrimination and harassment plus discrimination arising from disability, that she was called into a meeting with Ms Emma Lacy on 23 November 2016.

74. The background to this was that Ms Lacy had learned that her private life was being discussed. She believed that the claimant had been discussing an issue that was very personal and confidential to her. Ms Lacy was told by another UK registration officer that it was the claimant who had been discussing this personal issue with another colleague. Ms Lacy was naturally upset about this and wanted to speak to the claimant to find out whether such a conversation had taken place. She wanted to find out the claimant side of the story and to quote her "*to lay down a marker in terms of what behaviour was and wasn't appropriate*" (statement paragraph 28).

75. Ms Lacy called the claimant to a meeting on 23 November 2016 to discuss this matter. Ms Lacy's evidence was that the claimant was instantly hostile and aggrieved. The claimant categorically denied the rumour about discussing personal issues and said she felt she was being treated unfairly. The claimant agreed in evidence that if Ms Lacy thought the claimant was talking about her personal life, she had a reason to be upset. The claimant said in oral evidence that she thought it was not right to be pulled up on conversations which took place outside the hours of 8am to 4pm.

76. We find that on 23 November 2016 Ms Lacy was understandably upset to find out that someone had been discussing very personal issues concerning herself. She had been told this was the claimant. Understandably she wanted to find out if this was the case. We find that the reason she called the claimant to a meeting on 23 November 2016 was because she was upset about what she had heard. It had nothing to do with the claimant's race or disability, it was not related to her race or disability nor the amount of sick leave she had taken. In any event in the months leading up to 23 November 2016 the claimant had not taken any sick leave.

6 December 2016

77. The claimant complained that on 6 December 2016 Ms Lacy met her in the corridor and "*laid into her*" shouting at her and being very angry. The claimant's case, statement paragraph 32, was that Ms Lacy told her to

leave in an aggressive tone saying: "*if you want to go just go, no-one's stopping you*". The claimant left work and said that she felt humiliated in front of her team. She said that the incident affected her so badly she considered suicide.

78. Ms Lacy's recollection of that day was quite different. She said she arrived at work and put her bag down when registration officer Ms Hannah Mabey said that the claimant had asked her to tell Ms Lacy to check her emails as soon as she got in and to respond to an urgent email from the claimant. The email was to ask if she could go home early because she was not feeling very well (email at page 389 timed at 08:16 on 6 December 2016). By 09:10am the claimant had gone home (see 388).

79. Ms Lacy, who had not yet opened her emails, decided it would be quicker and easier to speak with the claimant direct. She hurried to the part of the office where the claimant worked and met her in the corridor. She put her head around the corner of the office to the part where the claimant sat, asking if she could "*borrow*" her. Ms Lacy said the claimant reacted with alarm and asked her why she had come storming into the office. Ms Lacy apologised for startling the claimant.

80. For reasons which we go on to set out, we preferred Ms Lacy's account of the events of the morning of 6 December 2016 as opposed to the claimant's version of events. Even if the claimant was correct, we find nevertheless that Ms Lacy's actions were not because of the claimant's race or disability, it was not related to her race or disability, nor the amount of any sick leave she had taken

81. On 12 December 2016 Ms Lacy sent the claimant an email setting out what had been discussed in their meeting of 23 November 2016 (page 392) and asked the claimant for any comments. The claimant did not take up the opportunity to give any feedback on this account of the meeting. The claimant raised no contemporaneous complaint about the 23 November 2016 meeting.

82. The claimant's case on discrimination arising from disability is that Ms Lacy treated her with hostility on 23 November 2016 and on 6 December 2016 because of the amount of sick leave arising from her disability. In the preceding nine months, from 13 March 2016 to 7 December 2016 the claimant did not take any sick leave at all (Sickness Absence Record page 231). It is also relied upon as either direct discrimination because of race and/or disability or harassment related to race and/or disability. We find that when the claimant and Ms Lacy interacted on 23 November and 6 December 2016, Ms Lacy's actions had nothing to do with the amount of sickness absence taken by the claimant. She had been attending work consistently for about the last nine months.

83. About a month after the December incident, on 16 January 2017, in an email from Ms Hannah Mabey to Ms Edina Ojeifo, Head of Registration and Revalidation, Ms Mabey reported the claimant as saying that she

"*liked all the seniors and Emma*" and that she was "*cool*" with all the seniors and Emma (pages 420 – 421). Similar comments were made by the claimant in her investigatory meeting with Mr Mark Brooke on 16 January 2017 (notes pages 412-416) including the comment "*Emma is a good manager"* (page 416). It was put to the claimant that she had exaggerated the incident on 6 December 2016 and was not telling the truth. The claimant said she felt that she could not tell Mr Brooke what was going on. We find that the claimant did exaggerate the 6 December 2016 incident.

