EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100490/2021

Final Hearing held at Dundee remotely by Cloud Video Platform on 20, 21, 22, 23, 27, 28, 29, 30 September 2022 and 21 October 2022; deliberation day on 7 November 2022

Employment Judge A Kemp
Tribunal Member P Fallow
Tribunal Member L Grime

C	**Claimant** **Represented by:** **Mr D Flood,** **Counsel** **Instructed by:** **Ms C Horsfield,** **Senior Paralegal**
Grampian Health Board	**First respondent** **Represented by:** **Mr K McGuire,** **Advocate** **Instructed by:** **Mr A Watson,** **Solicitor**
Tayside Health Board	**Second respondent** **Represented by:** **Mr K McGuire,** **Advocate** **Instructed by:** **Mr A Watson,** **Solicitor**
NHS Education for Scotland	**Third respondent** **Represented by:** **Mr K McGuire,** **Advocate** **Instructed by:** **Mr A Watson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous Judgment of the Tribunal is that the Claim does not succeed, and is dismissed.

2. The Tribunal grants an order under Rule 50 of the Rules of Procedure within Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that the identity of the claimant shall not be disclosed to the public and that her name and address, the terms of paragraph 16, and references to the hospital at which she worked found at paragraphs 17, 44 and 265 shall be redacted from the version of this Judgment entered on the Register maintained under Rule 67. The claimant shall be identified by the letter "C".

REASONS

Introduction

1. This was the Final Hearing into claims of discrimination on the ground of disability under sections 15, 20 and 53 of the Equality Act 2010 ("the 2010 Act"), and for unfair dismissal under section 98 of the Employment Rights Act 1996 ("the 1996 Act"). There have been a number of previous Preliminary Hearings in this case. It included one before EJ Kemp on 26 January 2022, after which an expert report, jointly instructed, on the issue of disability status was obtained, and the present hearing fixed.

2. The claimant was represented by Mr Flood, and all the respondents by Mr McGuire. The Tribunal was grateful to both of them for the most helpful and professional manner in which they conducted the hearing, and for their detailed submissions. It was also grateful to the solicitors who had co-operated in producing the documentation for the Tribunal, which included for example a Chronology and a Cast List.

3. The present case is one of particular complexity, in the context of the claimant training to become a Consultant Paediatrician. The evidence was substantial, involving over 1,700 pages of documentary evidence,

and oral evidence from 10 witnesses on the basis of written witness statements extending to over 150 pages. Evidence was heard over eight days, after which the Tribunal acceded to a request from counsel for more time to prepare their written submissions. Those were exchanged, and oral submissions heard on 21 October 2022. The Tribunal commenced its deliberations thereafter, and continued them on 7 November 2022.

Preliminary Matters

4. The claimant produced a Schedule of Loss and supporting documentation, which was received without objection. It sought compensation of a little over £380,000. The claimant also produced some additional documents late, which again were received without objection, with the respondent providing one document in response. It was agreed that the claimant would give her evidence first. There was a discussion as to adjustments required for her, being for regular breaks, which were allowed when requested.

Issues

5. There was an initial discussion as to the issues in the case. The respondents were confirmed as the three set out above, and although there had been reference earlier to the North of Scotland Deanery, that being the entity against which the Claim had been taken before later particulars were provided which included the present three respondents, and it was confirmed that there was no claim directed to that entity. It was further confirmed that the respondents were designed properly as above. The claimant had provided two sets of Further and Better Particulars, with the latter dated 17 May 2021 being that on which the claim proceeded. The legal basis of the claim as directed to the third respondent was confirmed as under sections 53 and 54 of the 2010 Act, subject to enquiries as to whether the Tribunal had jurisdiction, later addressed in submission. Jurisdiction was also an issue raised in relation to timebar and again was addressed in submission.

6. The respondents confirmed that the status of the claimant as a disabled person was not disputed, with the joint report from Dr Woodward not

being the subject of direct challenge such that he was not called as a witness, but that issues as to when that arose from, and actual or imputed knowledge, did remain in dispute. The first respondent as employer accepted that it had dismissed the claimant and argued that the reason for doing so was some other substantial reason.

7. The issues are reflected in the following list which is in the nature of a framework for consideration of them, as follows:

(i) From what date was the claimant a disabled person under the 2010 Act?

(ii) When, if at all, ought each of the respondents reasonably to have known that the claimant was a disabled person under the 2010 Act?

(iii) Did the claimant suffer unfavourable treatment under section 15 of the 2010 Act in any of the following respects –

(a) Dr Fardon's treatment of her at the meeting in October 2019, alleged to be aggressive and hostile

(b) The ARCP Outcome 4 decision

(c) Permitting or causing negative feedback to be given to cause that decision

(d) Dismissing the claimant's appeal against the Outcome 4 decision

(e) During the appeal permitting or causing negative feedback to be given

(f) Dismissing her.

(iv) Were any of the following –

(a) Difficulties in carrying out studies or qualification related projects outside work time

(b) The effect on the claimant's performance at work

(c) The effect on the claimant's studies and advancement whilst not at work

(d) Increasing the time it took to achieve milestones in training

(e) The effect on the experience and attainments during training

(f) The effect on the quality and effectiveness on interactions with colleagues

something arising out of her disability under section 15(1) of the 2010 Act?

(v) If so was that "because" of disability

(vi) If so, was a proportionate means of achieving a legitimate aim established under section 15(2) of the 2010 Act?

(vii) Did each of the respondents apply a provision, criterion or practice under section 20 of the 2010 Act to the claimant in relation to (in summary)

(a) Training milestones within particular timeframes

(b) Standards of competency and attainment

(c) Taking account of mitigation in the assessment?

(viii) Did doing so put disabled persons at a substantial disadvantage compared to those who are not?

(ix) Did doing so put the claimant at a substantial disadvantage?

(x) If so, did each of the respondents not take any step that was reasonable to take to avoid the disadvantage under the terms of section 20 of the 2010 Act?

(xi) What was the reason or principal reason for the claimant's dismissal?

(xii) Was it fair or unfair under section 98 of the 1996 Act?

(xiii) Is any claim outwith the jurisdiction of the Tribunal under (a) section 123 of the 2010 Act or (b) section 120 of the 2010 Act in relation to the third respondent?

(xiv) Was the third respondent in breach of the terms of section 53 in respect of the Outcome 4 and rejection of the claimant's appeal, and in that respect was it making a competence assessment?

(xv) If any claim succeeds to what remedy is the claimant entitled, including

(a) what sum for injury to feelings is appropriate and

(b) what were the claimant's losses?

8. There were also a number of what may be described as sub-issues, which were:

(xvi) The relevancy of aspects of evidence to which objection was taken

(xvii) The question of the confidentiality of some of the information given by the claimant

(xviii) An application for a privacy order by the claimant

Evidence

9. The parties had prepared a single Inventory of Documents, together with a Supplementary Inventory, which was added to as referred to above. Most but not all of the documents were spoken to in evidence. Evidence in chief was given by written witness statement. Those doing so are referred to below. The joint report of Dr Woodward has been referred to above.

10. The respondents objected to certain parts of the evidence, the most material of which was evidence being taken from Professor MacVicar in cross examination in relation to documents said not to have been provided to the Appeal Panel which the claimant argued ought to have been. The essence of the objection was lack of fair notice as the matter had not been pled. The Tribunal decided to allow those questions subject to reservation. There was a claim for unfair dismissal alleged under section 98(4), which referred to the appeal hearing in paragraph 25 of the Second Further and Better Particulars, and set out matters "inter alia", such as not to be exhaustive. The Tribunal considered that alleging unfair dismissal was sufficient. There is not the same level of specification required in the Tribunal pleadings as in the civil courts. The Tribunal considered it within the overriding objective to allow the evidence to be heard on such a basis, but to allow the respondents an opportunity to lead further evidence on the point if it so desired. An adjournment was allowed for instructions to be taken, but the respondents did not wish to lead further evidence. A separate issue which arose was whether one document had been provided to the third respondent, which it was later clarified had been, and had formed document A61 for the appeal. There is an issue as to the respective actions of each respondent, the first respondent being the employer and therefore the party which dismissed the claimant, addressed below.

11. The written documentation was in part not straightforward to follow and understand. It was not set out in chronological order throughout, and for

example the documents the claimant said that she had sent for her appeal against the Outcome 4 were in a single document with the description in the inventory of "A1 – A61", but with no list of them to show what each document was (there were two pages blank in the Inventory of Productions which had been intended for that list).

12. The documents were essentially a mixture of documents and emails. There were at least two documents with grounds of appeal. The appendices, with A and a number, were not possible to relate exactly to the relevant production. A10 appeared for example to be two different documents. The claimant had not in her witness statement identified which document was which.

13. It also became apparent that what was described in the Inventory as the evidence pack for the appeal hearing was not the full evidence pack, but only the documents from the respondent side (either or both of the second and third respondent). It also had appendices with numbers.

14. The written witness statements did not deal with the process of documentation being provided, and the person who had arranged that, Karen Shearer (as it appeared from the productions) was not a witness before us.

Facts

15. The Tribunal found the following facts, relevant to the issues, to have been established from the evidence led before it:

The claimant

16. [redacted]

17. In August 2013 she commenced employment with the second respondent. She did so to commence a period of training with a view to becoming a Consultant Paediatrician. In August 2018 she was transferred to the employment of the first respondent, although she continued to work with the second respondent. The claimant's work was primarily undertaken at [redacted].

The first respondent

18. The first respondent is Grampian Health Board. It is responsible for the delivery of healthcare services in the north-east of Scotland.

The second respondent

19. The second respondent is Tayside Health Board. It is responsible for delivery of healthcare services in the Tayside region of Scotland.

The third respondent

20. The third respondent is NHS Education for Scotland. It is a national special health board. It is responsible for the management and delivery of undergraduate and postgraduate training for the NHS in Scotland, including for the training of those seeking to become Consultants. It is a body independent of the first or second respondents. It is a qualification body under section 54 of the Equality Act 2010.

Contracts of employment

21. The claimant entered into a contract of employment with the second respondent on commencement of her employment, which was later amended. A decision was then taken that all Trainees in Paediatrics in the northern areas of Scotland, including the area of operation of the second respondent, would be employed by the first respondent and the claimant's employment was transferred to the first respondent. She continued to carry out her work, and undertake training, with the second respondent acting as what is referred to as the Placement Board. A new contract of employment was issued on her transfer to the first respondent.

22. The claimant was employed by the first respondent as a Core/Speciality Trainee within what was termed Paediatrics - East. The claimant's role included clinical work as well as being part of the process of training towards becoming a Consultant. The training was part of a postgraduate specialty training programme approved by the General Medical Council ("GMC") The contracts of employment all included a provision that "Your employment is conditional upon you continuing to hold a place in an approved postgraduate training programme". To hold such a place, a national training number required to be issued and retained.

Training

23. The GMC has responsibilities for postgraduate training, amongst other matters, under the Medical Act 1983. It issued guidance on supporting disabled learners in medical education and training. It included a reference to those in training, and indicated that reference to an occupational health physician may be appropriate where there were concerns over a trainee's health.

24. The training of the claimant was carried out under the direction of the third respondent. It complies with a curriculum set by the Royal College of Paediatrics and Child Health ("RCPCH"), which is approved by the GMC. Training arrangements are summarised in a document titled "A Reference Guide for Postgraduate Speciality Training in the UK" called the "Gold Guide". A seventh edition of the Gold Guide was in effect from 31 January 2018 and an eighth edition with effect from 31 March 2020. It aimed to set out a framework with clear principles for the operational management of postgraduate speciality training, including that for those seeking to become Consultants.

25. Its provisions included –

> "Structured postgraduate medical training is dependent on having curricula that are mapped to the GMC's standards in Good Medical Practice and the Generic Professional Capabilities Framework. These curricula clearly set out the competences of practice, an assessment framework to know whether those

> competences have been achieved and an infrastructure that supports a training environment in the context of service delivery.
>
> The three key elements that support trainees in this process are formative assessments and interactions (e.g. SLEs and other supervisor discussions), summative assessments (e.g. assessments of performance and examinations) and triangulated judgement made by an educational supervisor. These three elements are individual but integrated components of the training process. While the formative elements are for use between trainee and educational supervisor, they will aid the supervisor in making their informed judgement so that together with the other elements they contribute to the ARCP."

26. The process of assessment included therefore meetings with an Educational Supervisor, and an Annual Review of Competency Progression ("ARCP"). On the latter the Guide stated

> "The ARCP provides a formal process that reviews the evidence presented by the trainee and their educational supervisor relating to the trainee's progress in the training programme. It enables the trainee, the Postgraduate Dean and employers to document that the competences required are being gained at an appropriate rate and through appropriate experience."

27. The Gold Guide provisions included that a training number for a Trainee is issued by the Postgraduate Dean, and that "Postgraduate Deans will review any health matters (including occupational health advice) with trainees to ensure appropriate decisions are made regarding training." It confirmed that a training number could be withdrawn if, inter alia, the Trainee "has received an Outcome 4 from the ARCP panel, and the appeal process (where relevant) has been concluded and the appeal rejected."

28. The Gold Guide had provisions for review and appeal of decisions made. It stated that the review "must take into account the representations of the trainee asking for the review and any other relevant information, including additional relevant information, whether it formed part of the

original considerations or has been freshly submitted." The Guide further stated that an appeal "is a procedure whereby the decision of one individual or a group is considered by another (different) individual or group. An appeal can take into account information available at the time the original decision was made, newly submitted information relevant to the appeal and the representations of the appellant. Those involved in an appeal panel must not have played a part in the original decision or the review…….Trainees may support their appeals with further written evidence relevant to the grounds of appeal. All documentation presented to the appeal panel must also be made available to the trainee."

29. The programme undertaken by a trainee should ensure that there was sufficient time to learn, that rotations meet their training needs, and that they are supported to acquire the required learning outcomes and clinical competencies.

30. Each trainee is allocated both an Educational Supervisor and a Clinical Supervisor by the training body, which for the claimant was the third respondent. The Educational Supervisor seeks to ensure that the trainee is meeting the training requirements and competencies. They meet the trainee at the start of the training year, in the middle of the year, and before the ARCP to provide feedback and agree action plans for any issues identified. They are allotted one to two sessions per week, or four to eight hours per week. They may meet more frequently if there are specific issues or for additional support. The Clinical Supervisor supervises day to day clinical work and patient care, and seeks to ensure that the trainee is supported to develop clinical skills safely and independently. The Clinical Supervisor is allotted eight hours per annum to perform the role. In practice each of the Educational and Clinical Supervisors spend more than the allotted time to carry out their roles.

31. The Educational Supervisor tends to change less frequently than the Clinical Supervisor. Initially the claimant's Educational Supervisor was Dr Buddhi Gunaratne. The claimant made complaints about Dr Gunaratne in that role, and Dr Claire Webster became her Educational Supervisor in November 2017. In or around November 2019 the Educational Supervisor for the claimant changed to Dr Nicholas Conway.

32. The third respondent appointed a Training Programme Director ("TPD") to be responsible for the provision of training for Trainees such as the claimant. For the claimant the TPD was Dr Alice Jollands, a Consultant Paediatrician employed by the second respondent. The third respondent also appointed Associate Post-Graduate Deans ("APGD") to assist the Post Graduate Dean. For the claimant the APGD was Dr Tom Fardon, a Consultant Physician employed by the second respondent.

