



## REASONS

1. RK worked as a Trainee Biomedical Scientist for the NHS Trust. She started work on 15 September 2003. The NHS Trust decided to end her employment at a meeting on 22 May 2015. RK's employment ended on 7 August 2015.
2. RK says that her dismissal was unfair and was disability discrimination. The agreed issues for us to decide are set out in more detail in attachment 1.
3. We heard RK's case from 20 to 24 January 2020. We made our decision on 27 and 28 January 2020.
4. Tom spoke for RK. Martina spoke for the NHS Trust.
5. RK has not been well at times. RK has been helped to make decisions by a litigation friend, Kulvir.
6. Catherine is a registered intermediary. At our hearing she helped RK to take part. She made sure questions were clear. She helped everyone use simple language.
7. We use similar language in this Judgement. We deal with things like the law in separate papers.
8. We call people by their first names like we did at the Hearing. Attachment 2 is a list of people.
9. RK started work with the NHS Trust as a Trainee Biomedical Scientist on 15 September 2003.
10. RK was given a contract of employment. The contract said:
  - 10.1 RK could be asked to work anywhere in the NHS Trust
  - 10.2 RK should work 37 hours a week.
  - 10.3 RK needed to get professional registration.
11. RK was also given a job description. The job description said:
  - 11.1 RK needed to do a training programme
  - 11.2 RK should be registered by the HPC as soon as she could
12. The job description said that RK was an undergraduate. RK did a part-time degree in biomedical science. The degree would normally take four years.
13. RK needed to complete a portfolio to register with the HPC. The portfolio would show that RK had a lot of experience of different jobs.

14. The job of a biomedical scientist is very important. They test samples from patients. This has to be done very carefully and accurately. Mistakes put patients at serious risk. It is very important that samples have a label with the right name of the patient. The NHS Trust cannot allow mistakes that put patients at risk to continue.
15. RK did not pass 2 modules of her degree. She had to take them again. RK took 5 years to finish the degree. On 23 October 2008 RK was given a 2.2. honours degree.
16. RK did some work on her portfolio while doing her degree. RK thought that the portfolio was complete. We know this will be difficult for RK; but we have decided that the portfolio was not complete. There was still a lot of work to be done to finish it properly. It could not be submitted because it had not been finished. If it had been submitted it would not have been acceptable and registration would not have been granted.
17. RK started work at Ealing Hospital. RK then moved to Hammersmith Hospital. One of the machines RK worked on at Hammersmith Hospital was the Axsym Analyser. RK moved again to Charing Cross Hospital in September 2009. because the Axsym Analyser was moved there.
18. RK was managed by Vijay at Charing Cross Hospital. In early 2010 some staff spoke to Vijay about RK. They said that they had concerns about the quality of her work. Vijay had a meeting with RK to discuss the concerns on 9 April 2010. If you look at p344 of the bundle you can see that the concerns were very serious. Some of the mistakes made by RK could have affected patient care.
19. Vijay gave RK a step-by-step list to help her work on the Axsym Analyser. Vijay set 11 targets for RK.
20. Vijay met with RK again on 21 May 2010. RK had improved. There were still some targets that had not been met. Vijay told RK that her performance was still unsatisfactory in some areas.
21. Vijay met with RK again on 3 September 2010. There had been some further improvement. RK's performance was still unsatisfactory in some areas.
22. Vijay met with RK again on 15 October 2010. Further progress had been made. Vijay felt that there was enough progress for RK to move to another section. RK was to move to the Immulite section.
23. RK only worked on one machine at a time unlike her colleagues. RK had fewer duties than most of her colleagues. We have decided that RK was not overworked. We have decided that RK was given a lot of support.
24. The Immulite machine was differently to the Axsym Analyser. RK needed time to learn to use it. RK was given support to learn to use the Immulite machine.
25. RK found changing to the Immulite machine very difficult. RK found it stressful to have to learn how to use the new Immulite machine.

26. On 10 December 2010 RK went off work because of ill health.
27. On 6 January 2011 a Fit Note was provided for RK signing her off work until 1 March 2011. The Fit Note said RK had depression and anxiety.
28. On 4 January 2011 Vijay sent a letter to RK saying that he was worried about her absence. Vijay had phoned RK's father who thought that RK was at work when she was not. RK told her GP that she felt stressed at work. The NHS Trust only saw the fit note referring to depression and anxiety. They did not see any other medical material.
29. On 13 January 2011 RK was referred to the psychiatry service by her GP. RK was given antidepressant medicine. The NHS Trust did not know this.
30. On 22 February 2011, Vijay tried to refer RK to Occupational Health. There was a problem with the computer. The form did not go through. The form went through in March 2011.
31. RK was signed off sick until 31 March 2011 with depression. She was then signed off on 31 March 2011 until 30 April 2011 with depression.
32. On 4 April 2011 Dr Marat sent a report to RK's GP. The report was not seen by the NHS Trust. Dr Marat said that RK felt that her job had changed and involved using more machinery. RK told Dr Marat that she found troubleshooting difficult and that she spent a lot of time thinking about how to work the machines. Dr Marat said that RK had applied for nutrition-related courses.
33. RK told Dr Marat that she was not being supported. We find that RK was provided with more support than her colleagues. We do not accept that RK was not supported. RK found that working with the new machine was very difficult.
34. On 18 April 2011 Vijay referred RK to Occupational Health again.
35. RK was signed off from 28 April 2011 to 31 May 2011 with work related stress.
36. On 18 May 2011 Dr Gaal of Occupational Health sent a report to the NHS Trust. Dr Gaal said that RK had been concerned about work for some time. RK told Dr Gaal that there was a crisis in December 2011 when she felt she could not stay at work.
37. RK told Dr Gaal that:
  - 37.1 she wasn't supported at work
  - 37.2 she had not had appraisals on time
  - 37.3 she did not get help with technical aspects of her work
  - 37.4 she would like to change Department