84. The claimant accepted that Ms Lacy gave her positive comments in her appraisal a week after the incident on 13 December 2016. We saw the appraisal at page 400. It included comments such as the claimant having a flexible approach, being driven to providing good customer service and acknowledging an award she had received for customer service.

Occupational Health referral

85. By December 2016 Ms Lacy became aware that the claimant started to suffer more from headaches (statement paragraph 12). On 22 December 2016 she had a meeting with Ms Bonser from HR to discuss this (meeting request page 398).

86. In early January 2017 Ms Lacy triggered the process for an OH referral for the claimant. OH referrals are managed by HR and Ms Lacy contacted Ms Bonser to put this in place. Ms Lacy did not personally take this forward as she had a period of sick leave from 6 January 2017 to 12 February 2017. As Ms Lacy's period of sickness absence was relatively lengthy, the respondent put cover in place and asked Ms Ade Obaye, who was a Quality Manager, to cover Ms Lacy's role during her absence. It was Ms Obaye who took forward the OH referral.

87. The claimant complained in her submissions about the failure of the respondent to refer her to OH at an earlier stage. The claimant was diagnosed with IIH on 15 August 2015. We find that she did not mention it to the respondent until 25 May 2016. There was no evidence of the claimant raising it at an earlier stage. She said she did, for example she said that she sent emails to Ms Laura Bell, but accepted that even she (the claimant) could not track down any of these emails.

88. In the claimant's Further Particulars at bundle page 56, she said she was diagnosed in September 2014 and told Ms Bell and told her manager Ms Boyle in October 2014. The claimant told the tribunal on day 1 of the hearing that this was incorrect and that she was not diagnosed until August 2015. In submissions the claimant sought to backtrack from this to say that the 2014 disclosures were correct. We did not accept this and find that the Further Particulars were not correct and the diagnosis was in August 2015 as the claimant confirmed more than once in oral evidence. On the claimant's own evidence the first three entries in those Particulars cannot be correct.

89. In terms of there being any earlier disclosures the claimant has been at work with access to her work emails. She was at work continuously from the date of disclosure of her condition until 7 December 2016 when she took three days off because of flu/cold. She had a further 1 day of sick leave on 29 December 2016 for flu/cold and the OH report was triggered at the beginning of 2017. We find that when the claimant was continuously fit for work from March 2016 to December 2016, the need for an OH referral was not apparent. It was Ms Lacy who initiated it when she became concerned about the claimant's health in December 2016 which we find was a supportive approach.

90. We find that the respondent did not have knowledge of disability prior to 25 May 2016.

91. On 3 February 2017 the claimant was informed by Ms Bonser that an OH appointment had been made for her on 7 February 2017 (email page 437).

92. The OH appointment took place on 7 February 2017 and the report was produced on the same date. The claimant was seen by Mr Paulin an OH Adviser. Mr Paulin is a registered nurse and his report was seen and approved by Dr Ledda, an OH consultant. The report was sent to the claimant on 7 February 2017 in draft form and password protected (page 460). The claimant's evidence was that she went back and forth with the OH adviser with corrections. We find she was given the report in draft form for her approval.

93. The OH report (page 183) identified that claimant had IIH and that she was diagnosed with the condition after attending an optician appointment and being referred to a consultant. The report said that her symptoms could be made worse by increased stress and those symptoms were: severe pain in her head, visual disturbances such as blurred vision and photophobia, nausea, memory issues and confusion. She was being treated with medication for the pain and symptoms but could not tolerate stronger medication whilst at work. The symptoms were not improving and the claimant had asked for another consultant's appointment. The claimant was advised to see her GP and to use the Employee Assistance Programme.

94. The report stated that the claimant had a rare condition and it was causing significant symptoms which could be affecting her actions at work.

95. The report made the following recommendations (pages 183-184):

- *She is fit for work with adjustments which are temporary and given below*
- *A workstation assessment should be carried out.*
- *If she is experiencing symptoms, she needs to tell her manager.*
- *Please use the stress risk assessment guidelines as given by the HSE.*

- *She has been advised to use the EAP.*
- *Time off to attend medical appointments.*
- *If available, working from home may assist her in managing her symptoms on these dates.*

96. There was a delay of two months in the respondent seeing the OH report. The date of the report was 7 February 2017 and it was not sent to the respondent until 6 April 2017. We find that there were two main reasons for this. Firstly, the claimant was sent a draft of the report and she told the tribunal that there was some "*to and fro"* between herself and the OH professional in approving the report. Secondly there was a delay on the part of the OH provider so that the respondent had to chase it up. Another part of the reason for the delay was the requirement for the OH consultant's approval of Mr Paulin's report.