33. When acting for the third respondent in such roles as Educational Supervisor, Clinical Supervisor, TPD, or APGD, the individual was employed by the third respondent.

34. There are eight different stages of training, from ST1 to ST8. Level 1 is for ST1 – 3 during which trainees are highly supervised. Level 2 is for ST4 – 5 during which trainees are able to work independently with support. The claimant commenced the training programme at ST4. Level 3 is ST6 – 8 and is to prepare trainees for independent Consultant working. The role of the Consultant requires more than clinical expertise, and includes the ability to manage a team of healthcare professionals, to communicate with that team and others including patients and their families, and to handle challenges under conditions of high stress.

35. There are eleven "domains" under the curriculum which are considered important for good medical practice. Trainees are expected to evidence each domain at each level of training. Documents and outcomes are recorded in an ePortfolio to be presented at the ARCP.

36. Evidence for the ARCP is presented both by the trainee and the Educational Supervisor, and includes Multi-Source Feedback ("MSF") from those working with the trainee. It includes a report by the Educational Supervisor which is of particular importance to the Panel conducting the review. The Panel may include those at APGD level, and others including external members not employed by any of the respondents.

37. The review results in an "Outcome". It determines whether the trainee can progress to the next stage of training, or that the training has been completed. The potential outcomes include:

0. No review held.
1. Satisfactory progress.
2. Development of specific competencies is required but no further training time is needed.
3. Inadequate progress and additional training time is required.
4. Trainee released from programme.
5. Where there are missing pieces of evidence, which can be remedied within a set period of time.
6. All required competencies have been gained.

38. Outcomes 2, 3 and 4 are known as adverse outcomes. There is a right of appeal such an outcome. A trainee may also leave the programme temporarily, for example to conduct external learning.

39. If an outcome 6 is awarded the panel recommends that the trainee receive a Certificate of Completion of Training ("CCT"). That recommendation is made to the RCPCH which in turn recommends the award to the GMC, which formally makes the award.

40. The ARCP is generally held annually around December or January, but if there is an adverse outcome an interim ARCP will be held after about six months. Additional ARCPs can be convened in exceptional circumstances.

41. The curriculum undertaken by a trainee changed with effect from 15 September 2019. If a doctor in training had not obtained the CCT by that date, a new curriculum called "Progress" required to be followed. Both the old and new curricula had essentially the same 11 domains. The old curriculum had a greater emphasis on experience gained, and evidence of clinical work. The new curriculum had a greater emphasis on evidence of meeting the domains.

42. Once a CCT is issued the person in receipt is able to apply for entry to the GMC speciality register, and thereafter to act as a Consultant.

43. The claimant's training was originally intended to be concluded by 31 July 2018, with the anticipated CCT date being on or before that date. It was extended as hereinafter referred to.

The relationships between the claimant and each respondent

44. The following is a general summary of the relationships between the claimant and each respondent. The claimant was contracted to the first respondent. She was contractually accountable to them. The claimant was operationally accountable to the second respondent, as she performed the service element of her role, primarily clinical work with patients, in [redacted]. The service element of the claimant's role was managed by employees of the second respondent. The claimant was professionally accountable to the third respondent. It was responsible for the assessment of her training, and whether she met the competencies set by the GMC. That aspect of the claimant's role was managed by employees of the third respondent. Some of those managing the claimant's operational and professional responsibilities were the same person, acting under employment with the second and third respondents respectively.

The claimant's health

45. The claimant had health symptoms including fatigue from around 2015.

46. The claimant consulted her General Practitioner on the issue in 2016. Her symptoms then included "brain fog", being an inability properly to concentrate, and gastro-intestinal problems. The claimant consulted her GP. A number of tests were carried out to seek to identify any cause, without success. Initially the GP did not consider that the claimant suffered from Coeliac disease, although the claimant had suspected that she might do so. In January 2019 the claimant underwent blood tests which indicated that she may well suffer from the disease, as disclosed to her by her GP at a consultation on 12 February 2019, and that was confirmed after a biopsy conducted later in February 2019. The result of that biopsy was intimated to the claimant in April 2019.

47. The nature of Coeliac disease and its effect on the claimant are accurately summarised in a report by Dr J Woodward, Consultant Gastroenterologist, dated April 2022 [no specific date is provided]. It is caused by an immune reaction to gluten. The absorption of certain nutrients is affected, which can lead to iron deficiency. It can lead to

Sjogren's disease. Treatment is by a gluten-free diet. The symptoms that the claimant experienced included the following:

(i) Tiredness and fatigue.
(ii) Breathlessness and occasional palpitations.
(iii) Needing more sleep than someone without any disability.
(iv) Difficulties in sleeping and not feeling rested after sleep.
(v) Headaches, migraines and occasional vomiting.
(vi) Diarrhoea, constipation and abdominal pain.
(vii) Weight loss, changes in appetite, and significant changes in bowel habit.
(viii) Chronic and occasionally severe bowel pain.
(ix) Inability to absorb vitamins such as B and D.
(x) Dizziness, pallor.
(xi) Low mood, depression, anxiety and consequent panic attacks.
(xii) Difficulty focusing, difficulty concentrating, "brain fog" and poor memory.

48. Each of those symptoms was caused by Coeliac disease, or as secondary illness phenomena to the disease.

49. The said symptoms had a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities. The effect was significant from 2017 onwards [no month or other date is given in the report]. Following the diagnosis in April 2019 her predominant symptoms were fatigue, "brain fog", poor concentration, poor quality of sleep, low mood and depression. Treatment included moving to a gluten-free diet, which improved but did not eliminate all the symptoms.

Bereavements

50. In early 2016 the claimant's father was admitted to intensive care in an hospital. The claimant returned to her home country in January 2016 to assist in his support and care. She did so on two other occasions that year until he died in October 2016 [dates of leave are referred to below].

51. In March 2016 the claimant learned from her sister who resided in the USA that she was suffering from cancer. The claimant stayed with her

sister for six weeks around April and May 2016. She took some further time of unpaid leave thereafter totaling about two months. Her sister died in July 2018.

ARCP Outcome History and material periods of leave to August 2019

52. In August 2014 the claimant received an ARCP Outcome 2, noting a need to demonstrate improvement in interpersonal skills with colleagues and team working skills, following feedback from colleagues. The claimant moved to ST5 in August 2014. She received an ARCP Outcome 1 in November 2014.

53. In June 2015 the ARCP report recommendations included that the claimant "…. Will have ongoing feedback from educational supervisor and clinical supervisor. MSF on this occasion more positive with regard to team working. [The claimant] still has difficulty presenting herself in ARCP or interview type setting and needs to work on this".

54. The claimant moved to ST6 in August 2015.

55. The claimant was absent on special leave from 12 January 2016 to 12 February 2016, and then on unauthorised leave from 15 February 2016 to 7 May 2016. An ARCP report dated 9 May 2016 noted that the claimant "seems to find starting with new teams difficult". It referred to her "not seeking feedback appropriately".

56. In August 2016 the ARCP Outcome was 3, which included an additional six months' training such that the CCT date was deferred to 31 January 2019. The form recording the reasons for the same stated

> "Incomplete assessments for level of training. Concerns regarding engagement with clinical learning eg nature of information she includes in her wpba showing lack of reflection on her learning. Ongoing concerns regarding communication with her peers and professionalism. Concerns about how she projects herself in meetings about her training and ARCPs. Concerns regarding lack of leadership and initiative skills required for her training……..Mitigating circumstances. Significant difficult personal circumstances"

57. The claimant was on sick leave on 14 July 2016, and on special leave on 3 August 2016, 21 – 27 September 2016 and 31 October to 3 November 2016.

58. On 24 January 2017 the ARCP Outcome was 2. On 1 February 2017 the claimant commenced as ST7.

59. In the period 1 – 3 February, 6 – 10 April, 5 and 8 May 2017 the claimant was on sick leave.

60. On 31 May 2017 the ARCP Outcome was 5 with additional training possibly required. The report stated that the claimant had "shown enormous progress and has evidenced this very effectively in her ePortfolio. She has demonstrated achievement across a broad range of competencies and reflective practice is much improved." There was outstanding evidence required on which it was stated "the panel appreciate that there are mitigation circumstances." The Panel included Dr Jollands. The outstanding evidence was remedied, and on 13 June 2017 the outcome issued was a 1.

61. The claimant was on special leave on 14 and 15 June 2017 and then on sick leave on 3 – 19 July, on 6 September 2017.

62. In November 2017 the claimant underwent an assessment called START, which was of her readiness to become a Consultant. She did not perform well at it. Areas of improvement were identified.

63. The claimant was absent on 21 to 27 December 2017.

64. On 7 February 2018 the claimant commenced ST8.

65. On 12 and 13 February 2018 she was on sick leave.

66. On 22 March 2018 the claimant met with Dr Fardon the Associate Post Graduate Dean, Dr Webster and Dr Jollands. The purpose of the meeting was to offer the claimant support and provide a plan for the remainder of the hearing. The claimant did not engage with the meeting. After the claimant was informed that her training would likely have to be

extended, the claimant said that she did not want to be in the room. She felt that she was experiencing a panic attack, and left the meeting.

67. On 31 May 2018 the ARCP Outcome was 2, with an additional six months' training. That deferred the expected CCT date to 31 July 2019.

68. On 18 June the claimant commenced special leave, lasting until 6 July 2018. She was then on sick leave from 7 to 15 July and 22 to 24 October 2018.

69. On 19 October 2018 the claimant attended a meeting with Dr Fardon, with Dr Rebecca Goldman of the RCPCH also in attendance. There was a discussion about whether the claimant would be able to obtain the CCT at the end of January 2019, to which the claimant said something to the effect that she did not know.

70. On 10 December 2018 there was an interim ACRP panel, after which the outcome was 3, with additional training time required. The expected CCT date was deferred to 31 July 2019. On 13 December 2018 a meeting was held with the claimant, Dr Jollands, Dr Fardon and Dr Goldman at which the claimant was informed that she needed to evidence progress in the next six months. Following that meeting Dr Fardon and Dr Jollands discussed the claimant's health.

71. The claimant was on sick leave on 28 – 30 January 2019, and 26 and 27 February 2019. She was again on sick leave between 9 April and 9 July 2019.

72. On 10 June 2019 the ARCP outcome was 0, as none was possible as the claimant had been off work from April 2019. The panel agreed that the CCT date would have to be amended. The outcome that followed that was in August 2019 and is addressed below.

73. The claimant had a phased return to work from 10 to 28 July 2019 which did not involve training. Training resumed on 29 July 2019.

74. The claimant was on sick leave on 14 – 16 August 2019.

Reports of health concerns to the respondents

75. The claimant reported her feelings of fatigue to the second respondent on a number of occasions in 2015 and 2016. She felt that particularly after a period on night shift, or working long days, being a day of about twelve and a half hours, and explained that on occasion to Dr Peebles, Dr Jollands and Dr Gunaratne.

76. On 26 May 2016 Dr Lawler TPD referred the claimant to Occupational Health. 0n 14 June 2016 the claimant was seen by Dr Lewthwaite, Consultant Occupational Health Physician, who reported the following day. At the consultation the claimant said of her heath “Fine; OK”. The consultation note included “possible low mood but not acknowledged.” With regard to issues over communication skills he stated that he was not sure if there was a medical explanation. A letter issued to a staff counsellor at OH noted concerns over her interactions with peers, and related matters. The report was sent to the claimant on 28 June 2016 with a message to state that it would be sent to the second respondent after two working days if the claimant did not reply to object to that.

77. On 9 December 2016 the claimant was referred to OH after she reported difficulties with sleep and night shifts, with a note of a period of compassionate leave after the death of her father.

78. On 9 January 2017 the claimant met Dr Lewthwaite again, who noted her tiredness after night shifts. On 10 January 20017 Dr Lewthwaite sent a report to Dr Naismith, Clinical Lead, which stated “it is very unclear what her health needs might be, as she denies any on-going concerns” but did advise that night shifts should perhaps be infrequent and avoid consecutive nights for now.

79. On 11 December 2017 the claimant self-referred to Occupational Health at the respondent. A note of consultation that day with Fiona Gordon, Occupational Health Nurse, records the claimant’s difficulty with night shift such that she could tolerate only a few per month, and that the fatigue and other symptoms were affecting her general health and mood. The claimant was reported to have felt that symptoms had escalated in

November 2017 with hair loss, dry skin, palpitations and feeling sweaty and tired with minimal exertion.

80. On 22 December 2017 the second respondent's occupational health department sent Dr Peebles a report from Fiona Gordon, Occupational Health Nurse, in relation to the claimant dated 12 December 2017. It stated, after referring to the claimant having self-referred and consenting to a report being sent, that "over a number of years C has experienced a poor and broken sleep patters on a very regular basis. In particular C can experience a situation following night-shift that she is unable to sleep during her rest time or for a number of days thereafter. At C's consultation today we discussed her current health and wellbeing. C is currently attending her GP due to increased levels of fatigue with some associated health considerations. In order to support C at this time and going forward I would recommend that were possible C works the minimum required for night-shift rotations, working her night-shifts over a one-week period per four-week block. This in my opinion will be of significant benefit to C in assisting her to manager her on-going levels of fatigue and broken sleep pattern….."

81. In December 2017 and January 2018 the claimant did not work night shifts. From February 2018 to mid January 2019 the claimant worked one set of night shifts per calendar month.

82. A Professional Support Team meeting was held in relation to the claimant on 26 February 2018, which the claimant did not attend. It sought to consider concerns over the progress that the claimant was making at that time.

83. Dr Peebles raised her concern over the claimant's health with her informally from time to time, but the claimant did not provide her with further information on the cause of the same, or the symptoms she was experiencing.

84. On 16 January 2019 Fiona Gordon issued a report to the claimant after a self-referral. It referred to the fatigue and other difficulties the claimant experienced after working night shifts and recommended that, where possible, she "work the minimum requirement of night shifts in order to

successfully complete your training post". The claimant did not disclose it to the respondents. The note of consultation refers to "newly diagnosed with Coeliacs disease".

85. The claimant ceased to work any night shifts with effect from mid-January 2019.

86. On 14 February 2019 the claimant emailed Dr Claire Webster her Educational Supervisor, an employee of the second respondent employed in the role of Educational Supervisor by the third respondent, asking if she was around as "I need to discuss something if you are around". She met Dr Webster on or around that day. She took with her a print out of a report from her GP she had obtained with regard to the anticipated diagnosis of Coeliac disease as she anticipated that someone from Human Resources would be at the meeting. In fact, no one from HR attended. The claimant did not hand Dr Webster the copy of the report. She mentioned that the blood test result indicated she had Coeliac disease and that there was to be a biopsy to confirm it.

87. Dr Webster wrote by email to the claimant on Monday 18 February 2019 referring to their "meeting last week", that for health reasons the claimant was unable to do night work, and commenting with regard to options the claimant had. The first was to continue and review after one month prior to the next set of night shifts. The second was to see her GP with a view to taking sick leave. The third was a reference to Occupational Health, with a view to adjusting night shifts. The email referred also to arranging a meeting with HR.