38. Dr Gaal said that the way RK felt about work was affecting her mental health.
39. On 24 May 2011 Vijay wrote to Dr Gaal. Vijay said that what RK had said was not right. Vijay said that RK had been appraised. Vijay said that there were problems with RK's technical work. Vijay said that RK had been supported with her portfolio. Vijay said RK could not be registered because she hadn't finished the work to a good enough standard. VJ said that RK had poor retention of information. We accept that what VJ said in the letter was right.
40. RK's GP wrote a note on 31 May 2011 saying that RK was feeling much better. RK's GP signed a Fit Note to say that RK was fit for a phased return to work. The Fit Note said that RK had work-related stress that had resolved.
41. Vijay met with RK on 1 June 2011. Vijay and RK agreed a phased return to work. RK told VJijay that her main concern was the delay in completing her portfolio. RK told Vijay and that the delay in completing her portfolio was causing the stress and anxiety.
42. Vijay agreed to help RK. Vijay said that RK would need to return to Hammersmith Hospital to finish her portfolio. The portfolio was kept at Hammersmith Hospital. RK would be assessed by doing a walkaround at Hammersmith Hospital. On the walkaround RK would take the assessor to the benches in the laboratory and explain how the tasks are performed on the benches.
43. RK signed a letter asking to be transferred to Hammersmith hospital on 2 June 2011. We do not accept that RK was forced to sign the letter. We do not accept that RK was told that she had to move because of lack of staffing at Hammersmith Hospital. The move was agreed with RK. Vijay thought that the move to Hammersmith Hospital would help RK to complete her portfolio. Vijay thought that completing the portfolio would help RK stop feeling stressed.
44. Dr Marat wrote a note on 30 June 2011. The NHS Trust did not see the note at the time. RK told Dr Marat that she had returned to work on a slow phased return. RK told Dr Marat she was having regular supervision and help from her manager at Hammersmith Hospital. RK told Dr Marat that the portfolio issues had been finished.
45. After RK moved to Hammersmith Hospital, Donna was her Training Manager. Ela was RK's line manager.
46. We have decided that the portfolio issues had not been resolved. There was still a great deal of work that RK needed to do. Donna and Ela tried very hard to help RK. We agree that RK was provided with a very high level of support. The support given to RK was much more than for the other trainee biomedical scientists.
47. Dr Marat wrote to RK's GP on 4 July 2011. Dr Marat said RK had "stress reaction, unspecified" and "moderate depression". Dr Marat said that RK told him that she felt supported by her new manager, Dr Marat said that RK had

“good insight”, but Dr Marat wondered whether RK would accept help if it was needed in the future.

48. RK was referred to Occupational Health on 25 July 2011 because she said she was upset that she had not returned to Charing Cross Hospital. Returning to Charing Cross Hospital was not possible because RK needed to do a lot of work to finish her portfolio.
49. Dr Gaal of Occupational Health wrote a report about RK on 4 August 2011. RK had told Dr Gaal that she had not expected to be permanently based at Hammersmith Hospital. RK said that being kept at Hammersmith Hospital was causing her distress. This was mainly due to the time it took to travel to work.
50. We have decided that RK needed to stay at Hammersmith Hospital to complete her portfolio.
51. In September 2011 Donna looked through RK's portfolio carefully. Donna wrote a detailed list. Donna said what RK had done and what RK still needed to do.
52. RK continued to find her work difficult during 2012. RK did not make much progress with her portfolio. In October 2012 RK was put on an informal performance plan for eight weeks. We have decided that RK was put on the performance plan because there were serious concerns about her performance. Donna tried to deal with the problem in a way that would cause RK as little stress as possible. We have decided that the performance plan was designed to help RK improve her performance.
53. RK had a an appraisal on 21 March 2013. RK was told that her performance, and knowledge was below the level required. RK would need further training. RK made a comment saying that she thought that her performance and development had been “just satisfactory”. Unfortunately, we have decided that RK did not realise how serious the problems with her performance were.
54. An incident report was written about RK on 5 June 2013. RK had done a serum test. The serum test had to be done again because RK labelled a test tube with the wrong patient details. RK's mistake had to be reported because the mistake was a risk to patient safety.
55. Another incident report was written about RK on 13 July 2013. RK had discarded samples that were still needed.
56. On 13 September 2013 another informal plan was drawn up to try to improve RK's performance. It was limited to one machine, the Architect Analyser. RK would need to improvement a lot before RK could work on other jobs.
57. Donna sent an email to RK on 17 September 2013 saying how RK needed to improve. Donna told RK this was informal performance management, but if RK did not improve she would have to go onto the formal stage.
58. On 20 September 2013, Andy, The Blood Science Manager, referred RK to Occupational Health. Andy said he was worried that RK's performance was

getting worse and she was finding difficult to communicate, interpret information and process fundamental tasks. This caused a risk to patient care.

59. Donna had a meeting with RK on 1 October 2013. Donna said that RK had not followed the standard operating procedure for the Architect Analyser. Donna said that RK had not identified the right reagents to be added or removed. Donna said that RK had not calibrated the Architect Analyser correctly. We have decided that what Donna said was right.
60. An incident report was written about RK on 9 October 2013. RK had put the blood of the wrong patient into a cup to be analysed.
61. Dr Khan of Occupational Health sent a report on 23 October 2013. Dr Khan said the referral said RK had shown "abnormal behaviour". Dr Khan said that RK did not think there were any problems with her performance. Dr Khan said RK had told him that work was settled and going well. Dr Khan said that a letter should be sent to RK's GP to find out if there had been any mental health issues. Dr Khan said "As things stand, there is no obvious well-known medical issue here and therefore I am keen not to medicalised the concerns at work. Unless her GP comes back with something unexpected you may need to progress and manage her in a non-medical way i.e. looking at performance, etc" Dr Khan said that no adjustments were required for RK. Dr Khan noted that RK was at work. Dr Khan said there was no specific diagnosis of a physical or mental health issue. The information provided to the NHS Trust did not suggest that the Claimant at this time had a impairment that had a substantial effect on day to day or work activities. It only suggested that the situation should be investigated, if possible.
62. Dr Khan wrote to RK's GP on 23 October 2013. Dr Khan asked RK's GP whether RK lacked insight and whether there were any medical problems that could have affected RK's work.
63. On 7 November 2013, a nurse from Occupational Health made a telephone call to RK's GP and asked whether there was any response to Dr Khan's letter. RK had not visited the GP so no information was provided to the NHS Trust.
64. On 12 November 2013 RK labelled a serum sample with the details of a different patient.
65. On 19 November 2013 RK was invited to a formal management of poor performance meeting because her performance had not improved.
66. On 22 November 2013 RK's GP was chased by Occupational Health for a response. Occupational Health were told that RK had not made an appointment with the GP so the matter could be moved forward.
67. Ela met with RK on 29 November 2013. Ela sent a letter to RK after the meeting saying there were very serious concerns about RK's performance. The letter set out a number of areas in which RK would have to improve. Ela said that support would be arranged to help RK. RK would have one-to-one meetings to review her progress. RK would shadow and be trained by

experienced colleagues that RK had chosen herself. RK would have independent observation and feedback on her performance. RK was told that if her performance did not improve the NHS Trust would have to move to the next stage of the formal procedure.