97. It is not in dispute that the respondent implemented the recommendations from the OH report. We saw the work station assessment at page 185–192. The stress risk assessment was at page 570–572. The claimant accepted that at no time was she refused time off to attend medical appointments. She used the EAP and although she initially declined counselling she later changed her mind and took this up and found it very helpful.

98. On 6 February 2017, the day before the OH consultation, the claimant had a meeting with her temporary line manager Ms Obaye who was covering for Ms Lacy whilst she was on sick leave. The note of the meeting was at page 454 – 455. The meeting took place on the claimant's return to work following an incident where she had left the office early due to ill-health but had not informed managers. The claimant and Ms Obaye had a discussion about the claimant's IIH condition.

99. The claimant was informed as to who she should contact if she was not feeling well and that if she could not locate either Ms Obaye or Edina Ojeifo, then Head of Registration and Revalidation, she could go to lie down in the first aid room. The claimant knew which managers to contact in the event of feeling unwell (OH recommendation bullet point 3).

100. Although the claimant's role did not particularly lend itself to working from home as it was client facing, the respondent nevertheless took this recommendation forward. In an email dated 19 May 2017 (page 567) Ms Lacy asked the claimant which day she would find most beneficial to take as a work from home day. The claimant said she would like to work from home on Fridays (her email 22 May 2017).

101. The claimant could not recall exactly how long she trialled the homeworking. She thought it was for about a month. She changed her mind about working from home. She said in evidence she did so because she was "scared" and that she put the team above herself. In a meeting with Ms Harpreet Bath, her new line manager, in a monthly one to one meeting the claimant said she preferred to come to work because she did

not want to spend the day at home with her son (email from Ms Bath to Ms Ojeifo 14 July 2017 page 613). The claimant did not say at the time, anything about being "scared". Ms Bath considered whether they could still pursue the homeworking route despite the claimant's reservations. They did not do so.

102. By the date of this hearing, the claimant was working in a seconded role at a higher band and with a higher salary. She was doing some homeworking which was working well. The claimant has a new line manager with whom she has a better relationship.

103. Ms Lacy made a number of suggestions to the claimant to see what would help alleviate her condition such as changing her hours, compressed hours, part-time working or flexible working. The claimant did not take up any of these suggestions.

104. We find that everything that was suggested in the OH report was implemented by the respondent.

The breach of confidentiality disciplinary issue

105. In early December 2016 the respondent received an anonymous complaint relating to the conduct and operational practices of managers within the Directorate of Registration.

106. The claimant was one of many witnesses invited to a fact-finding investigatory meeting on the matter. The investigating officer was Mr Jonathan Twidle. The claimant's investigatory meeting took place on Monday 16 January 2017 from 10am to 11am (interview schedule page 408). The letter to the claimant setting out the details of the meeting was at page 409 and it said clearly that the matter must be kept confidential. The claimant was also told this orally by Ms Broadbent.

107. The questions to be asked were set out in that letter. The invitation to the investigatory meeting itself was dated 21 December 2016 at page 508, in which the claimant was reminded of the requirement of confidentiality. Mr Twidle was accompanied at the investigatory meetings by Ms Fiona Berner, Senior HR Adviser. They interviewed the whole of UK Registrations, which involved carrying out between 36 to 50 interviews.

108. At the start of the meeting Mr Twidle reminded the claimant that the meeting was confidential and she was not to discuss the matter with anyone else.

109. At 11:39 on 16 January 2017 Registration Officer Ms Hannah Mabey sent an email to Ms Lacy saying that at 11:35 the claimant came to speak to her about the anonymous letter. This was brought to Ms Berner's attention and she considered that the claimant may be acting in breach of confidentiality.

110. It is a term the respondent's disciplinary procedure that matters related to disciplinaries should be treated with the utmost confidentiality. Paragraph 12 of the disciplinary procedure (page 127) under the heading "Confidentiality", says as follows:

> *All meetings, formal or informal, and anything related to the disciplinary should be treated with the utmost confidentiality. This means the purpose and content of meetings, discussions and documents must not be discussed with anyone except your HR support. Individuals who do not adhere to this confidentiality may be subject to the NMC's disciplinary policy and procedures.*

111. Appendix 4 of the disciplinary procedure sets out categories of gross misconduct which may lead to summary dismissal. Point 5 on page 140, gives "*breach of duty regarding the disclosure of confidential information*".