88. A further Professional Support Team meeting was held in relation to the claimant on 1 March 2019.

89. On 8 March 2019 Dr Jollands referred the claimant to occupational health, with a form of that date raising issues as to the effects of fatigue and any adjustments to training required, whether the claimant had a socio-communication or mental health difficulty and if so whether there are any ways she could be supported. She did so primarily because of her concerns over the claimant's communication problems.

90. The claimant saw Fiona Gordon as a self-referral (unconnected to the referral from Dr Jollands). Her notes of consultation referred to symptoms including fatigue, breathlessness, loss of 4 kg of weight in two to three months, and [low] mood. Ms Gordon issued a report to the claimant on 19 March 2019. The report referred to "long standing issues with regards to working the night shift rotation. These symptoms that you appear to experience include fatigue, exhaustion and in recent months exacerbation of gastro-intestinal issues [which] have been identified by your GP". It referred to what it described as the diagnosis by her GP of Coeliac disease on 18 February 2019, that included that "I would continue to advise that where possible, you avoid working the night duty rotation as this does appear to exacerbate your underlying symptoms." That report was not passed to the respondent.

91. On 19 - 23 March 2019 the claimant had supervision meetings with Dr Webster. A note of the same dated 25 March 2019 is reasonably accurate. Under Health it stated "there are on-going health issues which are currently affecting C's performance." No further detail was given. The claimant asked to bring forward the date for an assessment of whether she had passed the training, known as a CCT. It records Dr Webster's view that "the current barrier to achieving CCT is C's attitude towards and understanding of the complexities of interprofessional working and communicating with colleagues. I would recommend that C does not apply for early CCT." The CCT date was not brought forward.

92. On 29 March 2019 the second respondent received a fit note from the claimant's GP from an assessment on 19 March 2019 stating that she had "fatigue", and "may be fit for work taking account of the following advice – awaiting further NW appointments. Unable to do night shifts or late shifts until clinically better."

93. On 29 March 2019 Dr Jollands wrote to the claimant, and referred to the OH referral she had made, with the questions she had asked. It encouraged her to attend so that adjustments could be made.

94. On 2 April 2019 the claimant saw Ms Dawn Gellatly, Occupational Health Manager, following the referral from Dr Jollands. Ms Gellatly was not an

occupational health physician. The consultation notes include that the claimant had no energy in January [2019], had been unable to get out of bed, hair loss, itchy rashes, diarrhoea, weight loss, and was breathless.

95. The claimant commenced a period of absence on 9 April 2019, which was to continue to on or around 9 July 2019.

96. Ms Gellatly prepared a draft report and sent that to the claimant. Initially the claimant did not authorise its release and Ms Gellatly wrote to Dr Jollands to state that on 11 April 2019. The claimant thereafter amended the first report including to replace “gastro-intestinal problem” with “a medical condition”. The amended report stated that the symptoms had been present for two years or longer, and referred to fatigue. It stated that there was no evidence to suggest a mental health issue. The report referred to the symptoms of the condition being worse at night and there being continuing fatigue. The claimant did not wish to reduce her hours as her training was nearing its end. It suggested a restriction on night work be considered for 2-3 months, and that the effectiveness and continued appropriateness of the same be reviewed with her.

97. The amended OH report was approved by the claimant for issue to Dr Jollands, which was done by email on 18 April 2019.

98. The claimant answered an email from Dr Webster as to keeping in touch when absent on 30 April 2019 to state that she was a bit tired, her skin was itchy and she had developed some blisters, that she was anxious about what she had, and had a fear of developing another condition like diabetes or cancer. Dr Webster replied with comments including that she was happy to talk to her.

99. Fit notes issued to the claimant by her GP absence were seen initially by Dr Peebles, who passed them to Karen Archibald, Administrator of the second respondent, who sent them to HR. They included a fit note dated 15 March 2019, received by Dr Peebles on 18 June 2019, which referred to “new onset Coeliacs”. Other GP fit notes for the period of absence from April 2019 to July 2019 referred to “fatigue”.

100. Shortly after seeing the fit note on or around 18 June 2019 Dr Peebles met Dr Jollands, and said something to the effect that the claimant had received a significant diagnosis but that she could not share it with Dr Jollands as she did not have the claimant's consent.

101. The claimant returned to work on or around 9 July 2019.

102. At a return to work meeting held on 10 July 2019 the claimant discussed matters with Dr Peebles. The claimant was accompanied by two BMA representatives. The meeting discussed a phased return to work for the claimant, and agreement on the same was reached, with a timetable for doing so provisionally agreed. The claimant mentioned her CCT date which she wished to be before the new curriculum was introduced, which Dr Peebles encouraged her to discuss with Dr Jollands.

103. The claimant emailed Dr Jollands with regard to the new curriculum on 11 July 2019. Dr Jollands emailed the claimant on 15 July 2019 in advance of having a meeting and suggested issues to discuss. The meeting took place on 17 July 2019 and included the claimant, Dr Jollands, Dr Webster and a note-taker. Dr Webster offered the claimant a referral to OH. The claimant declined that. Dr Jollands was aware around this time that the claimant had a significant health condition, having been told that by Dr Peebles, but not the detail of it as the latter kept that confidential.

ARCP August 2019

104. An ARCP Panel was convened in light of the request for that by the claimant. On 12 August 2019 Dr Jollands prepared a report for use by the ARCP panel conducting the review later that month. She had been asked to do so, and understood that it would be used after the decision on what the outcome should be had been taken. She indicated that an outcome 3 was likely and recommended that the claimant be given an additional 12 months' extension, and that she be moved to another unit to see if a fresh start, and fresh eyes and support could enable her to achieve CCT.

105. On 30 August 2019 the ARCP Panel met. It was chaired by Dr Fardon and included external representatives in light of the context of it. A report from Dr Webster was a part of the documentation before it, which referred to her health in very general terms. Dr Webster commented on the claimant's performance both positively and negatively. It concluded that the claimant was not progressing at the level required and had not demonstrated that she had achieved the skills necessary for a Consultant. The outcome was a 3, noting inadequate progress by the claimant with additional training required. The expected CCT date was deferred to 30 April 2020. Dr Fardon had discussed that with the Post Graduate Dean Professor Clare McKenzie who agreed to a six months' extension of training on the basis of a review in five months, with a further extension then granted if the progress was sufficient, but the training terminated if not.

106. On 12 September 2019 the claimant met Dr Jollands, Dr Tom Fardon, a consultant physician in respiratory medicine employed by the second respondent who also acted as the Associate Post-Graduate Dean for Paediatrics, Obstetrics and Gynecology with the third respondent, and Dr Dagmar Kastner, Regional Adviser, with a note-taker to discuss the outcome 3 that had been issued. The reasons for the outcome were reviewed and discussed. Dr Fardon stated that the Dean was very clear that an outcome 3 had been awarded and that an initial extension was to be awarded for a period of only six months from October 2019. A further panel was to be held at five months into the six month period, March 2020, at which point either a final six months extension to training or an outcome 4 would be awarded. He stressed the importance of the degree of work required within the initial period of extension.

107. Dr Jollands emailed the claimant on 13 September 2019 to confirm their discussion, the next steps, and that the claimant had asked for help on reflections. Examples were given. Help was offered from Dr Kastner, Dr Webster and Dr Jollands herself.

108. The new curriculum became effective on 15 September 2019. The original information provided in the ePortfolio was automatically transferred to that for the new curriculum. The claimant, as the trainee,

was able to make further changes to move detail from one domain to another for example.

109. On 30 September 2019 the claimant met Dr Jollands and discussed her ARCP results, the outcome of which she summarised in an email that day. The claimant had expressed dissatisfaction with the training that she had received, and asked if she could be transferred to another Deanery, whether the Educational Supervisor could be other than Dr Conway, and whether she could do other than go to the Neonatal unit. Dr Jollands could not grant such a transfer, and did not agree to the other changes proposed.

110. On 30 September 2019 Dr Peebles wrote to the claimant asking her to attend a short term sickness absence formal review meeting on 16 October 2019. The claimant emailed on 14 October 2019 stating that she could not get anyone to come at what she described as short notice, as it had been posted not emailed. Dr Peebles replied to confirm it would be re-arranged.

Meetings with Dr Fardon

111. On 15 October 2019 Dr Jollands sent an email to Dr Fardon with an email she had received from the claimant dated 8 October 2019. The claimant's email stated that her training "went completely wrong", claimed that there was a lack of support, that the Educational Supervisor should be someone at TPD level or had supervised trainees at ST8 level or who had had difficulties, that Dr Jollands had not supported her, and that if she had been in another deanery she would have finished her training by then. It concluded "I do not want you to reply back on this email." Dr Jollands did not reply to it.

112. Dr Jollands commented on the position which included "I think she has a significant mental health problem and have referred her to occupational health but she has not wished the outcome to be shared. I do not know if she has agreed to have a further evaluation by psychiatry or similar. I suspect not. I had wondered about a significant socio-communication disorder but now think this may be even more complicated. I am no a psychiatrist so will not make any further comments. I am however

concerned that there may be an emergent issue around fitness to practice."

113. Dr Fardon was concerned by the email from the clamant, which he regarded as disrespectful to those training her, and showed a lack of insight. Dr Fardon discussed the issue with the Dean, Professor McKenzie, who advised him to give the claimant a warning as she had, she thought, breached the educational agreement that the claimant had entered into with the third respondent (the terms of which were not before the Tribunal).

114. A meeting with the claimant was arranged, and intimated to her by email dated 24 October 2019. It did not provide the claimant with fair notice of the purpose of the meeting, the primary purpose of which was to issue her with a warning in relation to the email she had sent.

115. On 25 October 2019 the claimant attended the meeting with Dr Fardon. The formal warning was given to the claimant by Dr Fardon as to her engagement in training. He referred to her health issues, and stated that he would like her to return to out of hours work, but that if she could not and that was supported by an OH assessment which he recommended she share, then adjustments could be made to her training. He referred to her not attending a return to work meeting, although that had been postponed. He stated that the email to Dr Jollands was unacceptable. Dr Fardon intimated concerns over the lack of progress that it was felt that the claimant was making. The claimant did not agree as to lack of engagement. Dr Fardon referred to the views of experienced trainers, which did not agree with those of the claimant. The claimant recorded that meeting without informing those present that she was doing so.

116. On 28 October 2019 the claimant emailed Dr Jollands asking for a meeting with her and the new Educational Supervisor Dr Conway together. Dr Jollands replied to state that she could not attend on the suggested date, and to recommend that the claimant meet Dr Conway alone.

117. On 19 November 2019 Dr Fardon wrote to the claimant confirming the terms of the warning issued and that there would be a further meeting fixed. A note of the meeting held on 25 October 2019 was attached.

118. A further meeting took place between Dr Fardon and the claimant on 5 December 2019. Diane Morrison Team Lead and a note taker were also present. The claimant was asked how her health was and said "OK". Dr Fardon noted that she was not doing a full time rota or on call shifts and asked when she envisaged that happening. She said perhaps next month. He said that if she felt unable to do so he would be keen to make adjustments but that she would require to release the OH report to facilitate it. Some improvement in engagement and other matters was noted, but more was sought. The claimant recorded that meeting without informing those present that she was doing so.

Further reports on health

119. In about November 2019 the claimant obtained a report from her GP, the letter for which is undated, referring to her medical condition of Coeliac disease and symptoms, which she took with her to the meeting with Dr Peebles.

120. That meeting took place on 3 December 2019, attended by the claimant, Dr Peebles and Ms Michelle Grier of HR of the second respondent. The claimant was asked about her current diagnosis and said Coeliac disease, which Ms Grier expressed surprise at. The claimant said that her main symptoms were fatigue and tiredness. Dr Peebles said that she had made a referred to OH the day before.

121. On 22 January 2020 the claimant attended a consultation with Julie Hamilton, Occupational Health Nurse, following a management referral. A report letter was issued to Dr Peebles on 22 January 2020 which recommended, if it could be accommodated, a limit of long (12.5 hour) shifts to a maximum of three per month and ensure that there is at least a five day break before rostered on another long shift, and a day off after weekend on-calls before resuming the normal working week, with a review after a month. It did not refer to her diagnosis in terms.

122. From February 2020 the claimant did not work any long days or shifts.

123. A short term sickness absence review meeting was held between the claimant, Dr Peebles, Ms Grier and Mr Anderson the claimant's BMA representative on 18 March 2020. It was agreed that the claimant work Monday to Friday 9am to 5pm for two months which would be reviewed.

124. There was to have been an ARCP meeting in relation to the claimant in March 2020 but as some of the panel could not meet then it was brought forward to 26 February 2020. The claimant was informed of the date of it on 20 January 2020 by email.

ARCP 26 February 2020

125. On 26 February 2020 an ARCP meeting was held with regard to the claimant. It included a report from the claimant's Educational Supervisor, at that stage Dr N Conway and Multi-Source Feedback (MSF) from a number of peers. The report from the Educational Supervisor included the following comments as to health

> "Do you have any concerns relating to this Trainee's health? – Yes
> If yes, please explain why –
> [The claimant] has referred to her health on a number of occasions within her portfolio. She has been unwell in the past for protracted periods and is not currently working night shifts for health reasons. I have not been informed of the reasons for [her] ill health and she has not raised it during our supervision meetings. It should be noted that whilst at work, there are no concerns regarding [her] ability to do her job, however ill health would appear to be impinging on her ability to meet her contractual obligations. I have also been informed that [the claimant] has not completed the mandatory 'attendance at work' process following a recent absence."

126. It further included commentary from the claimant, and a portfolio of the work she had been carrying out.

127. The ARCP was carried out by a panel consisting of Dr Fardon, Associate Post Graduate Dean (East), Dr Chris Lilley, Associate Post Graduate Dean (West), Dr Vicky Alexander, Consultant Paediatrics, Mrs Joan Knight, Lay representative, and Dr Amol Chingale, External Advisor, with Miss Larissa Spindler (administration of the third respondent) attending to take notes.

128. The outcome for that ARCP was a recommendation to the Post Graduate Dean of an outcome 4, being that the claimant leave the training. It was explained to her initially at the meeting that day that significant concerns continued to be highlighted in the areas of

- "ability to work independently at senior (consultant) level, particularly the ability to manage challenging situations and conflict
- Team working
- Reflective practice
- Insight into the challenges faced
- Professionalism, evidenced by reflection entries
- Probity, evidenced by request to redact MSF entries"

129. The panel did not feel that further additional training of six months would be enough to rectify these concerns. It had noted that the report from Dr Conway had raised areas of significant concern regarding the claimant's ability to work at consultant level particularly reflective practice and professionalism. It also noted that on receipt of the MSF feedback the claimant had asked Dr Conway to redact the comments with which she did not agree. The panel considered this a significant and very concerning lack of insight into her training, and issues around lack of progress, lack of professionalism, with an inability to respect the skills and judgments of colleagues and her Educational Supervisor. Two reflections dated 24 February 2020 were considered to show worrying attitudes towards colleagues, and a lack of ability to reflect on her own practice.

130. The claimant's health was discussed, and it was noted that an OH report had been released in redacted form. That was not correct, as it had been

amended not redacted. It referred to a right not to disclose the reasons for sickness absence but did not refer to the fit note disclosing the diagnosis, or the discussions on that held with the claimant.

131. The unanimous conclusion of the Panel was that the outcome was a 4 and therefore the termination of training. Dr Fardon chaired the meeting but did not vote. That decision was then intimated orally to the claimant.