68. Occupational Health contacted RK's GP again on 12 December 2013. They were told that RK had still not made an appointment for assessment. As a result no information could be provided to Occupational Health.
69. On 23 December 2013, Dr Khan wrote to Andy and told him that because it had not been possible to obtain information from RK's GP he could not comment or confirm on whether there were any medical issues that could be affecting RK. Dr Khan said that if RK did go to see her GP he would write again.
70. An incident report about RK was produced on 21 February 2014 because RK had discarded trays of samples when they were needed for analysis.
71. An incident report about RK was produced on 25 April 2014 because a label with a barcode for one patient had been put by RK onto a blood sample from a different patient.
72. On 25 April 2014 a letter was sent to RK. RK was notified of a formal performance management meeting. In the letter it was said that RK had made further errors and so it was necessary to move to the formal stage.
73. Ela met with RK on 2 May 2014. Ela said that RK had not made the necessary level of improvement.
74. Donna met with RK on 11 July 2014 to discuss RK's performance. Donna said that there had not been any improvement. A performance appraisal document was produced in which it was noted that the objectives set for RK had not been met.
75. On 29 August 2014 RK put some samples into the centrifuge by mistake. Because of RK's mistake wrong results were given to a patient.
76. On 13 January 2015 a note was made on a plan for RK that said that her performance was poor and that colleagues did not trust her work.
77. RK made a three-week visit to India in March 2015.
78. On 2 April 2015 Ela sent a letter to RK about a performance meeting that had been held on 4 March 2015 before RK went on holiday. Ela said that RK's performance remained poor. Ela said that RK was not following verbal and written instructions and was not working without being prompted to perform tasks. Ela said that RK was making mistakes when aliquoting samples. Ela said that RK did not do procedures in time. Ela said that RK was doing additional tests that were not needed. Ela said that RK did not seem to retain information after being trained. Ela gave considerable detail of the problems with RK's performance. Ela said that she did not believe there would be a suitable role within the blood science department. Ela thought that RK could



not undertake even the more junior roles. Errors such as labelling samples with incorrect patient details could not be allowed.. Ela produced a detailed performance report setting out the informal, and formal attempts that had been made to improve RK's performance. Ela said that RK had not improved to perform the expected level. We have decided that Ela was right. Ela said RK's performance would have to be considered to decide whether she was capable of undertaking her role.

79. On 10 April 2015 RK was invited to formal performance management meeting. RK was given a copy of Ela's report.
80. On the same day, 10 April 2015, RK was referred for investigation of her mental health. The NHS Trust did not know about the referral at the time
81. 20 April 2015 a nurse made a note that RK said she felt very stressed. The Claimant was seen by the mental health team on 12 May 2015. They noted a potential very serious mental illness that could have been developing for a long time. The NHS Trust did not know about this at the time.
82. On 24 April 2015 RK was referred to Occupational Health to consider whether she was fit enough to attend a hearing.
83. On 12 May 2015 RK made a telephone call to OH and cancelled her appointment. RK said that she would telephone again to fix another appointment but she did not do so. As a result the Respondent only had very limited information about RK's health. They were doing their best to obtain more information.
84. On 17 May 2015 RK was given a Fit Note signing her off work for two months with depression and stress at work. The Fit Note was sent to the NHS Trust
85. Dr Carey sent a report to RK's GP on 18 May 2015. The report was not seen by the NHS Trust. Dr Carey said that she was worried that there was a vicious circle in which RK's anxiety was negatively impacting on her performance, resulting in performance management, that was increasing her level of stress.
86. On 20 May 2015 Charlotte wrote to RK. Charlotte said that RK's brother had telephoned to say that RK could not attend a meeting as she was ill. Charlotte said that sometimes people who are too ill to attend work can attend meetings. Charlotte asked RK to attend another meeting.
87. On 21 May 2015 RK sent an email to Charlotte saying that she was upset to receive "a threatening letter" about formal performance management. RK said that she was not well enough to attend because she was under medication treatment. RK had not provided evidence from her GP or rearranged the proposed meeting with Occupational Health.
88. Charlotte replied to RK on 21 May 2015 and told RK that she could send a representative or a written statement. RK replied saying that she was not in a position to attend. RK said that if Charlotte wanted a statement she could give a brief one. RK said:

“I do not agree to the allegations levelled against me about poor performance as I always do my job honestly, diligently, with full concentration and hard work. I am working on this job from the last 12 years and know my job very well, however if there are any mistakes occurred I apologise and would request you to give me full support and chance instead of harassment and victimisation. “