112. Mr Mark Brooke, Regulations Adviser, was asked by Ms Berner to investigate the issue of breach of confidentiality. The claimant was interviewed by Mr Brooke on 16 February 2017. Within that investigation he found evidence to suggest that the claimant had conversations with Ms Mabey on 16 and 18 January 2017 in which the claimant discussed the investigatory meeting. Mr Brooke produced an investigation report on 28 March 2017 which we saw at page 484-489 of the bundle. He recommended disciplinary action which if proven he said could amount to gross misconduct.

113. Ms Berner was also involved in a similar investigation in relation to the claimant's comparator PN who was investigated for a similar breach of confidentiality. The investigating officer into his matter was Ms Ade Obaye. The investigation report for PN was at page 527 dated 13 April 2017. His disciplinary hearing took place on 8 June 2017 (invitation letter page 582).

<u>The letter from Ms Permall</u>

114. On 21 April 2017, three days before the claimant's disciplinary hearing, her colleague Ms Nadia Permall, also a Registration Officer, gave a letter to the Director of Registration, Ms Emma Broadbent. It was a letter complaining about unfair treatment of the claimant. We were told and find that the claimant and Ms Permall were close friends. Ms Permall was not called to give evidence to this tribunal. The claimant said in submissions that Ms Permall did not give evidence because she was scared to lose her job. Ms Permall was promoted after the date of her letter of 21 April 2017. The claimant has also been promoted into a seconded role since bringing these proceedings. We find that this does not support the claimant's argument that Ms Permall was scared to lose her job.

115. Ms Broadbent replied to Ms Permall both in person and in a letter dated 16 May 2017 (page 560) explaining that for confidentiality reasons she could not discuss the claimant's issues with Ms Permall. We find that this

was a proper response from Ms Broadbent.

The April 2017 disciplinary hearing

116. The claimant's disciplinary hearing took place on 24 April 2017. It was heard by Ms Alice Hilken who is a qualified lawyer. Her job role at the respondent at the relevant time was as interim Head of Policy and Legislation. Ms Hilken was asked by the Director of Registration and Revalidation Ms Emma Broadbent to chair the hearing.

117. The claimant said the disciplinary hearing lasted 7 to 8 hours. Ms Hilken had difficulty remembering the times. We saw from the invitation to the disciplinary hearing that the start time was 11:30am although Ms Hilken thought it started later than that. Ms Hilken said that the claimant was probably right that it ended around 4pm. At the very outside we find that the hearing covered a period of 4.5 hours and not 7 to 8 hours which we find to be an exaggeration. The claimant told the tribunal that when she came out it was "*so dark*". We do not accept this as by late April clocks have changed to BST and it is light until around 7pm. We find this was another exaggeration.

118. We accepted Ms Hilken's evidence and find that she took great care to ensure that the claimant had the breaks she needed within the disciplinary hearing. The claimant was accompanied by a workplace colleague Mr Edward Mingle and Ms Hilken gave the claimant all the opportunity she needed to take breaks to confer with Mr Mingle or to take breaks for whatever reason she needed. We find that breaks were actively encouraged. Ms Hilken's evidence was that the claimant did not request a lunch break. We accept this evidence and given the high priority Ms Hilken placed on the claimant's need for breaks, we find that had she asked for a longer break to have lunch, this would have been granted.

119. At the hearing the claimant denied the disciplinary allegations of breach of confidentiality. Ms Hilken concluded the disciplinary hearing and arrangements were made for her to deliver the disciplinary outcome two days later on 26 April 2017. Ms Hilken wished to consult with Ms Jane Pound in HR before making her decision, in particular as to the disciplinary outcome that she might impose. The claimant was already subject to a final written warning from her previous disciplinary. Ms Hilken made a note to assist her in presenting the outcome and this was at page 543 of the bundle.

120. Ms Hilken found on a balance of probabilities that the allegations were proven. She preferred the evidence of three witnesses who supported the position that the claimant had breached confidentiality, as opposed to the claimant's evidence that she had not. Ms Hilken was satisfied that the claimant understood the confidentiality requirement and the allegation was proven.

121. Ms Hilken concluded that although the claimant had breached

confidentiality, this did not merit summary dismissal taking into account mitigating factors. She decided to extend the claimant's existing final written warning by a further 2 years.