132. The claimant was very shocked by the outcome. She had said very little during the meeting. She had acknowledged in answer to a question that she was made aware of the outstanding competencies and areas of concern from the last ARCP face to face meeting in September 2019.

133. The Post Graduate Dean approved the decision after discussion with Dr Fardon, and the claimant received formal written notification of the decision on 4 March 2020

Appeal of Outcome 4

134. The claimant appealed that outcome by letter dated 19 March 2020. It was sent to the third respondent by email. It had attached to it, and sent in a series of emails that day, a total of 61 appendices, identified as A1 – A61. The letter of appeal contained information as to the claimant's health, amongst other details.

135. On 24 March 2020 the claimant required to return to her home country after the Covid-19 pandemic was declared, at the requirement of the government there. The claimant sent an email to Michele Grier and Dr Peebles to explain that on 24 March 2020. She remained in her home country until late October 2020 because of that requirement.

136. On 24 March 2020 the claimant was signed off as sick by her General Practitioner for a period of 56 days, and on 19 May 2020 for a further period of 84 days, because of fatigue.

137. The first stage of her appeal was a review by the original panel, which took place by email on 12 April 2020. On the instruction of the Dean Professor Denison, Dr Fardon had not provided to the Panel the claimant's appeal letter, such that they were not aware of the additional

information as to the claimant's health. Not providing that additional information and considering it as part of the review was contrary to the guidance in the Gold Guide. The review concluded unanimously that the decision should not be changed, and the claimant was informed of that on 14 April 2020. The claimant sought a full appeal determined by an external panel.

138. On 14 April 2020 Karen Shearer of the third respondent emailed the claimant to state that the review had taken place and had recommended that the outcome 4 be upheld. It stated that she had the right to request an appeal hearing.

139. On 28 April 2020 the claimant sent Karen Shearer a further series of emails, which included a series of documents again identified as A1 – A61. She confirmed in one email that she sought an appeal hearing and in another provided a different document with grounds of appeal, and stated that the reference to A40 was to the same document as A43, so she had taken out the latter. She separately attached documents she identified as A47 and A60 to one email which she said were not in the previous emails.

140. Ms Shearer acknowledged the documents by email on 29 April 2020. Documents were prepared for the appeal panel to consider. That included documents provided by the second and third respondents, which were set out in 46 appendices. The date or dates on which they were sent to the panel was not given in evidence. They were sent by a series of emails.

141. On 3 June 2020 Karen Shearer sent the appeal panel three emails with a "trainee request for an appeal" and other documents sent to her by the claimant. It included documents identified as A10 – A40. It did not include documents A2 – A9, or documents A41 – A61. (It is likely that document A1 was the request for appeal, and was not the letter of appeal provided as another version of it was provided by the claimant which was within her appendices. It is likely that that latter version of the request for appeal letter was included in the email of 3 June 2018.) These three emails were copied to the claimant.

142. On 17 June 2020 the claimant sent additional documentation for the appeal by email, including five GP letters. The emails were sent to Karen Shearer. One of the GP letters detailed 30 consultations with the practice from 19 May 2016 to 27 November 2019, and another commented with regard to Coeliac disease and related symptoms suffered by the claimant. Ms Shearer passed all the additional documentation to the appeal panel on the following day. The documents provided were listed in the email. A document was created on behalf of the third respondent for the appeal listing the documents as received from the claimant, identified as A10 – A40 and a description of each document, and a list of the additional documents sent by email on 18 June 2020. There was no reference to A1-9 or A41 – A61.

143. The documents passed to the panel were set out in an index prepared for that purpose, which referred to A10 – A40, and a list of additional information.

144. The documents not passed to the panel but sent by the claimant to Ms Shearer included four letters sent in support of the claimant, from Dr Kastner-Cole, the claimant's Clinical Supervisor, Dr Husselbee another of the claimant's Clinical Supervisors, Dr Peebles, and Dr Clerihew, Consultant Paediatrician which gave details of the claimant's work, provided examples of it, and made reference to the effect on her of her health conditions.

145. The appeal of the claimant's Outcome 4 was heard on 25 June 2020. It was heard remotely. There was a reduced panel in light of the Covid-19 pandemic under arrangements which had been made by the third respondent. It was heard by Professor Ronald MacVicar as Chair, Dr Ailsa McLellan and Mr Tristan MacMillan. They considered that there was a lack of competency progress, and a competency deficit, in relation to the role as Consultant, against which they weighed the claimant's health, which included consideration of her status as a disabled person, and their opinion of the realistic prospect of the claimant achieving CCT in the time required (if further time was to be extended, being of six months). They concluded that the balance favoured refusing the appeal as they were not satisfied that there was a realistic possibility of the

claimant achieving the CCT on such a basis. It was an unanimous decision. That decision was communicated to the claimant on the day of the hearing orally, and later in writing.

146. In the event that the panel had seen the full documentation provided for the appeal including the said letters of support relied on by the claimant they would have weighed that evidence in the balance along with all other material before them.

Actions of first respondent

147. On 29 June 2020 the first respondent wrote to the claimant about a letter of 25 June 2020 sent to the claimant in which the third respondent had removed the claimant's National Training Number with effect from that date. The first respondent's letter set out three options (i) to attend a meeting to discuss her position (ii) the meeting proceed in her absence with the claimant providing written information or (iii) for the claimant to waive the right to attend and accept that the employment had come to a natural and fair end. It also sent the claimant a copy of the first respondent's Non-Disciplinary Dismissal Procedure. The claimant indicated that she would wish to attend a meeting remotely, which was agreed to.

148. On 20 July 2020 the first respondent wrote to the claimant inviting her to a meeting held remotely on 5 August 2020 to determine the outcome of her Doctor in Training status, and included a management case which had been prepared by Dr Peebles. The claimant submitted a written response.

149. The meeting took place remotely on 5 August 2020. It was chaired by Dr Richard Coleman, assisted by Ms Jane Lloyd of HR and Dr Daniel Bennett, Associate Postgraduate Dean. The claimant attended with her BMA representative Mr Anderson.

150. By letter dated 7 August 2020 the claimant was informed that her employment would be terminated unless a suitable alternative post could be identified in a notice period of three months. It set out the reasons for that decision, and the issues addressed at that meeting. The panel

considered that the claimant could not continue to occupy the role of doctor in training for the post of Consultant because of the removal of her national training number, and that her employment would require to terminate unless another role could be identified by way of redeployment.

151. No redeployment post was identified during the three months of notice. The claimant was placed on the Redeployment Register with effect from 7 August 2020, and the first respondent assessed any suitable vacancies for her on a weekly basis. One vacancy was identified which the claimant initially applied for, but she withdrew that application later. On 6 October 2020 Mrs Lloyd wrote to the claimant advising that the first respondent was having difficulty in finding a post for her and asking her if she wished to consider a wider range of vacancies.

152. In late October 2020 the claimant returned to the United Kingdom, and initially spent two weeks in isolation.

153. The claimant's employment terminated on 26 November 2020 after the end of the notice period with no redeployment post having been identified, and taking account of accrued leave, which was confirmed by letter dated 1 December 2020.

154. The claimant had a right to appeal the decision to dismiss her but did not do so.

155. The claimant intimated a grievance in relation to the redeployment process on 2 December 2020. One was in relation to a post at the first respondent, the closing date for which had been on 19 July 2020 and therefore before the claimant was placed on the Redeployment Register. The second was for a post at the second respondent, which the first respondent was not responsible for accordingly. The grievance was investigated by Ms Lynda Drysdale of the first respondent, who rejected it on 29 January 2021.

Jurisdiction

156. The claimant consulted the British Medical Association ("BMA") in March 2019. They advised her generally, and attended the appeal hearing, amongst other meetings.

157. In about July 2020 the BMA sought advice from their solicitors with regard to any claims that the claimant may have at the Employment Tribunal [the detail of the advice given is confidential in the sense of being privileged, and was not given in evidence]. The BMA assisted the claimant in the period to about November 2020.

158. The claimant had no prior experience of employment law issues. The claimant sought legal advice from about 10 solicitors in the period from about November 2020 until early February 2021. Initially she was not successful in doing so. She conducted research online, and accessed details of ACAS.

159. The claimant commenced early conciliation with "North of Scotland Deanery" on 16 December 2020, and the certificate was issued on 8 January 2021. She did so herself.

160. The present claim was presented on 3 February 2021. It was directed to "North of Scotland Deanery NHS Grampian placement in Tayside". She drafted the Claim Form herself.

161. About 5 February 2021 the claimant instructed her present solicitors, who agreed to act for her. Thereafter two sets of Further and Better Particulars were presented. The identity of the respondents was amended to Grampian Health Board, Tayside Health Board, and NHS Education for Scotland, the three respondents, following an application to do so on 31 March 2021.

Claimant's submission

162. The following is a basic summary of the written and oral submissions made. A challenge facing the claimant was the division of responsibilities amongst three entities. The claimant should not be disadvantaged by that. The respondents were inter-linked. The second respondent was an agent of the first respondent. The personnel of the second respondent also acted as personnel of the third respondent, such that what the

second respondent knew was also known by the third respondent. There were two fundamental questions, the first being the extent of the effect of the claimant's disability on her, which included non-physical symptoms primarily brain fog and depression. The second related to what the claimant was, being a disabled person, and what the respondents thought that she was. It was accepted that the claimant was not a contract worker, no argument was made in relation to night working, nor were sub-paragraphs 17(ii) (iii) and (viii) of the Second Further and Better Particulars. The first and second proposed PCPs were not pursued, being paragraphs 19(i) and (ii). No argument as to redeployment was made.

163. The argument that there was no jurisdiction over the third respondent as there was a right of appeal was not correct, as that required to be "by virtue of" an enactment. That was not the case here. The argument that the claim was excluded because it related to a competence standard was not correct, as the ARCP process was not that, but an assessment of sufficiency of progress towards the CCT, which was the competence standard.

164. It was accepted that the respondents did not have actual knowledge of the claimant's disability, but they had constructive knowledge. There were facts as to the claimant's circumstances which should have triggered the right questions being asked, and if they had been the answers would have led the questioner to the knowledge of the claimant being a disabled person. The right question had never been asked. The claimant's disability had had an effect on her performance, that was "something" arising out of her disability, and it had affected the performance to a more than minor or trivial extent. It had a significant influence on the decisions, and met the statutory test. It had not been objectively justified.

165. The respondents had applied the PCPs relied upon, they had caused disabled persons, and the claimant, substantial disadvantage, and it was a reasonable adjustment to give the claimant more time. That was clarified to be an additional six months, and if the claimant had made good but not complete progress by the end of it, some further short

period of time to achieve CCT. It was also reasonable to give her a day off work after a shift to work on the matters required for her training, and to recognise, and take account of, the physical and mental effects of her disability on her.

166. The claim for unfair dismissal should take into account the deficiencies in the appeal process, and take account of the principles established in the cases of ***Jhuti*** and ***Uddin.***

167. The remedy that should be granted was set out in the Schedule of Loss, and included a recommendation.

168. An application was made for an order under Rule 50 so that the identity of the claimant was not revealed. The consequence for the claimant, and others such as her past, present or future patients, could be severe.

Respondents' submission

169. The following is again a basic summary of the written and oral submissions made. The respondents did not accept that they should all be treated as if one. It had been accepted that the second respondent was the agent of the first respondent for the purposes of section 109(2) of the Equality Act 2010 only. The actions of each individual required to be seen in the context of whether it was for the second or third respondent, and knowledge should be assessed similarly. It was accepted that when acting for the third respondent those concerned did so as its employees, such that they were employed separately by both the second and third respondent, carrying out different functions.

170. Dr Woodward's report was a joint one, but where the claimant's evidence went beyond it, it was not accepted. Her evidence was not credible.

171. Separately the claims against the third respondent could not be pursued. There was a right of appeal provided by the Gold Guide, which emanated from the provisions of the Medical Act 1983, and that negated jurisdiction under section 120(7) of the Equality Act 2010. Separately, the effects of sections 53 and 54 were that claims could only be made if an indirect discrimination claim under section 19, which this was not, and were excluded for competence standards, which the ARCP process was.

The CCT was awarded by the GMC after the ARCP process was successfully concluded, and all of that process was a competence standard, including issues such as achieving milestones within a particular time period.

172. None of the respondents had actual knowledge of the claimant's disability. The third respondent had constructive knowledge at the start of the appeal hearing in June 2020, but not before then, and neither of the other respondents had constructive knowledge at all. The claimant was a private and guarded person, as she was entitled to be. She did not disclose sufficient details either that she was disabled, or to trigger enquiry on that, but if she had she would not have provided sufficient answers to disclose her status as a disabled person. There was therefore no basis for the discrimination claims.

173. If the Tribunal held to the contrary, there was no credible evidence that "something" had arisen out of her disability. The issues as to her performance arose from other matters. The meeting with Dr Fardon did not take place as the claimant alleged, and did not arise from her disability. The ARCP outcome 4 was a competence standard, but if not was not an outcome because of something arising out of her disability. The same point applied to the other matters relied on by the claimant. There had in any event not been any unfavourable treatment. Even if the terms of the section had been met, there had been objective justification for what happened. Mr MacVicar had explained that the claimant was a long way off achieving what was required. Any additional time would not have made the difference. What was sought was open-ended. It was not proportionate to do so.

174. It was not accepted that the PCPs relied on for the section 20 claim were so. They were in any event competence standards, and thus fell to be excluded from what could be a PCP. There had been no evidence that any PCP had put the claimant at a substantial disadvantage. Even if it was, it would not be reasonable to make the adjustments contended for, as they would not make a substantial difference. That was the view of Mr MacVicar, and was supported by what the claimant said at the appeal.

175. The claimant's arguments on unfair dismissal were not correct. The facts of the present case are not equivalent to those in the authorities relied on. Here the claimant could not be employed after the loss of her training number, that was some other substantial reason for dismissal, and was fair.

176. The respondent argued that the discrimination claims were not before the Tribunal as they were time-barred, but that depended on the precise factual findings. The remedy sought by the claimant was challenged, as being not supported by the evidence, and speculative. The recommendation sought should not be given.

Law

(i) Disability Discrimination

(i) Statute

177. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

178. Section 15 of the Act provides as follows:

> "**15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

179. Section 20 of the Act provides as follows:

> **"20 Duty to make adjustments**

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

(2) The duty comprises the following three requirements.

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

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table the Schedule specified in the second column

Part of this Act	Applicable Schedule
……Part 5 (work)	Schedule 8”

[Part 5 includes sections 39, 53 and 54]

180. Section 21 of the Act provides:

“21 Failure to comply with duty

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

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person….”

181. Section 39 of the Act provides:

“**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……

(7) In sub-sections (2)(c) and (4)(c) the reference to dismissing B includes a reference to the termination of B's employment-

……

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

182. Section 53 of the Act provides

"53 Qualifications bodies

(1) A qualifications body (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment…….

(7) The application by a qualifications body of a competence standard to a disabled person is not disability discrimination unless it is discrimination by virtue of section 19".

183. Section 54 of the Act provides

"54. Interpretation

(1) This section applies for the purposes of section 53.

(2) A qualifications body is an authority or body which can confer a relevant qualification.

(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession…….