89. The performance management hearing was held on 22 May 2015. Ela provided her report. Charlotte questioned Ela in detail. Charlotte decided that RK should be dismissed because her performance was unsatisfactory. The decision was written out in the letter of 27 May 2015. We have decided that the letter accurately sets out the reason for the dismissal.
90. RK send a handwritten letter on 8 June 2015 saying that she wanted to appeal against her dismissal.
91. There is a note in RK's GP records on 10 June 2015 that shows that RK was very ill at this time (see page 681). The NHS Trust did not know this at the time.
92. Stephen was chosen to hear RK's appeal. Stephen sent a letter to RK on 15 June 2015 to fix an appeal hearing. RK's brother sent an email on 15 June 2015 saying that RK was not well and was not fit to attend a meeting. RK's brother said RK was under the care of Dr Carey and the early intervention service. RK's brother gave the address of the early intervention service.
93. RK was becoming increasingly ill at this time. The medical evidence, including that at pages 709-713, show that RK was very unwell at this time and was not able to take part in the appeal. The NHS Trust did not have the full details at the time.
94. On 8 July 2015 Stephen wrote fixing an appeal for 20 July 2015. On 10 July 2015 RK's brother replied saying that RK was not well enough to attend and was under the care of Dr Carey.
95. On 10 July 2015 Stephen wrote stating that he needed a sick Fit Note for RK. Stephen suggested that a representative or attorney could attend an appeal hearing.
96. On 14 July 2015, a Fit Note was sent from the Grosvenor Ward of the West Middlesex University Hospital. The fit note was completed by a staff nurse who said that RK was unfit. It must have been obvious to Stephen that RK's condition was now serious because she had now been hospitalised.
97. On 20 July 2015 Stephen wrote stating that a an appeal needed to be fixed. Stephen said that the appeal process was not an open-ended. Stephen said that unless the process could be concluded by 21 August 2015 the NHS Trust would assume that RK was not pursuing her appeal.

98. On 28 July 2015 the NHS Trust was sent another Fit Note signing RK off. The Fit Note was completed by a registered mental health nurse. Reading the Fit Note must have made it clear to Stephen that RK's absence was due to a very serious mental health condition.
99. On 3 August 2015 RK's parents were contacted and told that the doctors had decided that RK must now stay in hospital, whether she wanted to or not.
100. On 11 August 2015 Stephen sent a letter saying that unless the process could be complete by 21 August 2015 the NHS Trust would assume that RK was not continuing her appeal.
101. On 17 August 2015 RK's brother wrote stating that he and RK's father would attend an appeal on behalf of RK. They said they were able to attend on 21 August 2015. Stephen was not available on 21 August 2015. A letter was sent to RK's family saying that there would be a meeting to discuss the way forward on that day, but it would not be part of the formal appeal process. The meeting would be held with Charlotte, who had made the original decision to dismiss RK.
102. An informal meeting was held on 21 August 2015 between RK's family and Charlotte. The family explained to Charlotte that RK was in hospital receiving help for her mental health. RK's family not explain the full nature of the illness, but did make it clear that it was so serious that she had had to go to hospital. RK's brother said that RK might go to the Employment Tribunal. At the end of the meeting RK's family were told that if the appeal was to be progressed RK would need to nominate family members to pursue it on her behalf.
103. RK wrote a note from hospital on 24 August 2015 saying that she was unwell due to work-related stress and depression and was under treatment by the medical authorities. RK said that she wanted her brother and father to represent her at an appeal.
104. On 25 August 2015 another sickness report was sent to the NHS Trust by a registered mental health nurse.
105. On 1 September 2015 RK's parents were told that RK was going to be kept in hospital for a period of up to 6 months.
106. RK's brother spoke with Stephen on the telephone on 1 September 2015. RK's brother swore at Stephen but then calmed down. RK's brother said that RK's family felt there was a failure in duty of care and that they wished to talk to someone senior in HR. We have decided that this was something separate from the appeal and that Stephen must have realised that was the case. In her note RK had made it clear that she wished to pursue her appeal and she wanted her brother and father to be allowed to represent her.
107. On 24 September 2015 Stephen wrote to RK's brother said that they should provide any further information about what they thought was wrong with the way in which matters had been dealt with to HR. Stephen did not say anything about fixing the appeal hearing. Stephen did not fix an appeal hearing. Stephen told us that he knew that RK's family was saying that RK was

seriously ill, that the NHS Trust had failed in its duty of care to RK and that RK might go to the Employment Tribunal. Stephen said in his evidence that the fact that RK might go to the Employment Tribunal was one of the reasons that he did not push ahead with fixing an appeal hearing. He said he also felt that RK's family should explain their concerns to HR before the appeal hearing was fixed. RK's brother did not contact HR or chase Stephen to fix an appeal hearing.

108. On 26 October 2015 a fit note was sent to the NHS Trust specifying the condition that resulted in the RK being kept in hospital and is admitted to be a disability (p575). A similar fit note was sent on 23 December 2020 (p577).
109. We are going to start by giving our overview of the case. We will explain the relevant law in attachment 3 and give some more detail of our analysis in attachment 4.
110. We know this may be very difficult for RK to hear. We have decided that RK found the work of a bio medical scientist very hard. RK's performance was not satisfactory for many years including long periods when she was not unwell. RK made mistakes. Luckily no patients were harmed, but RK's mistakes cause an totally unacceptable risk to patient safety.
111. We have decided that RK was provided with a lot of support. RK was given more support than other trainee biomedical scientists. Vijay and Donna tried to help RK by using informal performance procedures. Donna tried to help RK complete her portfolio so that she could apply for registration.
112. We do not accept that RK was seriously overworked or that there was a failure to allow her to take breaks. RK was only doing limited parts the role of biomedical scientist. RK found the work to be difficult and stressful. RK found it particularly stressful when Donna and Ela took reasonable steps to manage her performance. RK became so unwell that she had to stay in hospital for a long time .
113. The problems with RK's capability was so serious that the NHS decided that they could not continue to employ RK as a biomedical scientist, or in any other similar role that might be available for her. RK made mistakes on matters such as labelling blood samples. This was a necessary part of any role in the laboratory.
114. At the time that RK was dismissed the NHS had limited material about the true state of RK's health. The fit notes provided limited information. RK had cancelled the Occupational Health appointment made for her and had not provided any evidence from her GP and had not agreed to her GP contacting Occupational Health. We have decided that at the time of RK's dismissal the NHS Trust did not know that RK was disabled. We have also decided that the NHS Trust could not reasonably have been expected to know that RK was disabled. They took the steps that they reasonably be expected to take to clarify the situation but RK did not co-operate and her family did not provide the information that the NHS Trust needed. Accordingly, the disability discrimination up to the date of dismissal must fail.