The disciplinary outcome meeting

122. At the meeting on 26 April 2017 the claimant was informed of her right of appeal. The claimant did not appeal the disciplinary sanction. It was put to her that the reason she did not do so was because she knew that Ms Hilken's decision was lenient and fair. The claimant said: "*The decision that Alice came to was fair, yes."* The note of the outcome meeting on 26 April 2016 at page 552 (point 16) shows that the claimant said she accepted the outcome, knew it was fair and said she would not be appealing. The claimant agreed in evidence that she said this at the meeting. We find that Ms Hilken's decision was fair and the claimant accepted and understood this and that is the reason why she did not appeal the outcome.

123. On the same day as the disciplinary outcome meeting, 26 April 2017 and within a few hours of the outcome meeting, the claimant sent a grievance letter to Ms Broadbent (page 547). This complained of race and disability discrimination. It covered matters such as the first disciplinary issue from December 2015, the claimant's health issues, the meeting with Ms Lacy in November 2016 and her lack of a salary increase.

124. The respondent's first port of call with grievance issues is to see whether they can be resolved informally. The claimant was offered a meeting with Ms Pound and Ms Broadbent which took place on 2 June 2017 (agreed chronology). Ms Pound sent the claimant an email on 8 June 2017 summarising the meeting (page 584). Ms Pound said that she was sorry that the claimant did not get the support she needed in relation to her health condition.

125. We find that Ms Pound was not well informed about the claimant's employment history and the steps that had been taken in the past by Ms Lacy. Ms Pound was not familiar with the claimant's personnel file. Ms Pound had only joined the respondent on 27 March 2017, just under a month before the claimant's disciplinary hearing and had not taken the time to consult the claimant's file in advance of that hearing. Ms Pound told the claimant that the respondent could not waive the past disciplinary sanctions but they would reinstate her right of appeal against the most recent outcome.

126. Ms Pound sent a letter to the claimant on 7 July 2017 to confirm the meeting and set out the claimant's options (page 604). The letter explained the reason for the lack of a pay award, which was because of the disciplinary warning, upon which we make further findings below. The letter had a heading "*Moving your matter forward*" (page 605). It gave the claimant two options; firstly, to give a formal extension of the right of appeal against the April 2017 disciplinary sanction, to 14 July 2017 and

secondly if that was not considered a satisfactory route to resolution, to treat her grievance letter of 21 April 2017 as a formal grievance.

127. The claimant did not take up either of these offers. She said in evidence that she "*didn't see these offers*". We did not accept that evidence. This was a very important letter. This came at the end of the letter under a heading which we find must have been important to her: "*Moving your matter forward*". We find that she saw it and decided not to pursue either route because, as she had previously said, she considered the disciplinary sanction to be fair and we find that she also considered that the grievance had no merit.

128. In addition by July 2017, the claimant had already commenced Early Conciliation as the precursor to these tribunal proceedings. The dates of Early Conciliation were from 13 June 2017 to 13 July 2017. The claimant said that she contacted ACAS but she "*did not know that ACAS were going to refer it to the tribunal*". It is not ACAS that refers the matter to the tribunal. It is the claimant who presented her claim, having confirmed in her ET1 that she has been through Early Conciliation. We did not accept the claimant's evidence on this point.

129. The claimant also said that she also did not see in Ms Pound's letter of 7 July 2017 the concluding paragraph under the heading "*Mediation*". The paragraph said:

> *"I note that you have sought support externally from ACAS and have suggested mediation as a way forward. I am happy to engage in this process and will wait to hear from you as to how you wish to proceed."*

130. The claimant told the tribunal in evidence that she did not see this and if she had she would have "*jumped at the chance".* We find that it was not credible evidence that the claimant did not see this in the letter.

131. The disciplinary allegations were also found proven against the claimant's comparator PN. His disciplinary outcome letter was at page 586. He was given a first written warning for discussing and divulging the content of a grievance investigation. The reason he was given a first written warning was because he was not already subject to a final written warning.

132. HR witness Ms Fiona Berner told the tribunal that there was a "grievance culture" at the respondent. It resulted from the respondent going through a period of change in which Ms Berner said managers became more vulnerable to grievances particularly where there was performance management. A total of five grievances were raised against Ms Lacy in a seven-year period from 2011 to date. None of these were upheld. Only one was for discrimination and this was an allegation of religious discrimination which was not upheld.

133. The combined experience of this tribunal is that grievances are not uncommon when organisations go through change management. The fact that grievances are raised against managers, is not of itself enough for us to find that a particular manager is a discriminator, particularly when none of the grievances have been upheld.

The pay issue

134. The respondent admits that the claimant did not receive a pay increase in 2016, 2017 or 2018. The claimant's terms and conditions of employment state at paragraph 13 in relation to pay (page 148) "*There is no obligation on the NMC to increase your salary following a review*". From this we find that there is no contractual right to a pay increase.