(6) A competence standard is an academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability".

184. Section 109 of the Act provides

"109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport))."

185. Section 110 of the Act provides

"110. Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be)."

186. Section 111 of the Act provides

“111 Instructing, causing or inducing contraventions

(1)A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2)A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3)A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4)For the purposes of subsection (3), inducement may be direct or indirect.

(5)Proceedings for a contravention of this section may be brought—

(a)by B, if B is subjected to a detriment as a result of A's conduct;

(b)by C, if C is subjected to a detriment as a result of A's conduct;

(c)by the Commission.

(6)For the purposes of subsection (5), it does not matter whether—

(a)the basic contravention occurs;

(b)any other proceedings are, or may be, brought in relation to A's conduct.

(7)This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8)A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9)For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—

(a)in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b)in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.

187. Section 120 of the Act provides

" **120 Jurisdiction**

An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to

(a) a contravention of Part 5 (work);….

(7) Subsection (1)(*a*) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal."

188. Section 123 of the Act provides

"**123 Time limits**

(1) Subject to [sections 140A and section 140B] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) 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."

189. Section 136 of the Act provides:

> "**136 Burden of proof**
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

190. Section 212 of the Act states:

> "**212 General Interpretation**
> In this Act - …….
> 'enactment' means an enactment contained in –
> (a) An Act of Parliament
> (b) An Act of the Scottish Parliament
> (c) An Act or Measure of the National Assembly for Wales or
> (d) Subordinate legislation…….
> 'substantial' means more than minor or trivial".

191. Schedule 8 to the Act, which has provisions as to making reasonable adjustments, states at paragraph 15, which itself applies where the entity having a duty to make reasonable adjustments is a qualifications body and the relevant matter is deciding upon to whom to confer a relevant qualification or conferment of a relevant qualitication:

> "(2) A provision, criterion or practice does not include the application of a competence standard."

192. In that same Schedule, paragraph 20, states:

> "**Part 3**
> **Limitations on the Duty**
> **Lack of knowledge of disability, etc**
> **20**
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

193. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

194. The Directives referred to are retained law under the European Union Withdrawal Act 2018.

195. The Medical Act 1983 provides that the General Medical Council, amongst other matters, requires to establish standards for, and requirements of, postgraduate medical training and education, and the award of a Certificate of Completion of Training (in particular at sections 34C to 34L).

(ii) Case law

(i) Constructive knowledge

196. The third respondent accepted that it had constructive knowledge of the claimant's disability at the stage of the appeal against the Outcome 4. There was a dispute for the period prior to that, and in relation to the position of the first and second respondents. The claimant confirmed in submission that the argument was solely made as to constructive, not actual, knowledge.

197. The issue of what has become known as constructive knowledge, which the respondent ought reasonably to have had, is one on which the onus

falls on the respondent. In ***Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283*** the EAT held that the correct statutory construction of s 4A(3)(b) [the predecessor provision in materially the same terms as the 2010 Act] involved asking two questions;

> (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then there is a second question, namely,
> (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

198. In ***IPC Media Ltd v Millar [2013] IRLR 707*** it was held that it is necessary to determine who the alleged discriminator was (ie whose mind is in issue and who, in an appropriate case, becomes 'A' in sub-s (2)). It was subsequently held by the EAT that the knowledge of one element of the organisation (eg HR or Occupational Health) is not automatically to be imputed to the manager actually taking action against the employee; if that manager lacks the requisite knowledge, sub-s (2) may operate: ***Gallop v Newport City Council [2016] IRLR 395***. Separate acts can amount to discrimination - ***Reynolds v CLFIS (UK) Ltd [2015] IRLR 562*****.**

199. The provision asking whether an employer could be 'reasonably expected to know' means that an employer may be under a duty to make enquiries to establish whether a person is suffering from a qualifying disability. The Code of Practice at para 6.19 gives the example of an employee who has depression and cries at times at work and says that it is likely to be reasonable for the employer to discuss with the worker whether their crying is connected to a disability and whether a reasonable adjustment could be made to their working arrangements. The Court of Appeal in ***Gallop v Newport City Council [2014] IRLR 211*****,** held that it was essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment, rather than rely on advice from OH. In ***Donelien v Liberata UK Ltd*****,** ***[2018]***

IRLR 535**,** the Court of Appeal clarified that, and emphasised that the case of ***Gallop*** should not be seen as discounting the value of OH reports generally, rather that an unquestioning reliance on an unreasoned report will not be sufficient.

200. If information is provided in confidence, knowledge of the individual in receipt of that will not necessarily be taken to be that of the organisation of which the individual is a part. In ***Hartman v South Essex Mental Health Community Care NHS Trust and other cases [2005] IRLR 293*** the Court of Appeal held, in the context of a personal injury claim, that if an employee disclosed confidential information about their health to the employer's occupational health adviser but stated that it was to be confidential and for their use only, the employer should be held to have knowledge only of the information later provided to it by the occupational health provider.

201. In the context of a section 20 claim, the knowledge that the respondent ought to have known extends both to the fact that the claimant was disabled, and that the PCP was liable to disadvantage her substantially (***Wilcox v Birmingham CAB Services Ltd (2011) EqLR 810***)

(ii) Discrimination arising from disability

202. The EAT held in ***Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893*** that the requirement for knowledge under section.15 was not that the putative discriminator knew that something arose in consequence of the disability; once the discriminator knew of the disability, and objectively the something which caused the unfavourable treatment arose in consequence of the disability, the terms of the section were satisfied. That "something" did not need to be the sole or principal cause of the treatment, but required to be at least an effective cause, or have a significant Influence on, the treatment.

203. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305****:*

> "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."

204. In ***City of York Council v Grosset [2018] IRLR 746****,* Lord Justice Sales held that

> "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

205. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** *that:*

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

206. In ***iForce Ltd v Wood UKEAT/0167/18*** the EAT held that there could be a series of links but required that there was some connection between the something and the disability.

207. In ***Dunn v Secretary of State for Justice [2019] IRLR 298*.** the Court of Appeal held that “it is a condition of liability for disability discrimination under s 15 that the claimant should have been treated in the manner complained of because the ‘something’ which arises in consequence of that disability”. This will typically involve establishing that the disability or relevant related factor operated on the mind of the putative discriminator, as part of his conscious or unconscious mental processes. This is not, in this context, the same as examining 'motive'.

208. In ***Robinson v Department of Work and Pensions [2020] EWCA Civ 859*, *[2020] IRLR 884*** the Court of Appeal held it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability.

209. The EAT overturned a Tribunal’s conclusion that the employer had constructive knowledge, because further enquiries could have been made, in ***A Ltd v Z [2019] IRLR 952*.** After reviewing the principles from authorities (repeated in the claimant’s written submission) the EAT stated the following:

> “Section 15(2) EqA is directed at the question of the employer's knowledge: where the employer does not have actual knowledge, what might it reasonably have been expected to have known? In the present case, the ET sought to answer that question in terms of what the Respondent might reasonably have been expected to do: that is, to have understood that mental health problems often carry a stigma, which discourages people from disclosing such matters and, therefore, to have made enquiries into the Claimant's mental wellbeing. That, however, does not answer the question as to what the Respondent might reasonably have been expected to know, after having made those enquiries.
>
> The ET had already found as a fact that the actual knowledge of the Respondent fell short of knowing anything more than that the Claimant had faced a number of difficult personal circumstances and had sometimes experienced stress as a consequence. Of

itself, that did nothing more than suggest that she had suffered symptoms that could be seen as unremarkable and unsurprising reactions to life events. As the ET found, allowing for the difficulties that arise in relation to the disclosure of mental health problems (although also mindful of the need for respect for an employee's dignity, as highlighted in the Code), it might well have been better had the Respondent made further enquiries of the Claimant. That, however, is not the same as a finding that the Respondent could reasonably have been expected to know of the Claimant's disability. That said, in the current case – as Mr Milsom has pointed out – the ET effectively went on to complete the answer to this question, when it later considered what would have happened if the Respondent had made the enquiries suggested of it. As the ET found, the Claimant would have continued to suppress information concerning her mental health problems; she would have insisted she was fit and able to work normally and would not have entertained any proposal for an Occupational Health referral or other medical examination that might have exposed her psychiatric history (see the ET at para 35). That being so, the complete answer to the s 15(2) question in this case could only have been that, even if the Respondent could reasonably have been expected to do more, it could not reasonably have been expected to have known of the Claimant's disability."

(iii) Unfavourable treatment

210. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. That was undisturbed by the Supreme Court when it later considered the case. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage." Reference to the measurement against an objective

sense of that which is adverse as compared to that which is beneficial was made in ***T-System Ltd v Lewis UKEAT/0042/15.***

(iv) Justification

211. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726****,* heard in the Court of Appeal, it was held that the test of justification under the statutory provisions then in force requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14*** applied the test set out in that case to a claim of discrimination under section 15 of the 2010 Act. It held that when assessing proportionality, while an employment tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

212. The Supreme Court summarised the law in relation to justification in ***Bank Mellat v HM Treasury (No. 2) [2015] AC 700***, and set four matters to consider – (i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right (ii) whether the measure is rationally connected to the objective, (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

213. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the tribunal was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account

medical evidence available for the first time before the tribunal. The Court of Appeal in ***Grosset [2018] IRLR 746*** upheld this reasoning.

214. In ***Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918*** the claimant was dismissed for unsatisfactory performance after eight months of absence. He had been in a serious motorcycle accident whilst responding to an emergency call, and developed post-traumatic stress disorder which had prevented a return to work. The respondent accepted that the officer had been treated unfavourably because of something arising from his disability – namely his absence – but relied on the application of the Police Performance Regulations by way of justification. The EAT held that the Tribunal had erred in accepting justification on the basis that the police force's general procedure had been justified. The EAT drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, to cases where a policy permits a number of responses to an individual's circumstances. In the former the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim. That may be contrasted with the case of ***Browne v Commissioner of Police of the Metropolis UKEAT/0278/17*** in which the EAT held that the employment tribunal were entitled to find that the individual treatment of the claimant was justified because the employer had given the claimant an opportunity to make representations asking for an extension of sick pay.

(v) PCP

215. What is a provision, criterion or practice can be was considered in ***Carrera v United First Partners Research UKEAT/0266/15.*** A liberal rather than an overly technical approach should be adopted. That was considered further by the Court of Appeal in ***Ishola v Transport for London [2020] ICR 1204***. That case was in the context of indirect discrimination, but its provisions are also apt for consideration in this context. The same term of a “provision, criterion or practice” is used in section 20 as in section 19. It did not include all one-off decisions, or to every act of unfair treatment. It was said that “all three words carry the

connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."

(vi) Substantial disadvantage

216. Guidance is given in ***Sheikholeslami.*** Substantial has the section 212 meaning. It is applied to disabled persons, and the claimant herself, separately. The former is measured on an objective basis by comparison with what the position would be if the disabled person did not have a disability.

(vii) Reasonable adjustments

217. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, and in ***Newham Sixth Form College v Saunders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in ***Ashton***. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.***

218. The Court in ***Saunders*** stated that:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

219. The duty to make reasonable adjustments does not extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless

be of evidential significance. In ***Project Management Institute v Latif [2007] IRLR 579*** the EAT stated that

> "… a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."

(viii) Burden of proof

220. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the disability, but which may be relevant to the issue of whether the respondent applied a PCP to the claimant for the reasonable adjustments claim, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

221. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities. The law on the shifting burden of proof was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal, which said the following (in a case which concerned direct discrimination on the protected characteristic of disability):

> "In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee

raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

222. The application of the burden of proof is not as clear in a reasonable adjustments' claim as in a claim of direct discrimination. In ***Project Management Institute v Latif [2007] IRLR 579***, Mr Justice Elias, as he then was, gave guidance of the specification required of the steps relied upon.

223. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** held that ***Latif*** did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one.

224. The EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The adjustment proposed can nevertheless be one contended for, for the first time, before the ET, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205.***

(ix) Jurisdiction

225. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387.*** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally,

particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner*, *[2003] IRLR 96***).

226. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***).

227. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held**:**

> "First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see ***British Coal Corporation v Keeble [1997] IRLR 336***), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see ***Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800***, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see ***Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728***, paras [30]-[32], [43], [48]; and ***Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72***, para [75].
>
> 19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by

> preventing or inhibiting it from investigating the claim while matters were fresh)."

228. That was emphasised more recently in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23,*** which discouraged use of what has become known as the **Keeble** factors as form of template for the exercise of discretion. Section 33 of the Act referred to is in any event not a part of the law of Scotland***.***

229. Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.***

230. The EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14.*** There it was held, in brief summary, that a failure to provide a reasonable explanation for the delay in raising the claim was fatal to the issue of what was just and equitable.

231. In ***Ratharkrishnan***. there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

232. In ***Edomobi v La Retraite RC Girls School UKEAT/0180/16*** a different division of the EAT (presided over by a different Judge) in effect preferred that approach, with the Judge adding that she did not "understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

233. In ***Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801*** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason".

234. In ***Accurist Watches Ltd v Wadher UKEAT/0102/09*** the EAT stated that, whilst it is good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

235. If there is negligence by a solicitor that need not prevent application of the extension: ***Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24*** a principle that was applied in ***Benjamin-Cole v Great Ormond Street Hospital for Sick Children NHS Trust UKEAT/0356/09***.

236. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 provide in effect that within the period of three months from the act complained of, or the end of the period referred to in section 123 above if relevant, or its equivalent for the other provisions, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but the requirement to undertake EC remains.

(iii) The EHRC Code

237. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular, but not exhaustively:

> *"***What if the employer does not know that the person is disabled?**
>
> 5.14
>
> It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
>
> 5.15
>
> An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment.

When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example: A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability…….

Substantial disadvantage

6.15

The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis……

WHAT IF THE EMPLOYER DOES NOT KNOW THE WORKER IS DISABLED?

…….

6.20

The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping the disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a

disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

6.21

If an employer's agent or employee [such as an occupational health adviser, a HR officer or a recruitment agent] knows in that capacity of a worker's…..disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfill their duties under the Act……

Reasonable steps

6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;
b. the practicability of the step;
c. the financial and other costs of making the adjustment and the extent of any disruption caused;
d. the extent of the employer's financial or other resources;
e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
f. the type and size of the employer.

6.29

Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

6.33

[Provides a list of examples of steps it might be reasonable for an employer to take, including….

Altering the disabled worker's hours of work or training

Example: An employer allows a disabled person to work flexible hours to enable him to have breaks to overcome fatigue arising from his disability……."

(ii) Unfair dismissal

238. Section 98 of the Employment Rights Act 1996 provides, so far as material for this case, as follows:

> **"98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> …….
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."……..

239. The burden of proof as to the reason for dismissal is on the first respondent. It argues some other substantial reason. In that regard provided the reason is not whimsical or capricious (***Harper v National Coal Board [1980] IRLR 260***), it is capable of being substantial and, if, on the face of it, the reason could justify the dismissal then it will pass as a substantial reason (***Kent County Council v Gilham [1985] IRLR 18*****).** If the reason, or principal reason, for the dismissal is a potentially fair reason under section 98(2) whether or not it was fair under section 98(4) of the Employment Rights Act 1996 falls to be considered. No burden of proof applies to that stage. The issue is assessed against the band of reasonable responses, not what the Tribunal itself would have done.