115. The position was different by the time of the appeal hearing. By then it was clear that RK was confined to hospital because of her mental ill health. That required a much more detailed investigation to be undertaken into her health. RK health had deteriorated to such an extent that her family would have co-operated in obtaining a clearer medical position. They did not hide the fact that she was now an inpatient receiving treatment for serious mental ill health.
116. We have decided that Stephen should have fixed an appeal hearing once RK had stated that she wished to be represented by her brother and father. The fact that RK's brother had said that he wanted to complain about the alleged failure to the NHS Trust to comply with its duty of care in respect of the Claimant did not mean that Stephen did not need to fix an appeal hearing. The failure to fix the appeal hearing made the dismissal unfair.
117. Stephen found it difficult to explain in his evidence why he did not fix an appeal hearing. We do not accept his evidence that an appeal could not be fixed because RK's brother had said he wanted to complain to HR about his allegation that the Trust had failed in its duty of care to RK. We have decided that these were separate processes and that Stephen must have realised that was the case. Stephen told us that part of the reason for the decision not to progress with the appeal was the fact that RK's brother had said that RK might go to the Employment Tribunal. We do not accept that this provided a valid reason not to fix the appeal hearing. However, we do feel that it provided an insight about the way Stephen was thinking. He knew that RK was very unwell and that she was an inpatient in a mental health ward in hospital. He must have known that the illness was serious and likely to last a long time. He knew that RK was likely to be disabled and was thinking about bringing a claim in the Employment Tribunal. We infer that Stephen wished to avoid having to deal with someone who was on long term absence with a serious mental health condition and was likely to bring a claim in the Employment Tribunal. Those were links in a chain that were all things that arose in consequence of RK's disability. We infer that Stephen decision not to proceed to fix an appeal was, at least in part, something arising consequence of disability. We find Stephen knew or should have known that RK was disabled.
118. We do not find for RK on any of her other claims for reasons set out in more detail in Annex 3.
119. We have decided that, unfortunately, there was nothing that could be done by reasonable adjustment or otherwise that would allow RK to return to work in the laboratory environment. It would not have been safe for her to do so because she did not have the capability to do the job. Accordingly, even if there had not been the failure to institute an appeal RK would not have returned to the hospital. In addition, RK was not well enough to go back to work.

120. However, if there had been an appeal we have decided that there would have been a much more detailed consideration of RK's medical position. This would have taken some weeks. Having ascertained the true position it may have been decided that RK should be dismissed because of ill health with any benefits that might be available in such a case. Those are matters that will need to be considered at any remedy hearing.

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Employment Judge Tayler

17 June 2020

Judgment and Reasons sent to the parties on:  
19 June 2020

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For the Tribunal Office

Attachment 1

1. The issues for our determination were agreed at the Preliminary Hearing for Case Management before Employment Judge Davidson on 17 March 2016 as follows:

**The issues**

3. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

**4. Unfair dismissal claim**

- 4.1. What was the reason for the dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief that the Claimant's performance was sub-standard and that this was the reason for dismissal.
- 4.2. Did the respondent hold that belief in the claimant's lack of capability on reasonable grounds based on a reasonable investigation?
- 4.3. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
- 4.4. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

**5. Disability**

- 5.1. Does the claimant have a physical or mental impairment, namely depression and anxiety?

**7. Section 15: Discrimination arising from disability**

- 7.1. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is

7.1.1. maintaining her 'trainee' status for twelve years;

7.1.2. dismissing her;

7.1.3. transferring her to Hammersmith Hospital against her will.

No comparator is needed.

- 7.2. Does the claimant prove that the respondent treated the claimant as set out in paragraph 7.1 above?

- 7.3. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

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

- 7.5. 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?

2. Claims of victimisation and harassment were withdrawn.
3. The Respondent admitted that that 'the Claimant's impairments of unspecified non-organic psychosis, work-related stress and depression caused her to be a disabled person at the relevant time within the meaning of Equality Act 2010. However the Respondent contested knowledge in relation to both the discrimination because of something arising in consequence of disability and reasonable adjustments claims.
4. At the outset of the hearing the representatives of the parties agreed that these were the issues for our determination.



## Attachment 2

<b>Full Name and Job title</b> (surname first, alphabetical)	<b>To be addressed as:</b>
Adeyemi, Grace Biomedical Scientist, C's supervisor (Jan. – Feb. 2010)	<b>Grace</b>
Ah-Kye, Didier Senior Employee Relations Advisor	<b>Didier</b>
Akwah, Edward Senior Biomedical Scientist	<b>Edward</b>
Benfield, Patricia Senior Biomedical Scientist	<b>Trish</b>
Biegun-Laroy, Ela Lead Biomedical Scientist / Laboratory Manager (Hammersmith 'HH'))	<b>Ela</b> (pronounced 'Ela')
Bond, Janet Interim Head of Employees Relations Service	<b>Janet</b>
Kiran C's Father	<b>Kiran / Father</b>
Dixit C's brother	<b>Dixit / Brother</b>
RK ('Claimant') Trainee Biomedical Scientist	<b>RK</b>
Gaal, Dr Eugen Occupational Physician	<b>Dr Gaal</b>
Ketheeswaran, Mahesh Senior Biomedical Scientist	<b>Mahesh</b>
Khan, Sajid Occupational Health Physician	<b>Dr Khan</b>
Maret, Dr Jose Consultant Psychiatrist	<b>Dr Maret</b>
Mustoe, Charlotte Operations Manager, Blood Sciences for 4 sites (from Jan 2014)	<b>Charlotte</b>
Niczyporuk, Anita Senior Employee Relations Advisor	<b>Anita</b>
Osei-Bimpoing, Andrew Blood Science Manager,	<b>Andy</b>

Ramanaidoo, Vijay Chief Biomedical Scientist and Laboratory Manager at Charing Cross Hospital ('CXH')	<b>Vijay</b>
Rowlands, TJ Senior Biomedical scientist	<b>TJ</b>
Snegin, Stephen Head of Laboratory Operations (from 2013),	<b>Stephen</b>
Torrance, Donna Training Manager in Blood Sciences, Training Manager from June 2011	<b>Donna</b>
Van Egghen, Madeline Employment Relations Manager (from July 2015)	<b>Madeline</b>

OTHER (*alphabetical*)