135. Included within the bundle (pages 156, 158 and 160) were the respondent's pay review FAQs for 2016, 2017 and 2018. They make clear that a pay award is subject to a satisfactory level of performance and that if the employee has an unspent disciplinary or capability sanction on his/her file, he/she will not receive the pay award.

136. In 2016 and 2017 the claimant had an unspent final written warning. We find that this is the reason she was not given a pay increase. The claimant was in exactly the same position as her comparator PN who did not receive a pay award because he had a current disciplinary warning on his file. We saw letters in identical terms to the claimant and PN in respect of the 2018 pay award (pages 632 and 633). We were told that PN is white British and is not disabled.

Time limits

137. The claimant gave no evidence on the time limit issue as to the timing of the presentation of her claim or her knowledge of time limits. The claimant's sister, who capably represented her at this hearing, is an HR professional and it was open to the claimant to obtain advice from her sister. We find on a balance of probabilities that through her sister the claimant knew or ought reasonably to have known of the time limit.

138. The claimant prepared and gave to Ms Broadbent on 21 April 2017 a detailed 3.5-page grievance complaint which included complaints of race and disability discrimination and specifically referred to the Equality Act 2010. The reference in the letter to the Equality Act supports our finding that the claimant either knew, or could reasonably be expected to have known, the time limit set out in that Act. The claimant's disability did not prevent her from preparing this detailed document.

139. The claimant was well enough to attend work from 31 January 2017 to 3 April 2017 being the period during which the primary time limit expired. It was submitted for the claimant that she was coming to work because she was fearful for her job and that she had not received the annual pay awards. Nevertheless the claimant was well enough to attend work and

perform her duties.

Witness credibility

140. As set out above, we found the claimant prone to exaggeration. We found this in relation to the duration of the 24 April 2017 disciplinary hearing and the suggestion that it was dark when she left at 4pm. We did not accept that the claimant had not seen parts of the disciplinary outcome letter relating to moving her matter forward and mediation. The claimant told the tribunal that she had notified Ms Bell by email of her disability prior to August 2015. We could find no such evidence and the claimant's own evidence was that she was not diagnosed until August 2015 and she did not know about the condition herself before this date. We found her Further Particulars at page 56 to be misleading and we were unconvinced by the claimant's change of position on this during submissions. We found that she exaggerated the 6 December 2016 incident. We found unconvincing the claimant's acceptance that the respondent had been lenient at both of her disciplinary hearings, yet subsequently denied that they had been lenient.

141. We found the respondent's witnesses consistent and credible. Therefore where there was a conflict of evidence and a lack of supporting documentation, on balance we preferred the respondent's evidence. We agreed with the respondent's submission that if the respondent was as unsupportive as the claimant suggested, they had the opportunity to dismiss her at either one of her disciplinary hearings and they chose the lenient approach. The claimant has since been given a promoted seconded role.

The relevant law

Direct discrimination

142. Section 13 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others

143. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

Harassment

144. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

145. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

146. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

147. In order to fall within section 26, the conduct must be "related to" race and/or disability. Behaviour which is unreasonable or bullying, but unconnected to those protected characteristics will not therefore fall within this category. This was emphasised by the EAT in ***Nazir v Aslam EAT/0332/09*** (Richardson J at paragraph 69).

> "*The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law - such as a person's race and gender."*

<u>Discrimination arising from disability</u>

148. Discrimination arising from disability is found in section 15 Equality Act 2010:

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

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

149. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

150. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

151. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial influence on the unfavourable treatment and so amount to an effective reason for or cause of it (judgment paragraph 31b).

152. The claimant referred us to the decision of the EAT in ***City of York Council v Grossett EAT/0015/16*** (and we also considered ***2018 IRLR 746*** in the Court of Appeal): a case in which a teacher showed an unsuitable film to some 15 and 16 year old pupils and relied upon stress arising from his disability as the reason for doing so. He was dismissed and the tribunal upheld his section 15 claim, considering that a final written warning would have been sufficient. This was upheld by the Court of Appeal. The claimant submitted that the case appears to break new ground in finding that the employer can be liable under section 15, even if it did not have any knowledge, actual or constructive ("ought to have known"), that the particular conduct was cause by a disability. The respondent accepted that the case makes the proposition that if an

employer did not have knowledge that the conduct was caused by the disability, there can still be a finding of discrimination under section 15.