240. The reason for a dismissal is that of 'the employer'; which will usually mean the reason motivating the dismissing manager, but that is subject to the qualification that if that manager is manipulated by another manager who acts for another reason (which may well be unfair) that second manager's reason can be attributed to the employer if that manager is higher in the organisation's hierarchy than the claimant: ***Royal Mail Group Ltd v Jhuti [2020] ICR 731*****.** The position was summarised in the speech of Lord Wilson as follows:

> "In searching for the reason for a dismissal for the purposes of s 103A of the Act, and indeed of other sections in Pt X, courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected

> disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

241. In ***Uddin v London Borough of Ealing [2020] IRLR 332*** the EAT extended that principle to the second manager's knowledge of facts, which had deliberately not been passed on to the dismissing manager.

Observations on the evidence

242. We address each of the witnesses in the order in which they gave evidence, but before we do so it is appropriate to make some initial comments in relation to the claimant. It was clear to us, and not disputed to any extent by any of the respondents, that the claimant is a highly competent clinician. Despite the difficulties that she had there was no question raised in evidence of patient safety being adversely impacted to any extent. The difficulties were said only experienced in relation to the training towards becoming a Consultant.

243. What was also clear to us is that the claimant has worked extremely hard to overcome a number of different challenges. They included her health issues as we shall come to, but also moving to Dublin initially, not at that stage having a complete command of English, two bereavements of her father and sister, and commencing her training to seek to become a Consultant in a location where it appeared she felt somewhat isolated. The evidence was also clear that she is in general a private person, which is not intended to be any form of criticism. Many people are, particularly on health matters. She has sought to pursue her career and become a Consultant despite the challenges she faced. She received and submitted for her appeal a number of letters of support from Consultants. She accepted in her witness evidence that she could see,

from the later perspective that time gives, that some of what she had said or done at the time might have been said and done differently. There is much in this case that is to her great credit. Our comments with regard to the claimant's evidence are that – our assessment of the evidence before us, as we require to do in any case, but they should be seen in the context we set out above.

(i) The claimant

244. It was clear to us that the claimant was seeking to give honest evidence. There were a number of occasions for example when she could have given an answer that assisted her case, but did not, often because she did not remember. That was we considered both honest and to her credit. It was evident that she was a highly-skilled clinician.

245. We did however have to assess the evidence as a whole and consider the extent to which her evidence was reliable. We concluded that in some material respects it was not. It is perhaps understandable that for someone who has undergone the issues that are described in this Judgment the claimant's recollection is not always correct.

246. That was so, particularly in the context of this case, as to what she had or had not told the respondents at the material time. She believed that they were aware of her condition, and she knew details of it herself both from her own knowledge and what medical advisers had told her, but what in fact she had disclosed we did not consider was always as she described. The claimant had not authorised the release of reports from Occupational Health (OH), or had had their terms changed to remove detail about her condition. That accorded with the evidence that she was a private person. It is referred to in some of the witness statements for the respondents, but also alluded to in some of the ARCP documentation at least indirectly. Some of that pre-dates her becoming a disabled person in 2017.

247. Some evidence we heard or accepted from witness statements is not consistent with what the claimant described in her witness statement, such as at paragraph 31 where she refers to informing Dr Webster of the biopsy that was to be undertaken in an email of 18 February 2019, but

that email from the claimant in fact refers only to a “procedure”, the detail of which was not given. There are other similar examples, such as at paragraph 41 of her witness statement referring to comments by Dr Webster in the supervision meeting, but which are recorded as referring only to “ongoing health issues which are currently impacting on C’s performance”. That does not state what those health issues were at that time. Her own reluctance to provide details of her health, including the symptoms she suffered from, continued throughout much of the events referred to in evidence, including at a meeting where she was represented by the BMA, and also to an extent up to the point of her appeal, where although she provided more information and clarification she still used what might be described as guarded language.

248. She did not set out to any of the respondents the full detail of the symptoms from which she suffered as a matter of fact, as those are described in Dr Woodward’s report, at any point. There were some comments, and some signs that others could see, the most obvious of which sign was from the long absence in mid 2019, but her perspective as the sufferer of the condition knowing what she did was we concluded very different to that of others who had far more limited information. That perception of others was affected by what she said, on occasion, which included that her health was “OK” or “fine” for example, when clearly it was not that. It was also affected by comments to the effect that she wished the ARCP to be brought forward before the new curriculum, clearly believing that she could achieve it, which gave a different impression to someone affected by disability. She did not in mid to late 2019, for example, raise the issue of disability even though she had BMA representation at some of the meetings.

249. We concluded from all the evidence that her complaints as to Dr Fardon’s treatment of her at a meeting on 22 March 2018, whilst her genuine perception, are not an accurate or reasonable description of what happened. We were satisfied that his evidence on that matter was reliable. We considered that he had conducted the meeting appropriately and not in the aggressive manner that the claimant spoke to. We consider similarly that the meetings he conducted in October 2019 were conducted professionally and appropriately, although that had an

element of unfairness about it from a lack of fair notice as to its reason, but the description of it from the claimant was not we considered reliable, and we preferred the evidence from the respondents on that. These were important matters, on which the claimant had placed significant reliance in her witness statement, and that we did not accept her evidence on such points, and had other concerns as to its reliability discussed above and below, caused us to consider the claimant's evidence more generally not to be reliable unless supported by other evidence.

250. These conclusions are we concluded consistent with other evidence as to a certain lack of insight, which we consider is evidenced in the documentation, including when the claimant sought to bring forward an ARCP meeting we referred to above. It showed her strong desire to do so but a lack of appreciation that she was not at all likely to be able to achieve that at such a time, not least as she had had such a period of absence not long beforehand, and a material amount of ground to make up. The claimant had also a number of disagreements with colleagues, including a number of Educational Supervisors, and other supervisors such as Dr Jollands. The number of such disagreements was high, and we did not find evidence to justify the claimant having done so as frequently as she did.

251. We were also struck by the consistency of the pattern of suggestions that the claimant was not engaging fully, not adequately working within a team, as a basic summary of some of the criticisms, and not showing the required level of professionalism (including matters such as reflective practice) required of a consultant. These issues at least in material part predated the onset of material symptoms of Coeliac disease, being set out in ARCP outcome documentation, particularly clearly in 2016 but also earlier than that, and we did not consider that they could be explained by that condition for reasons we set out more fully below. The claimant did not appear to accept that body of evidence. Her perception (and evidence) was that absent the effects of impairments she would have achieved CCT. Again it is an issue we address below, but we did not consider that the claimant's evidence was reliable in this regard.

252. There was no evidence of an impairment that was considered within the documentation of a form of socio-communicative disorder, or something of that kind. It was not suggested by the claimant, nor was it an impairment relied on or pled. There was no psychiatric or similar report, and the reports that were before us, particularly that of Dr Lewthwaite, contradicted such a suggestion.

253. The claimant in her written witness statement changed her position from that which she had taken during the material events. She sets out that she now accepts that for various matters what she thought, or did, or said, had not been either appropriate or reasonable. It is to her credit that she did so, but that there were so many such changes of position was not something that gave confidence that her evidence overall was reliable.

254. The Tribunal considered at length the evidence in relation to the impairments that the claimant suffered from as a result of Coeliac's disease, and what effect those impairments had had on her training. We were concerned at the reliability of her evidence in relation to the non-physical symptoms, which she attributed to her disease and said caused her not to be able to achieve CCT, to paraphrase her evidence. It appeared to us that there were several difficulties with her evidence in that regard, which we address further below.

(ii) Mr Calum Anderson

255. We were satisfied that Mr Anderson sought to give us honest evidence. He did however accept in cross-examination that his impressions were formed from what he had been told by the claimant's legal advisers, and that he was not qualified to give an opinion on matters at for example, the ARCP panel meetings. His knowledge of issues of timebar was we considered limited, as he thought that timebar commenced from the time of the appeal against the Outcome 4, not the decision on that outcome itself, and we noted that his qualifications did not include a legal degree. He confirmed that the BMA had sought a view from its solicitors on the claimant's case in about July 2020 after the appeal, and that the claimant had discussed with the BMA her legal options as well as others.

(iii) Dr Margaret Peebles

256. Dr Peebles is employed by the second respondent as a Consultant Pediatrician. She was Clinical Director from 1 February 2017 to 31 May 2022, having managerial responsibilities for medical staff, including the claimant. We accepted that Dr Peebles was a credible and reliable witness. She gave clear, and candid, answers to questions. She accepted many of the general propositions put to her in cross-examination, and did so in a convincing manner, but explained that, for example, although questions could have been asked of the claimant when they were, she did not provide either any reply or any detail in the reply. The balanced and measured nature of her evidence was clear to us. When she said that she could not recall points of detail, we accepted that. There were some matters that were material in that regard, such as a return to work meeting held in about mid July 2019, after an absence of about three months, which Dr Peebles could not recall at all. But that must be seen in the context of a very busy Consultant, with a very heavy workload, and limited HR support (HR staff formerly attended such meetings to minute them, but latterly did not). Mr Flood in his submission stated that there were some aspects of Dr Peebles' evidence that he challenged, but our conclusion is that the evidence she gave should in essentials be accepted.

257. We would also record that, entirely properly and to his credit, Mr Flood did not attempt to challenge the credibility or reliability of the respondent's witnesses other than the points of detail for Dr Peebles.

(iv) Dr Alice Jollands

258. Dr Jollands is a Consultant Paediatric Neurologist employed by the second respondent. Between 1 January 2017 and 31 December 2021 she was also TPD employed by the third respondent. We accepted that Dr Jollands was a credible and reliable witness. She gave her evidence clearly, and was direct in responding to points put to her. It was clear that she had sought to assist the claimant, and had found that increasingly difficult up to the email she received from the claimant on 8 October 2019 which made a series of complaints about the training she had

received. Dr Jollands had been told that the claimant had received a diagnosis on something significant, but had not been aware of its exact nature as that had not been disclosed directly to her at least initially. Dr Jollands had been concerned at matters after receipt of that email especially and her reaction to it is, in that context and the context of the evidence as a whole, not entirely surprising. Even with her stated concerns over mental health however, no formal reference to OH for a specific opinion on whether the claimant was a disabled person was made, either then or at any time.

(v) Dr Tom Fardon

259. Dr Fardon is a Consultant Physician in Respiratory Medicine employed by the second respondent. He is also the APGD employed by the third respondent. He gave candid and convincing evidence. He accepted many of the propositions put to him in cross examination, and explained the context in which he had acted. There were some aspects that he accepted could have been better, such as the notice given to the claimant before a meeting at which he gave her a warning, but denied that he had acted improperly in the meeting held on 22 March 2018. We considered that where there was a material dispute, such as on the two meetings held with him which were challenged, his evidence as to that was to be preferred to that of the claimant. It was clear that the knowledge that he had of the claimant's health and its impact was limited, but that there had been discussion about that on occasion. He had been the chair of the ARCP panel which issued the outcome 4, but had not held a vote. We accepted his evidence in relation to that, although none of the decision-makers themselves had given evidence. He also stated in evidence that he had discussed with Dr Jollands the possibility of the claimant being a disabled person under the Equality Act 2010, the precise timing of which he did not give in evidence, and without his using those precise terms, which we considered was likely to have been after the meeting including Dr Goldman as she was referred to in that connection, and therefore in December 2018. That candid evidence was to his credit, and confirmed our assessment of his evidence as being that on which we could rely as being credible and reliable.

(vi) Professor Ronald MacVicar

260. Professor MacVicar is retired from practice as a GP but had been employed by the third respondent as a Post Graduate Dean. The Tribunal was entirely satisfied that Professor MacVicar gave credible and reliable evidence. He was the Chair of the appeal panel, having had a career in medical education from 2004 in a number of senior roles. He accepted that he had not seen certain documents, including four letters of support and a number of documents that the claimant had originally sent as appendices, and that in principle had he done so with the panel, it would have been weighed in the balance along with all other material, but it was not suggested in cross examination that that would have led to a different outcome of the appeal. Professor MacVicar spoke to his taking account of the possibility of the claimant being a disabled person, and whether reasonable adjustments were required for her. He also spoke to taking account of the health condition as he knew it from what was before him. He did not consider that there was a realistic possibility of the claimant achieving the CCT within the period of about six months that might have been given to her, and that she was a material distance from doing so. We accepted that evidence.

(vii) Mr Tristan MacMillan

261. Mr MacMillan was at the time of the appeal panel a trainee Orthopaedic Consultant employed by the first respondent, and was a trainee representative on the appeal panel. We were entirely satisfied that he gave credible and reliable evidence. We accepted as likely to be correct his impression that the document with the grounds of appeal was the latter of two. He explained that he had read that letter, and then separately the supporting documentation that he had been provided with. He recognised that there was a lack of correlation between the referencing of documents by A numbers, but thought at the time that it was a referencing issue, not that documents were missing. We accepted that evidence as being honest, and noted that having been shown the documentation he accepted now that not all documents that the claimant had sought to rely on had been provided to him and therefore read.

(viii) Dr Ailsa McLellan

262. Dr McLellan is employed by Lothian Health Board as a Consultant Paediatric Neurologist, and was on the Appeal Panel acting for the third respondent. She also holds the post of TPD in the South East of Scotland region for the third respondent. She was not cross examined, and her evidence we accepted as credible and reliable. Mr Flood had stated that he did not intend to do so to avoid repetition of points already taken in relation to Professor MacVicar and Mr MacMillan.

(ix) Dr Richard Coleman

263. Dr Coleman is employed by the first respondent as a Secondary Care Appraiser. We were satisfied that Dr Coleman was a credible and reliable witness. We accepted his evidence that he had come to the meeting held with the claimant to discuss the potential termination of her employment with an open mind, and that at no stage did the claimant indicate anything to the effect that she was seeking to challenge the Outcome 4 or appeal decision further. Whilst her written statement had explained her position in relation to Dr Jollands' report, for understandable reasons, the loss of the training number meant that she could not continue in her present role. It was notable that there was no appeal against that decision. The claimant had also not stated to him that she was seeking to challenge further the refusal of her ARCP appeal, such that that process had, he considered, reached its end.

(x) Mrs Jane Lloyd

264. Mrs Lloyd is employed by the first respondent as Assistant Human Resources Manager. We were satisfied that Mrs Lloyd was a credible and reliable witness. She explained as to the redeployment process being undertaken within the first respondent, and that it did not have the resource to consider vacancies with other health boards. There was no real challenge to that aspect of the case.

(xi) Witnesses not called

265. It is also appropriate to note that some who might have been called to give evidence for the respondents did not do so. One person in that

regard is Dr Clare Webster, the claimant's Educational Supervisor at the time particularly material to some of the issues before the Tribunal. The claimant said that she had told Dr Webster about her diagnosis in February 2019. Dr Webster had prepared some of the ARCP and related documentation. She appears from some of the written evidence to have been aware of some at least of the symptoms experienced by, or signs from, the claimant, but did not attend before us to explain what she did know, and when, and what she did not know. We drew an adverse inference from the failure to call her, and noted the evidence of Dr Peebles that Dr Webster remained working at [redacted] such that no good reason not to call her appeared to exist.