**Murphy, Martina**  
**Counsel for the Respondent**  
**Martina**

**O'Neil, Catherine**  
**Registered Intermediary**

**Catherine**

**Tabori, Tom**  
**Counsel for the Claimant**

**Tom**

**Taylor, EJ**

**Judge**

Attachment 3

The Law

**Unfair Dismissal**

1. Pursuant to s.94 of the Employment Rights Act 1996 (“ERA”) an employee has the right not to be unfairly dismissed.
2. 94. If dismissal is established, it is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. These include, pursuant to s.98(2)(b) ERA, a reason which relates to the capability of the employee. S 98(3) ERA defines capability as follows:

““capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality”
3. Where the employer establishes a potentially fair reason for dismissal the Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This depends on whether in the circumstances, including the size and administrative resources of the employer’s undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is to be determined in accordance with equity and the substantial merits of the case. In a sickness absence dismissal case a Tribunal will often consider whether in all the circumstances of the case the employer could be expected to wait any longer and, if so, how much longer.
4. The Tribunal will consider whether the dismissal fell within the band of reasonable responses: **Iceland Frozen Foods v Jones** [1982] IRLR 439.
5. It is not for the Tribunal to substitute its decision for that of the employer: **Foley v Post Office, Midland Bank plc v Madden** [2000] IRLR 827.
6. The band of reasonable responses test applies to the decision to dismiss and the investigation of the Claimant’s ill health that took place: **Sainsbury’s Supermarket Ltd v Hitt** [2003] IRLR 23.
7. The Tribunal must consider whether the investigation of the Claimant’s ill health was reasonable, not whether it itself would have chosen some alternative reasonable methodology to that adopted by the Respondent.
8. When considering fairness of procedures, the Tribunal considers the overall process including any appeal: **Taylor v OCS Group Ltd** [2006] ICR 1602.
9. Where a complaint of unfair dismissal is successful the tribunal will have to consider what compensation to award. Pursuant to Section 123(1) ERA the Tribunal should award compensation of such an amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal, insofar as the loss is attributable to the action taken by the employer. The equivalent provision to Section 123(1) ERA also founded what is referred to as a **Polkey**

reduction where it is decided that there is a chance that had a fair procedure been operated the employee would have been dismissed in any event. That cannot have affected the dismissal but may still result in it being appropriate to reduce compensation because the loss has not been sustained by the employee entirely by reason of the action of the employer, because dismissal might have occurred in any event.

### **Disability Discrimination**

10. Disability is a protected characteristic for the purposes of the Equality Act 2010 (“EQA”).
11. Discrimination in Employment
12. Certain forms of discrimination in employment are made unlawful by section 39 EQA;
  - (2) An employer (A) must not discriminate against an employee of A's (B)—
    - (c) by dismissing B;
    - (5) A duty to make reasonable adjustments applies to an employer.
13. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

“It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error”.
14. The provisions that we are dealing are to combat discrimination. In that context, it is important to note that it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer’s procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

### **Burden of Proof**

15. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

136 Burden of proof

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

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

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

16. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867.
17. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.
18. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the section: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

#### **Discrimination because of something arising in consequence of disability**

19. Discrimination because of something arising in consequence of disability is defined by section 15 EQA;
  - 15(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.
20. Langstaff P held in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305, EAT):

"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."
21. We had regard to the approach to section 15 claims set out by Simler P, as she then was, in **Pnaiser v NHS England** [2016] IRLR 170 at §31.

22. Section 15 of the Equality Act 2006 provides in relation to the statutory Codes of Practice issued by the EHRC that a failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but the code shall be admissible in evidence and shall be taken into account by a tribunal in any case in which it appears to the tribunal to be relevant.
23. At paragraph 17.20 it is noted that; If an employer takes action against a disabled worker for disability-related sickness absence, this may amount to discrimination arising from disability. The key issue then will be that of justification.
24. In considering whether the treatment is a proportionate means of achieving a legitimate aim the ECHR Code helpfully summarises:
- “4.27 The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:
- Is the aim ... legal and non-discriminatory, and one that represents a real, objective consideration?
  - If the aim is legitimate, is the means of achieving it proportionate -- that is, **appropriate** and **necessary** in all the circumstances?
- ...  
4.30 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a **balancing exercise**. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect ... as against the employer’s reasons for applying it, taking into account all the relevant facts.”
25. The term necessary should be seen as meaning reasonably necessary: **Hardys and Hansons plc v Lax** [2005] ICR 1565, CA, in which Pill LJ stated:
- “I accept that the word ‘necessary’ used in Bilka is to be qualified by the word ‘reasonably’... The presence of the word ‘reasonably’ reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible.”
26. In considering whether such justification is made out the Tribunal adopts an objective approach. The Tribunal has to make a determination of whether the treatment was objectively justified: see **Cadman v Health and Safety Executive** [2005] ICR 1546. The focus is not on the decision making process of the Respondent but on the objective question of whether the treatment was a proportionate means of achieving a legitimate aim.
27. Dismissing a person because of sickness absence arising in consequence of disability generally will not be proportionate if the absence could be avoided by the making of a reasonable adjustment.
28. However, a claim of discrimination because of something arising in consequence of disability will not be made out if at the time the act occurred the Respondent shown that it did not know, and could not reasonably have

been expected to know, that the Claimant had a disability. The test focuses not only on whether the Respondent could have done more, the tribunal also need to consider whether if that had been done the Respondent would have known that the Claimant was suffering a physical or mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Accordingly, if the Tribunal concludes that even if the right question had been asked they would not have been answered in a way that would have provided the necessary information, the Respondent could not reasonably have been expected to know that the Claimant was disabled.

29. Para 5.17 of the ECHR code provides that knowledge of a disability held by an employer's agent or employee, such as an occupational health adviser, will usually be imputed to the employer.