Reasonable adjustments

153. The duty to make reasonable adjustments is found under section 20 Equality Act 2010.

> *(2) 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.*
> *(3) The second requirement is a requirement, where a physical feature 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.*

154. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

Burden of proof

155. Section 136 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

156. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

157. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

158. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden doers not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts

only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

159. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

160. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

161. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

Time limits

162. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) 8 the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

163. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

164. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: *"The question is whether that*

is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed" (paragraph 52).

165. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period ***- Owusu v London Fire and Civil Defence Authority 1995 IRLR 574 (EAT).*** Where pleaded incidents are of a wholly different nature to each other, they cannot amount to a continuing act: ***Robertson v Bexley Community Centre 2003 IRLR 434 (CA)*** at paragraph 12 per Auld LJ.

166. A claimant who has presented his or her claim out of time must convince the tribunal that it is just and equitable to extend time: ***Chief Constable of Lincolnshire Police v Caston 2010 IRLR 327 (CA)***. In exercising the just and equitable discretion, tribunals are encouraged to consider all the circumstances of the case and the factors set out in section 33 of the Limitation Act 1988. Those factors include: the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action and steps taken by the claimant to obtain professional advice.

Unlawful deductions from wages

167. Section 13(1) of the ERA provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

Conclusions

168. The respondent admitted disability with the condition of IIH and admitted knowledge disability from May 2016.

Harassment on grounds of race or disability

169. We have found on the facts that Ms Lacy did not harass the claimant related to her race or disability on 23 November 2016 or 6 December 2016.

170. On the April 2017 disciplinary, our finding of fact is that the claimant considered Ms Hilken's disciplinary penalty of an extended final written warning to be fair. We have found that this is why the claimant did not initially appeal and she did not appeal when she was given an extension of time to 14 July 2017. It is also why she did not pursue her grievance lodged on the day of the disciplinary outcome 21 April 2017. We agree

and find that it was fair.

171. The claimant was treated in the same way as her comparator PN who is white British and not disabled. He was disciplined for breaching similar confidentiality. He received a warning. The material difference between his circumstances and the circumstances of the claimant, for the purposes of section 23 of the Equality Act, is that PN did not have an existing final written warning. That is why on our finding he received a first written warning and the claimant received an extension to her existing final written warning, as opposed to dismissal. The claimant accepted that dismissal was an option and we find that Ms Hilken's decision not to dismiss was lenient because the option of dismissal was open to her.

172. We find that the disciplinary proceedings against the claimant in April 2017 were not related to her race or disability. We find that these disciplinary proceedings were entirely related to her breach of confidentiality.

173. Our finding on the lack of a pay increase is because the pay award is always performance related and the respondent makes it very clear that the existence of a conduct or capability warning on file means that the employee will not receive pay award.

174. We find that the reason the claimant was not given a pay award in 2016, 2017 and 2018 was not related to her race or disability but was because of the existence of a live disciplinary warning. It was not an act of harassment related to her race or disability.

175. The claims for disability and race harassment fail and are dismissed.

<u>Direct discrimination because of race and/or disability</u>

176. We have found on the facts that the reason Ms Lacy acted as she did on 23 November 2016 or 6 December 2016 was not because of the claimant's race or disability.

177. We find that the disciplinary proceedings against the claimant in April 2017 were not because of her race or disability. We find that the disciplinary proceedings were brought because of her breach of confidentiality in the same way as PN's disciplinary proceedings were brought against him.

178. Our finding on the lack of a pay increase is because the pay award is always performance related and the respondent makes it very clear that the existence of a conduct or capability warning on file means that the employee will not receive pay award. The same applied to the claimant's comparator PN.

179. We find that the reason the claimant was not given a pay award in 2016,

2017 and 2018 was because of the existence of a live disciplinary warning and not because of her race or disability. We find that any employee with a live disciplinary warning would have been treated the same and would not have been given a pay award.

180. The claim for direct discrimination fails and is dismissed.

Discrimination arising from disability

181. The claimant's case was that Ms Lacy's treatment of her on 23 November 2016 and in December 2016, amounted to unfavourable treatment because of something arising from her disability. We have found on the facts that the reason Ms Lacy acted as she did on 23 November 2016 or 6 December 2016 was not because of anything arising from the claimant's disability.

182. What was relied upon as arising from her disability was her frequent sickness absence as a result of IIH (Case Management Order paragraph 11.3 - bundle page 51 and issues set out above paragraph 6).

183. It was not put to Ms Lacy that she acted as she did on 23 November 2016 or on 6 December 2016, because the claimant had taken sick leave because of her disability. By late 2016, the claimant had not been off sick for about nine months. She seemed to be coping well at work.