266. Ms Michelle Grier was the HR person who was involved in some of the discussions and meetings, particularly that in December 2019 when the claimant stated that her diagnosis was Coeliac disease as to which Ms Grier expressed surprise. She is still employed by the second respondent. As she did not give evidence it is not known whether she did anything with that information, or made any further enquiries. She may have seen some of the GP fit notes for the claimant. The evidence was that the practice was to show them to Dr Peebles and then send them to HR. What happened thereafter was not known to Dr Peebles. It is possible that someone from HR, if not Ms Grier, may have seen a fit note dated 15 March 2019 but received by the second respondent on 18 June 2019 which referred to a new diagnosis of Coeliac disease. It is possible also that that person may have considered the other matters known to the second respondent, which included that the claimant had by then been off work continuously for over two months, and would be for a period of about three weeks or so, that there had been earlier absences, and that there had been OH intervention and adjustments made with regard to night shift and otherwise because of fatigue. It is possible that, if Dr Peebles did not consider whether the claimant was a disabled person as a possibility, as she spoke to in evidence, that an HR member of staff might have done so. There was however no witness on that issue from the HR staff of the second respondent, particularly Ms Grier.

267. The only witness to the ARCP Panel in February 2020 was Dr Fardon, but he did not have a vote. No witness was therefore tendered from

those who did vote. The vote did not lead directly to a decision, but a recommendation, which was given to the Dean Professor Denison who formally made the decision, but also did not give evidence. But as we accepted Dr Fardon's evidence, the absence of such witnesses we did not regard as material.

268. Ms Karen Shearer of the third respondent acted for the ARCP panel, and made administrative arrangements for the appeal hearing in particular. It appears that of the 61 documents the claimant sent for that, about 30 were passed to the panel, omitting therefore about a half of them. That is not something that was explained by Ms Shearer giving evidence to us, but it was a concern that the documents the claimant thought would be before the appeal panel, not unreasonably, were in fact not. The Tribunal did note however that the email from Ms Shearer sending documents to the panel was copied to the claimant, despite the argument for the claimant to the contrary, who did not raise at that stage the issue of incomplete documentation being passed on. The Tribunal rejected the argument to the effect that the missing documentation is explained by the additional information listed, as that came much later in June 2020.

269. There are others who are mentioned at various points in the evidence, and we accept that there are judgments to be made as to who to call and who not, but given the issues that are identified in the case we do consider that the failure to call Dr Webster, Ms Grier or Ms Shearer in particular, without any explanation for that, is somewhat surprising, and we considered the extent to which it was appropriate to draw adverse inferences from that, all as referred to below. These issues are not confined to the respondents/. We comment below on the absence of evidence from others who might have supported the claimant's evidence.

Discussion

270. It is we consider important to state at the commencement of our discussion that our role is to assess the evidence we heard on the issues before us. We are an Employment Tribunal, not a medical education panel or similar. We assess the claims made to us on the basis of the law that applies to them. We are not in a position to conduct a more

wide-ranging enquiry on our own initiative. We must address matters only on the basis of the evidence that we heard, either orally or from the written witness statements, and the documentation before us referred to. In certain respects, part of which we address above and below, the evidence was not as complete as it might have been.

271. The Tribunal addresses each of the issues as follows:

(i) From what date was the claimant a disabled person under the 2010 Act?

272. The Tribunal considered that the report from Dr Woodward was likely to be the most reliable evidence in this regard. He had considered the claimant's medical records, and history as given to him. Whilst there were criticisms of the claimant's evidence which was argued to be contradictory of some of that, it did not in our view undermine the conclusions that Dr Woodward had reached. His opinion was that the claimant had been a disabled person from 2017 onwards. No date or month within that year is given in the report. From all the evidence we heard we concluded that it was likely to have been towards the latter part of that year, which we conclude was in or around October 2017. That is as the claimant had reported an escalation of symptoms to OH in November 2017, which appeared to have commenced during the period reasonably shortly before that.

(ii) When if at all ought each of the respondents reasonably to have known that the claimant was a disabled person under section 6 of the 2010 Act?

273. Mr McGuire accepted that this was an issue of corporate knowledge, and not solely what was known by each individual. Whilst the claimant argued that the knowledge of the respondents should be looked at on a collective basis, the respondents argued that it could not be and that the position of each respondent was different. We have accordingly addressed the position of each respondent individually.

(a) The first respondent

274. In so far as the first respondent is concerned, we do not consider that there is a basis in the evidence from which a finding of imputed knowledge can properly be made on the basis of what in fact their

employees knew. If at all, their knowledge can only come from their relationship with the second respondent. On that, it was accepted that the second respondent is an agent for the purposes of section 109(2). There was no suggestion in the evidence that anything done by the second respondent was not done on the authority of the first respondent. In reality, the employment of the claimant by the first respondent was a matter of convenience, and she was effectively managed by the second respondent as if their employee. If the first and second respondents decide that it is convenient for such an arrangement to take place, it appears to us that under basic principles of the law of agency, under the terms of section 109(2) and as a matter of common sense, what the second respondent's employees knew about the claimant, the first respondent's employee, is or ought to be deemed to be known by the first respondent. To hold otherwise would be a triumph of artifice over reason. The constructive knowledge of the first respondent does however depend on whether or not the second respondent had such knowledge, and if so when that was.

(b) The second respondent

275. At no stage was it stated specifically that the claimant considered herself a disabled person, or words to that effect, nor was that issue apparently addressed by OH. The specific question was not asked of OH, or volunteered as an issue by them.

276. Having Coeliac disease is not a fact of itself sufficient to meet the definition of a disabled person under the Act. It is however a fact of some importance. It can be a disease with serious consequences, as is set out in Dr Woodward's report. It did have sufficient consequences for the claimant that she was a disabled person under the Act. Once that diagnosis was communicated to the second respondent, therefore, that is a material factor in the consideration of constructive knowledge.

277. We considered whether or not that fact, taken with all other evidence were such that the second respondent ought reasonably to have been aware of the claimant being someone who was a disabled person under the 2010 Act. We did so not on the basis of what the claimant knew, but

what had been said either orally, where that was accepted in the evidence, in writing, or where there were other signs that a reasonable person ought to realise was indicative of disability status.

278. The claimant was aware of far more detail than she was prepared to give to the second respondent. She had symptoms that were wide-ranging and substantial, as she partly informed Fiona Gordon for example. She did not however intimate the full extent of them to the second respondent either herself, or from the report Ms Gordon prepared. We did not consider that we could take into account the matters that the claimant had disclosed to OH but chosen to keep confidential. That is as the respondents were not aware of them unless confidentiality was to be breached. Whilst we accept that there are circumstances where that may be necessary for the health of the person in a situation of some urgency, that was not we consider the position in the circumstances of this case. The claimant similarly amended the later OH report to refer only to a "medical condition". There are other examples of her acting in a manner consistent with keeping details of her health private, including her saying that she was "OK" when asked about her health. She was properly described in evidence as a private person. That symptoms were there to be discovered, as Mr Flood argued, is not, we consider, the point. The issue is a different one, and is firstly what material was known to the second respondent which ought reasonably to have alerted it to the possibility that the claimant was a disabled person so as to require further enquiry, and secondly if so what further enquiries which ought reasonably to have been made would have revealed.

279. We turn to consider what that knowledge of the second respondent was. That is far from easy. It includes detail from a period prior to that during which the claimant was a disabled person. We consider that that is however relevant as part of the overall detail of which the second respondent was aware. There are various elements to that, which we summarise as follows:

(i) Comments from the claimant as to her fatigue.

(ii) GP fit notes provided to the second respondent which referred to "fatigue".

(iii) Absences from work intermittently for fatigue and headaches.

(iv) The terms of the OH reports that were issued to the second respondent.

(v) Discussions of the effect of fatigue on her ability to carry out night shifts, long shifts, and weekend working, and the effect on her sleep patterns.

(vi) The disclosure of her Coeliac disease to Dr Webster in February 2019.

(vii) The absence from work from April to July 2019.

(viii) The fit note received by the second respondent on 18 June 2019 with the reference to the Coeliac diagnosis.

(ix) Return to work discussions in July 2019 including a phased return.

(x) A discussion with Dr Peebles in October 2019 about her diagnosis.

(xi) Dr Peebles also being aware of some of her symptoms as described in her witness statement, which included diarhhoea, constipation, and abdominal pain, joint pain, rash, low mood, and “brain fog”. Whilst no date is given in her witness statement we conclude from all of the evidence that that is likely to have been during the period of about the summer of 2019.

(xii) Dr Jollands being aware that the claimant had a medical condition of some kind, but not exactly what until a meeting on 3 December 2019, also attended by Ms Grier of HR.

280. We accept that not all of the detail was known by any one individual but we conclude that from the detail set out above the second respondent has not proved that it did not reasonably know of the claimant’s status as a disabled person. The onus is on that respondent. We do not consider that it had been discharged.

281. In that regard we took account of the example given in the Code referred to above. That was, we considered, less obvious than the factors set out above (and for this purpose we left out of account the later letter of appeal). We also took account of the fact that the fit note referring to the diagnosis was seen by Dr Peebles on 18 June 2019, and then sent to HR, but it was not clear (as no evidence was provided on this) what if anything was done by HR on receiving it. Dr Peebles had knowledge of a

wide range of symptoms experienced by the claimant in addition to the diagnosis.

282. The combination of those pieces of evidence was we considered strongly indicative of a need on the part of the second respondent to consider disability status, including by a referral to OH to ask that particular question or alternatively by asking the claimant herself. The timing of that we refer to further below.

(c) The third respondent

283. So far as the third respondent is concerned, its constructive knowledge was present at the time of the appeal, as Mr McGuire accepted. The claimant had provided far more information as to her health when submitting her appeal. She presented her appeal in various emails in March 2020. The receipt of those messages was considered initially by Dr Fardon, and we conclude that by the time of the decision not to allow new information to be considered for a review on the Dean's instruction, and wrongly according to the Gold Guide, there ought to have been knowledge of the possibility of disability status subject to further enquiry as referred to in the preceding paragraph.

284. We considered then whether the constructive knowledge of the third respondent was liable to have been any earlier, and whether the third respondent had proved that it did not reasonably know of the claimant's status as a disabled person. The onus is again on that respondent. We did not consider that it has been discharged.

285. Dr Jollands raised the issue of the claimant's communication, which she referred to as possibly a socio-communication or mental health difficulty, and referred her to OH in March 2019 for that and other matters. Their advice was that "there is no evidence to suggest any mental health problems", sent on 18 April 2019. Dr Jollands had also been aware from around late June 2019 that the claimant had a significant diagnosis, and continued to have her own concerns as she set out in an email of 15 October 2019. There were issues beyond those as to mental health or related matters. She was also aware of the absence of three months to July 2019. Dr Jollands as TPD is we consider someone acting for the

third respondent in this connection, and discussed matters with Dr Fardon from his evidence, which we accepted, on the issue of status.

286. The matter does not however end there. In so far as the knowledge of the second and third respondents respectively is concerned, the position is not simple. They have some employees in common in the sense that each of the second and third respondents employed some of the same individuals, for their different roles, but not always so. In simple terms what may be described as the clinical role was for the second respondent, and the educational or training role for the third respondent. Where there is such a close connection between each of the three respondents within the overall ambit of the National Health Service, but for this case particularly the second and third respondents, it appears to us again to be artificial to seek to excise knowledge acquired by a person whilst carrying out the second respondent's role from that acquired by the same person when carrying out the third respondent's role. It would be an impossible task given the lack of clarity about that in the evidence before us to try to make such a distinction. It is also effectively an impossible task as the roles are so closely related. The performance in the clinical setting was part of the assessment of competence. It included, for example, issues of communication with colleagues, and working with team members. If one person has two separate roles, as in this case, the knowledge that they in fact or constructively have applies, we consider, for both of those roles in such a situation, and becomes knowledge of both the second and third respondents for these purposes.

287. Taking account of all the evidence we concluded that the third respondent ought reasonably to have raised the issue of whether the claimant was a disabled person in late July 2019. They were on notice that that was a reasonable possibility at the very least.

288. In each respect it is we consider important to be clear as to the nature of the impairments. They are as described in the report from Dr Woodward and as we comment on above. Dr Jollands and Dr Fardon considered whether the claimant may have some form of socio-communicative

disorder. Dr Jollands raised the issue of a psychiatric condition of some kind as above.

289. There was no adequate evidence before us that the claimant did have such a disorder, or had a psychiatric condition beyond depression and anxiety, and brain fog. Dr Woodward did not address the detailed connection to such non-physical symptoms, unsurprisingly given his specialism, and there is no evidence that if there was some form of communication issue that arose from Coeliac disease. OH reports did not indicate that there was such a condition. There was no psychiatric or psychological report, or similar, before us.

290. For the purposes of the section 20 claim the constructive knowledge must include that there was a substantial disadvantage suffered by the claimant. We consider it clear from the evidence that it did. The combination of the various disclosures of the diagnosis, the three month period of absence, the range of symptoms disclosed to Dr Peebles, the knowledge held by Dr Jollands, the earlier background of fatigue and difficulties with sleep, the absences, and the other factors set out above, combine to lead to the conclusion that the disadvantage was substantial, as that term is defined in section 212. The substantial disadvantage was in respect of those symptoms described in Dr Woodward's report, however, and the effect of them on issues as to training is a separate issue we address below.

(d) What would further enquiry have disclosed, if anything?

291. It is not enough that there was notice of an issue to investigate. It is clear from authority that there is a separate matter of what that investigation would have led to, and whether that would in effect have been actual knowledge of the claimant meeting the statutory test of being a disabled person. It is knowledge that ought reasonably to have been held that the statute is directed at, rather than what a reasonable employer could have done. We consider that the second respondent, as agent of the employer and the entity acting as if the employer in fact, ought either to have instructed an OH report specifically to address the question of whether or not the claimant may be a disabled person, or to have asked further

questions of the claimant herself on that issue in an appropriate manner. It appears to us that the former is more appropriate in all the circumstances, and the more likely course to have been followed. There had been a number of referrals to OH both by the claimant and by the second respondent. The circumstances were such that the guidance referred to above indicated that referral to an occupational health physician should be considered, and in our view that guidance ought to have been followed. We consider that the instruction of such a report was reasonably required by early July 2019, and that had that been done for that stated purpose the claimant would likely have agreed to undertake it, the answer would likely have been to the effect that the claimant was believed to be a disabled person (albeit that that is a legal question not a purely medical one) and received, after allowing for review and input by the claimant, by the end of August 2019.

292. We do appreciate that OH reports may not be conclusive, and that they depend in part on what the claimant said, but in this regard we noted that the claimant had disclosed much material to Fiona Gordon and we consider it likely that she would have done the same in that new context, particularly if the reason for it – including to assess any adjustments reasonably required to her training – was properly explained. The claimant gave some information to Dr Peebles, and others as evidenced by the letter from Dr Clerihew for example., and she disclosed the diagnosis several times both by passing on the fit notes and in meetings, as well as providing more detail at the appeal stage. If the claimant had not consented to an OH report we consider that had she been asked questions about her impairments from the disease, appropriately, she is likely to have given such answers as to make it clear that she was a disabled person, for essentially the same reasons as in relation to the OH report. Whilst the claimant was a private person in the main, and did retain privately some of the OH details and had reports retained or changed, we did not conclude that the respondent's argument that she would not have provided such information as likely to be correct.