### Reasonable Adjustments

30. Section 20 EQA provides in respect of the duty to make reasonable adjustments;
- (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.
31. The approach to PCP cases was considered in **Royal Bank of Scotland v Ashton** [2011] ICR 362 and **Environment Agency v Rowan** [2008] IRLR 20. The tribunal should consider the PCP relied upon, the identity of the non-disabled comparators, the nature and extent of the substantial disadvantage asserted to be suffered by the Claimant in comparison with the comparators and the practical result of the reasonable steps the employer can take to ameliorate the disadvantage.
32. A possible adjustment may be suggested by the parties or the Tribunal during the hearing: see **Project Management Institute v Latif** [2007] IRLR 579. There is no burden on the Claimant to identify the reasonable adjustment.
33. The duty to make reasonable adjustments may impose a requirement to treat a disabled employee more favourably than other employees and can involve transferring a disabled employee who could no longer perform his original job to an alternative role without competitive interview: **Archibald v Fife Council** [2004] ICR 954. It can even be a reasonable adjustment to create an entirely new role for a disabled Claimant in order to maintain their employment: **Southampton City College v Randall** [2006] IRLR 18.
34. The employer may not be under a duty to make reasonable adjustments by providing, for example, a phased return to work if the employee is at the time unfit for any work for the foreseeable future: **NCH Scotland v McHugh** EATS 0010/06. However, the employer will generally need to make sure proper adjustments are in place once a return to work is foreseeable. His Honour Judge McMullen QC referred to taking steps when there is "some sign on the horizon that the Claimant would be returning".

**Discrimination time limits**

35. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA;
- “(1) ... proceedings on a complaint ... may not be brought after the end of— the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.
- (3) For the purposes of this section—
- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
- (a) when P does an act inconsistent with doing it, or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”
36. The time limit is adjusted to take account of pre-claim conciliation.



Attachment 3

1. In this section we set out of our analysis of the claims in a little more detail. The submission made on behalf of RK were somewhat diffuse and unclear and were not clearly linked to the list of issues. At the outset of the hearing Tom and Martina agreed on behalf of RK and the NHS Trust that the issues were as in the agreed list of issues. Those are the only claims that were properly before the Tribunal. Reference was made to the final amended Particulars of Claim that were in the bundle. These included many detailed particulars of alleged unfairness and disability discrimination that were not in the agreed list of issues. While these were not properly before the Tribunal we set out what our determinations would have been in respect of those more particularised claims had they properly been before us.
2. We consider that the reason for the RK's dismissal was one that related to her capability. The Respondent genuinely believed that RK lacked capability. They did so on reasonable grounds having carried out a reasonable investigation up to the time of the dismissal. However, the overall procedure was not fair because of the failure by Stephen to arrange an appeal hearing. RK had clearly requested such a hearing and asked that she be represented at by her brother and father.
3. Tom did not refer in submissions to specific aspects of the RK's treatment that he contended rendered the dismissal unfair. The final amended particulars of claim had been produced that set out a large number of alleged particulars of unreasonableness. For completeness we deal with them here.
  - 3.1. The first is a complaint that the RK's portfolio was not sent to be IBMS to be "verified". That was because it was not completed. That does not render the dismissal unfair.
  - 3.2. The next allegation is that RK's incapability arose from ill health which was genuine and was allegedly caused by the Respondent's treatment. We do not accept that RK's poor performance was caused by her ill health. Absent her ill health her performance was not of a sufficient standard to her to remain as a biomedical scientist. We consider that the NHS trust acted reasonably in concluding that her performance was not satisfactory for her to remain working in the laboratory in any role. It would not have been safe for her to do so even if her health had recovered. Even when she was well enough to be at work she was unable to complete tasks reliably and safely.
  - 3.3. It is alleged that the Respondent was not "adequately informed" before dismissing RK. At the stage of the dismissal hearing the Respondent only had the fit notes that did not give significant detail of RK's condition. RK's family had only provided very limited information about her true medical condition. The Respondent made an OH referral but RK cancelled it. RK did not make an appointment with her GP so that the GP could contact Occupational Health. We do not consider that the NHS Trust could have done more at the dismissal stage. They could and should have done more at the appeal. Had an appeal been held the RK's medical position could have been investigated in more

detail. By that stage her condition had deteriorated very significantly and it was clear that she was seriously ill. A reasonable process would have included further investigation of the medical position. That is why we have held that the dismissal was unfair.

- 3.4. Next it is alleged that dismissal was not a fair sanctions because the RK's illness did not make her a risk to her fellow employees. We consider that the dismissal is unfair because of the lack of completion of the appeal process. However, although, RK may not have posed a risk to fellow employees she posed a very significant risk to patients that meant that she could not return to work in a laboratory environment.
- 3.5. It is again alleged that the portfolio should be referred to the IBMS in the last quarter of 2010. The portfolio was not completed so could not be submitted.
- 3.6. Next it is suggested that RK's disability should have been taken account of and as a result she should only have been managed under the sickness absence policy. While that at the appeal stage there should have been investigation of her sickness and consideration of options such as medical retirement, we consider that even absent any disability RK's capability was insufficient for her to carry out work that she had been employed to undertake. That could not be ignored.
- 3.7. It is alleged that there was insufficient investigation of RK's illness or disability. For the reason set out above we do not accept that that is the case in respect of the decision to dismiss but we do consider that an appeal hearing should be held at which the matter could have been investigated in more detail. Once the Respondent was aware that the RK was being kept in hospital because of mental ill health they should have investigated the matter further. However, we do not consider that would have resulted in the Claimant returning to work in the laboratory at one of the NHS Trust's hospitals. Consideration could have been given to medical retirement. Any benefits available on medical retirement will be for consideration as a matter of remedy.
- 3.8. It is contended that dismissal was disproportionate because RK should have been supported to remain in her current role, performance management targets should have been adjusted or RK should have been moved to alternative roles. Unfortunately, RK did not have the skills and attention to details that would make it safe for her to be retained in her role and there were not appropriate roles that she had sufficient aptitude to be moved to. Performance management targets could not be altered while ensuring patient safety.
- 3.9. Next it is alleged that the Respondent should have taken into account the fact that the RK's stress and depression was caused by the Respondent's treatment. We do not accept that is the case. We do not accept that the Claimant was overworked provided with too little support as alleged. The most significant cause of stress was performance management which, if the RK wished to remain in the

role, could not be avoided. Unfortunately RK's performance was at a level such that she could not continue to work in the laboratory.