184. The claim for discrimination arising from disability fails and is dismissed.

Reasonable adjustments

185. The claimant's case was that without flexible breaks at her choice, she suffered increased stress and that she needed breaks at less than four hourly intervals. Our finding above is that the formal rota for breaks did not require the claimant to work for more than four hours at a stretch and that whatever breaks she needed, she was given. Because of this, we find that the respondent did not apply a PCP of requiring the claimant to work at her desk to a set pattern.

186. Other than the disciplinary hearing on 24 April 2017 no meeting was identified by the claimant that she was required to attend which had a duration of more than about two hours. It was only the disciplinary hearing that had an entire duration, from start to finish, of a maximum of 4.5 hours. We have found above that Ms Hilken placed a high priority on breaks and there was no question of that disciplinary hearing running for 4.5 hours without a break. The claimant was given all the breaks that she requested. Had the claimant asked Ms Hilken for a longer break to have lunch, we find this would have been granted.

187. We find that the respondent did not apply a PCP of requiring attendance at a meeting of more than four hours without a break.

188. We find that there was no failure to make reasonable adjustments in relation to the claimant's breaks.

189. It is not in dispute that the claimant was not given an adapted computer screen. Our finding above is that without the respondent knowing that she was being placed at a substantial disadvantage because of the lack of an adapted computer screen or protective screen, there was no adjustment that they could reasonably make.

190. As we have found above, the claimant did not say that she needed an adapted computer screen or protective screen, neither did the OH physician, nor the workstation assessor. Without at least one of those sources alerting the respondent to the fact that the claimant would be placed at a substantial disadvantage without an adapted or protective computer screen, we find that the respondent could not reasonably be expected to know that the claimant was being placed at a substantial disadvantage.

191. We find that the respondent complied with its duty to make reasonable adjustments. Our finding is that the respondent implemented everything recommended by OH and that they took a supportive approach towards the claimant's condition.

192. The reasonable adjustments claim fails and is dismissed.

Unlawful deductions from wages

193. We have found above that the claimant had no contractual right to a pay increase in April of each year, 2016, 2017 and 2018.

194. The claimant submitted that if the respondent had taken the necessary actions they would have come to the conclusion that the claimant was suffering from a confused state of mind and her behaviour was due to the neurological symptoms from which she was suffering.

195. Our finding is that at the date of the first disciplinary hearing, the respondent did not have knowledge of her disability. Our finding is that the respondent did not have knowledge of disability until 25 May 2016.

196. The claimant did not raise these issues at either of her disciplinaries and chose not to appeal either sanction, even when given a further opportunity with an extension of time on the second disciplinary.

197. The respondent made it clear that anyone who had a live disciplinary warning would not be entitled to a pay award. The claimant had a live disciplinary warning in each of the years in question. There was therefore no entitlement to the pay award and no unlawful deductions from wages.

198. The claim for unlawful deductions from wages fails and is dismissed.

Time limits

199. When the issues were identified at the case management hearing on 29 May 2018 it was identified at paragraph 13 (bundle page 52) that any act or omission which took place before 14 March 2017 was potentially out of time so that the tribunal may not have jurisdiction.

200. This means that the two issues concerning Ms Lacy in late 2016 are out of time. The primary time limit on the 23 November 2016 incident expired on 22 February 2017 and for the 6 December 2016, the primary time limit expired on 5 March 2017. Early Conciliation does not operate in these circumstances to extend time as the claimant did not commence Early Conciliation until 13 June 2017. The ET1 was issued on 10 August 2017 and therefore the claimant is about six months out of time in relation to those incidents.

201. No positive case was put by the claimant in evidence as to why it would be just and equitable to extend time save that she was attending work in early 2017 because she was fearful for her job. Our finding above is that nevertheless she was fit enough to attend work and perform her duties. We have also found that the claimant knew or ought reasonably to have known about the time limit.

202. The burden is on the claimant and we find no basis upon which it is just and equitable to extend time.

203. No submission was made to the tribunal on continuing act. Whilst the two incidents themselves (23 November and 6 December) could be construed as a continuing act, we find nothing to link those incidents with the other issues before us. There were different participants and factual issues involved. In any event we had no submission as to a continuing act and we find that the 2016 incidents did not form part of a continuing act with pay awards and the disciplinary hearings or the reasonable adjustments.

204. We find that the claims in relation to the incidents in late 2016 are out of time and the tribunal does not have jurisdiction to consider them. Even if these claims had been within time, we have found that they fail on their facts in any event.

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Employment Judge Elliott
Date: 30 November 2018

Judgment sent to the parties and entered in the Register on: 30 Nov. 18.
_____ for the Tribunals