- 3.10. It is alleged that the procedure was unfair as RK was not given a reasonable opportunity to improve her performance. We consider that she was given reasonable opportunities to improve over a number of years. Informal performance management was attempted for a number of years. RK was provided with an great deal of support before the NHS Trust reasonably decided it had no option but to move to the formal process.
- 3.11. We do not accept that the Respondent failed in its responsibilities to create conditions that would enable RK to carry out her duties satisfactory. They did all they reasonably could to assist her to improve her performance.
- 3.12. Next it alleged that meetings were scheduled that RK could not attend. For the reason set out above we do not criticise the Respondent in the period up to the dismissal meeting. We do consider that the appeal meeting requested by the Claimant should have been fixed which had dealt with in our determination of the claim of discrimination because of something arising in consequence of disability.
4. Next it is contended, and that the Claimant was subject to discrimination because of something arising in consequence of her disability.
5. Up to the stage of the failure to provide RK with an appeal hearing we consider that did not the Respondent did not know, and could not reasonably have been expected to know, that the claimant had a disability. The Respondent was aware that the Claimant had periods of sickness and absence but had been provided with very limited information despite seeking it and seeking to obtain more medical evidence. This is discussed in our main findings.
6. As set out in our main findings we consider that the failure to arrange the appeal was, in part, because of something arising in consequence of the Claimant's disability.
7. In respect of the period prior the failure to fix an appeal hearing we now consider whether if the Respondent had known, or should have known, that the Claimant was disabled, whether the claims would have been made out.
8. In the agreed list of issues it is suggested that maintaining the Claimant as a trainee for 12 years was discrimination because of something arising in consequence of disability. This was done because she had not completed her portfolio. This was not something arising in consequence of her disability but because of her lack of capability to perform the role, irrespective of her ill health. In any event, retaining the Claimant as a trainee was a proportionate means of achieving a legitimate aim. The Respondent has a legitimate aim of providing an efficient and safe service to patient and staff.. The portfolio could not be assessed before it was completed. It was proportionate to require that the portfolio be properly completed before it was sent for assessment. In any event, if it had been sent uncompleted it would have been rejected.

9. The Claimant alleged that she was transferred to Hammersmith hospital against her will. We do not accept that was the case. The Claimant requested a transfer.
10. In respect of the claims other than in respect of RK's dismissal included the final amended Particulars of Claim, which do not form part of the agreed list of issue and so are not properly before us, we would not have found in favour of the Claimant, even if we had considered that the Respondent knew, or should have known, that the Claimant was disabled:
  - 10.1. We do not accept that RK was denied work opportunities.
  - 10.2. RK's portfolio could not be submitted because it had not been completed.
  - 10.3. RK was not required to undertake tasks without thought as to stress or illness. The Respondent limited task and provided RK with a great deal of support.
  - 10.4. We do not accept that the Respondent ignored requests for breaks or the brakes had been delayed.
  - 10.5. We do not accept that the RK's illness was caused by unfair treatment by the Respondent. We do conclude that had the appeal been heard that there would have been an opportunity to consider the possibility of dismissal for ill health. There would have been an opportunity for the Claimant's medical condition to be considered in more detail.
  - 10.6. The Respondent could not ignore the fact that the Claimant lacked the capability to do her job.
  - 10.7. The Respondent did not ignore the Claimant's medical condition to the extent they were aware of in up to the time when Stephen failed to fix an appeal hearing.
  - 10.8. We do not consider that Dr Gaal's recommendations were ignored.
  - 10.9. We do not accept that RK was transferred to an understaffed lab and high pressured workplace on her return from to work. This is a reference to the move to Charing Cross hospital. The move was undertaken as an opportunity for RK to complete her portfolio.
  - 10.10. The Respondent did take reasonable steps to try and follow up Dr Khan's suggestion that RK's GP should be contacted. They contacted the GP on three occasions, but were informed the Claimant had failed to make an appointment so that her health could be investigated in more detail.
11. We do not accept there was a failure to make reasonable adjustments as alleged in the list of issues.

12. It is alleged that a PCP was applied in respect of the standards imposed for qualifying as a biomedical scientist. These are nationally set standards that are required for someone to be a competent biomedical scientist. We do not accept that the Claimant was placed at a substantial disadvantage through the application of that PCP in comparison with people who did not have her disability. RK was unable to meet the standards irrespective of her disability. We do not accept it would have been reasonable to reduce the qualification standards for RK. The standards could not be reduced by the NHS Trust and it would not be reasonable to reduce the nationally applied standards in any event. They are necessary for patient protection.
13. It is next alleged that there was a PCP of failing to provide support. We find it hard to see how this would be a workable PCP for a reasonable adjustments claim. In any event, we do not accept that there was a failure to provide RK with support. RK was provided with a great deal of support in an attempt to enable her to improve her performance.
14. It is alleged that a PCP was applied in applying a performance management process. The Respondent did apply its performance management process. It is suggested that the performance management procedure should have been adapted. We do not accept that the Claimant was placed at a substantial disadvantage through the application of the performance management process in comparison with people who did not have her disability. The Claimant was not able to meet the standards because she lacked the necessary aptitude irrespective of her disability. In any event, to an extent the procedure was adapted in that lengthy informal processes were attempted before the formal process was adopted. We do not consider there is anything that the Respondent reasonably could have been expected to do to modify the procedure. It is further suggested that performance management targets should have been adjusted. The Respondent repeatedly set relatively low performance management targets and in an attempt to allow the Claimant to improve her performance. Unfortunately, it did not prove successful. There is nothing further they reasonably could have been expected to do.
15. In the further amended particulars of claim a number of further allegations were made that were not in the agreed list of issues so were not properly before us. If they had been properly before us we would have concluded as follows. The PCPs relied on are not particularised but it is contended that a number of adjustments should have been made.
16. It is suggested that a period of less than full duties should have been allowed. The Respondent repeatedly did so. By the time of dismissal that was no longer an option as the level of performance was so unsatisfactory that RK could not remain in the Respondent's employment in a biomedical role.
17. It is alleged that an adjustment should have been made of allowing RK to take her breaks on time. We do not accept that RK was not able to take breaks or that her poor performance arose as a result of the timing of her breaks.
18. It is alleged that the Claimant's workload should have been decreased. It was so far as possible while the NHS Trust sought to help RK improve her performance.

19. It is alleged that there should have been a referral under the “Respondent’s workplace wellbeing”. The NHS Trust did all they could reasonably do to investigate RKs wellbeing and to seek to help her improve her performance.
20. Furthermore, many of the claims prior to the dismissal of the Claimant are substantially out of time.