293. We conclude that the second and third respondents ought reasonably to have known of the claimant's status as a disabled person by 31 August 2019. That fact was one that ought then to have been passed up the line

of communication to the third respondent either through the Educational Supervisor or Dr Jollands. We conclude that the third respondent would, and should, have been aware of the position at about the same time as the second respondent accordingly. The first respondent should be deemed to have the same knowledge of its agent the second respondent, the first respondent as principal, for the reasons given above. We have therefore concluded that all respondents ought reasonably to have known of the claimant's disability by 31 August 2019.

294. We address further below the issue of whether the respondents ought to have known that the PCPs, if applied to the claimant, would cause her substantial disadvantage.

(iii) Did the claimant suffer unfavourable treatment under section 15(1) of the 2010 Act?

295. The comments that we make in relation to this issue are made subject to our comments below as to jurisdiction under section 53(7), and lest we are wrong in our conclusion on that aspect. There is a further matter that was not directly raised in submission. It is that the employer of the claimant was the first respondent, not the second or third respondents. The second and third respondents could be liable as employers of the individuals referred to below, potentially under sections 110 and 111 of the Act, but that still required there to be a breach by the first respondent as employer and activities by the second or third respondents falling within sections 110 or 111. This is far from straightforward. It is at least potentially an argument that employees of the second and third respondents whose acts or omissions falling under these statutory provisions which caused the first respondent as employer to dismiss the claimant. In light of our other conclusions the issue is not one that is determinative of the matter, but had it been we would have required to consider whether such an argument could be before us, and if so to seek submissions on this point, as the terms of sections 110 and 111 had not been directly relied on in pleadings or submission, although section 109 was referred to in the context of the issue of knowledge as above.

296. The claimant relied on the following as unfavourable treatment, which involve different respondents for separate matters, in summary –

(i) Dr Fardon's treatment of her at the meeting in October 2019, alleged to be aggressive and hostile.

(ii) The Outcome 4 decision.

(iii) Permitting or causing negative feedback to be given to cause that decision.

(iv) Dismissing the claimant's appeal against the Outcome 4 decision.

(v) During the appeal permitting or causing negative feedback to be given.

(vi) Dismissing her.

297. In regard to each of these matters the Tribunal concluded as follows:

(i) Dr Fardon did not treat the claimant aggressively or in a hostile manner as she alleged. We consider that his manner may have been somewhat direct but it did not become what could properly be regarded as unfavourable treatment. We set out above our concerns over the claimant's evidence on this, and more generally. The procedure was not a fair one given the lack of proper notice, but that is a separate issue. The meeting had been prompted by an email sent by the claimant she now, properly, accepts was not sent in the best terms. The calling of the meeting, and its conduct by Dr Fardon, does not we consider meet the statutory test as unfavourable treatment.

(ii) We accept that the outcome 4 was unfavourable treatment, as it ended her training subject to any appeal succeeding. It was to her disadvantage. It was not an act of the first respondent as employer, but of the third respondent.

(iii) MSF is part of the ARCP process. It is not unfavourable treatment to ask for it, or to include what was received in our view. The claimant may not agree with it, but that is not the point. As Dr Fardon sought to explain to her it is a fact of some importance that her colleagues held the views that they did. It appears to us not only to be part of the process of assessment set out in the Gold Guide, but also part of it for obviously good reasons. We did not

consider that this matter met the statutory test for unfavourable treatment.

(iv) We accept that dismissing the appeal was unfavourable treatment as it led to the ending of training and ultimately to her dismissal, which was to her disadvantage. It was an act of the third respondent, not of the first respondent as employer.

(v) We accept that the dismissal was unfavourable treatment, this being an act of the first respondent. The decision was taken separately from the ARCP process. It was a result of it, in particular the consequent withdrawal of the national training number.

(iv) Were there matters which were something arising out of the claimant's disability?

298. The next matter is whether there was something that, objectively, arose out of the disability. The claimant relied on the following, in summary:

(i) Difficulties in carrying out studies or qualification related projects outside work time.

(ii) The effect on the claimant's performance at work.

(iii) The effect on the claimant's studies and advancement whilst not at work.

(iv) Increasing the time it took to achieve milestones in training.

(v) The effect on the experience and attainments during training.

(vi) The effect on the quality and effectiveness on interactions with colleagues.

299. In relation to all these matters the Tribunal concluded that the claimant had not established that the "something" she relied on arose out of her disability to more than a minor or trivial extent (in this context we consider that the word trivial is less apt, and for us the issue focused around whether it was more than minor). In this regard we have commented above on the lack of evidence of what exactly the impact of the disability on the claimant's performance during her training was. That there were symptoms, and impairments, we accepted where they are listed in the report from Dr Woodward. But his report does not give us adequate detail to assess the extent to which the impairments adversely

affected her training, just that in his opinion they did. That opinion is however not based on sight of the ARCP documentation. What we require to assess is the extent of the effect on training for the claimant, and on the ARCP process, and his report does not tell us. There was no other professional report as we have commented on. It was not addressed in any respect in OH reports, save to the extent that when the issue of the potential for some form of socio-communicative disorder was raised, it was negated. There was nothing in the nature of an expert report from someone experienced in the assessment of trainees in such circumstances.

300. That leaves the claimant's own evidence, both written and oral, on the effect her disability had on her training. We did not consider that her evidence was sufficiently reliable to enable us to make a finding in this regard on the basis solely of her evidence. We accepted that the impairments included both more general fatigue and related symptoms, such as sleep being affected, and headaches. We also accepted that the gastro-intestinal symptoms could have affected the claimant whist at work. The brain fog was described as intermittent and the claimant said that it affected her training but not performance whilst carrying out the service element of her role. Brain fog is referred to by Dr Woodward. There were further symptoms referred to by the claimant of depression and anxiety. Whilst we accept that these symptoms existed, we did not consider that it had been proved that these symptoms affected her training performance however, the concerns over which focused mainly but not exclusively on how she inter-acted with colleagues. We did not accept her evidence as reliable that she conducted the service element of work well, but after that was so fatigued that she could not carry out the training element adequately. It was very difficult to see why and how such symptoms had affected reflective learning. If it was, it was not adequately explained by the claimant in our view.

301. These matters had also pre-dated, at least in general terms, her disability status. This was not a case of a trainee who had been completing her training fully successfully in the period prior to her becoming a disabled person, and only experiencing difficulties thereafter. The pattern of such difficulties for the claimant, noted in the ARCP

documentation, pre-dated that status as a disabled person for a significant period. It then continued, including after the diagnosis and treatment with a gluten-free diet, and at least some improvement in symptoms even if not complete.

302. We were also struck by the absence of clear evidence from the claimant of precisely how the impairments she relied on had affected her training. The evidence she gave was in more general terms. There was an absence of direct instances of how, for example, depression and anxiety had had an impact on the manner in which she had interacted with colleagues in a particular situation, or how brain fog or another impairment had impacted her ability to undertake reflective learning in a particular way. Her evidence also included matters that appeared to be unrelated to her impairments. In her written witness statement she referred to the MSF at the ARCP outcome 4 meeting. “Looking back at this now I can understand why my peers made these comments about me. Because I was quiet, and reserved because of the sense of isolation I felt at that time.” Being quiet, and having a sense of isolation, do not appear to us to be part of any of the impairments, and the claimant did not suggest that they were. These, and other factors that affected her (such as the bereavements) are we considered unrelated to such impairments, and highlight a distinction between the impairments from the disease, and factors affecting the claimant that were not related in any way to it.

303. The matters of managing difficult and challenging situations, team-working and professionalism which are a summary of the concerns raised at the ARCP meeting that led to the Outcome 4 are self-evidently important for a Consultant, and are part of the domains being assessed. They were an issue that continued after diagnosis, when the claimant was provided with treatment, and where her condition improved to an extent at least. It did not appear to us to accord with common sense that if the claimant suffered from a material lack of concentration and brain fog that that would only have affected training and not the service element of the role at all, which is what she had claimed. We did not consider that the effect would be likely to be as selective as that. It was a matter raised by the respondent in cross examination, and we did not

consider that the claimant's answers to that were reliable, although she gave them genuinely from her own perspective.

304. We were also struck by the consistency in the evidence as to issues of performance on the part of the claimant. It included early ARCP documentation, prior to her becoming a disabled person, and the later ARCP processes, and the supporting documentation for them which included MSF. It included the opinions of those who had been Educational Supervisors, those on the February 2020 panel, and those on the appeal panel. Those many reasonably consistent views of a wide variety of medical and educational professionals in regard to the claimant contrasted sharply with the opinion of the claimant herself to the effect that she had done enough to obtain her CCT and sought to have that awarded before the new curriculum was to be introduced. We did not consider that that view, genuinely held by the claimant and expressed to us in her evidence, was one we could regard as reliable.

305. We have addressed separately above both our conclusion that her evidence was not reliable, and that her perception of matters such as the interactions with Dr Fardon in particular was not we considered reliable. That there were such a number and variety of issues as to the reliability of her evidence, and where there was an absence of support for her position from other sources that were before us or could have been placed before us, were further factors that we took into account in not accepting the claimant's evidence in relation to the impact she claimed on her training from the disability. We took into account the point made in submission that some aspects of the claimant's evidence were not directly challenged in cross examination, such as paragraphs 81 and 82 of her witness statement, but there was a general challenge to her credibility and reliability, paragraph 82 was referred to during cross examination although only very briefly, and we considered the evidence as a whole.

306. The onus of proof of establishing this aspect falls on the claimant. We have concluded that she has not discharged it. We did not therefore consider it proved that the "something" relied on by the claimant in each case were affected by her disability to other than a minor degree. It is not

impossible that they did, but we did not have adequate evidence that we accepted that led us to hold that it was probable.

(v) Treatment "because" of disability

307. The next issue, if we are wrong, is whether the respondents treated the claimant unfavourably because of the "something" relied on. We concluded that they had not. We do not consider that the disability of the claimant, or the impairments from which she suffered, operated on the minds of the decision-makers other than, if at all, to a trivial or minor extent. They were not a significant influence on the decisions. To take each matter in turn

(i) Dr Fardon called the meeting because of the claimant's email, sent in inappropriate terms. Neither that nor the conduct of the meeting was affected by the claimant's disability to any extent.

(ii) It is clear from the evidence Dr Fardon gave and the written documentation why the February 2020 decision was taken by the panel to give an outcome 4. That was because of the claimant's having been considered by the panel not to have made the kind of progress she had been required to, for the reasons given. Those reasons were not influenced by the claimant's disability other than to a minor extent, if at all, as essentially explained above.

(iii) Similarly the MSF was provided without significant influence from the claimant's disability in our view.

(iv) We accepted the evidence of Professor MacVicar, supported by Mr McMillan and Dr McLellan, and concluded that the reasons for the appeal being refused were not influenced by the claimant's disability other than to a minor extent, if at all. In that regard it is we consider relevant that Professor MacVicar was aware of much more of the claimant's health and impairments than the earlier panel had been. He took that into account. But his conclusion was that the claimant was not near the level for CCT, and not likely to be able to achieve it within the next six months. We accepted that evidence. We did so in the context that even the claimant did not suggest to the appeal panel that she would achieve CCT in six months.

(v) It follows from the foregoing that as the outcome 4 and refusal of the appeal were not because of something arising out of disability, the consequent withdrawal of the national training number, and the dismissal that followed because of those facts, could not be either.

(vi) If so, was a proportionate means of achieving a legitimate aim established under section 15(2) of the 2010 Act?

308. We address this issue lest we are wrong on the foregoing matters. We were satisfied that the aims the respondents sought to rely on were legitimate. In simple terms they were to maintain adequate standards for a Consultant, a matter of public safety, and to do so within the resources available. Those aims are sufficiently important to justify the limitation of a protected right. The measure is rationally connected to the objective. The third issue is whether a less intrusive measure could have been used without reasonably compromising the objective. We did not consider that it could, as we discuss below on the issue of time and support. We then assessed the issue of the proportionality, balancing the severity of the measure's effects on the rights of the claimant against the importance of the objective.

309. Mr Flood very properly accepted that the standard required to be met, such that it could not be lowered to take account of disability, and that the issue was largely one of giving the claimant extra time and support to allow her the opportunity to achieve that standard, as her ability to do so was, he argued, affected detrimentally by her disability. The respondents argued that it was not reasonable to do so. We concluded that the respondent's submissions were to be preferred. The evidence from Professor MacVicar was particularly relevant in this context. His view was that the claimant was further away from achieving the CCT than a period of six months was likely to remedy. He explained that to us most convincingly. His view was also shared by his two colleagues. It was consistent in broad terms with the views of those on the initial Panel which gave the Outcome 4. The Panel which earlier gave the Outcome 3 were clearly concerned at whether or not the claimant could achieve the

standard required, and gave further time to do so. This is a very substantial body of evidence that supports Professor MacVicar.

310. The claimant's own evidence at the appeal was to the effect that six months may not be sufficient. That again was strong support for Professor MacVicar's position. The submission by Mr Flood was either for six more months if that proved to be sufficient, or some further time if the claimant was reasonably making progress towards it. That was not entirely open-ended, but nor was it entirely finite either.

311. A material difficulty for the claimant in our view is that the basic reasons for not achieving CCT were those that existed from an early stage, at least to an extent. Another difficulty for the claimant is that the concern over her performance was long-standing and consistently held by a large number of those who were assessing her performance, being Educational Supervisors, Clinical Supervisors, and the various members of a number of ARCP Panels, as well as the Appeal Panel. Whilst there were occasions when the claimant's performance improved, and the issue was not unchanging from time to time, that body of evidence that the claimant was not meeting the necessary standards and not likely to within a further six months, the period referred to at the Outcome 3 ARCP, was strong, consistent, and held by those expert in the field.

312. We considered that the respondent had established that, if there had been a breach of section 15(1), it was objectively justified under section 15(2).

(vii) Did each of the respondents apply a provision, criterion or practice to the claimant?

313. The PCPs founded on were

(i) A requirement to attain the same training milestones within the same timeframes or extensions as non-disabled trainees.

(ii) The application of the same standards of competency and attainment as non disabled trainees.

(iii) Not permitting the claimant's disability or symptoms of the effects of the same on performance and attainment to be considered as mitigation in the assessment of the claimant.

314. These PCPs, if applied, were applied only by the third respondent, and not by either of the first or second respondents. The same considerations as raised above apply, in that the third respondent was not the employer of the claimant, but the terms of sections 110 and 111 are potentially engaged. The first question, subject to that qualification, is whether the PCPs were applied by the third respondent or not. The third proposed PCP was not a PCP within the statutory term as it was directed solely to the claimant herself. That is not what a PCP is. The first and second proposed PCPs however we concluded arose from the Gold Guide and applied to any trainee in such a situation such that they could amount to a PCP.

315. We considered next the issue that arose in submission, and although it did not appear to have been pled as we refer to below as it was a matter of jurisdiction we required to consider it in any event, that the first and second PCPs were both a competence standard, and as a result fell within the exception to a PCP under Schedule 8. We considered that their being a competence standard was clear from the provisions of the Gold Guide. The ARCP is a process to measure progress towards the competencies required. The meetings within the ARCP process are an integral part of the overall competence standard. It includes both the domains and time periods within which to achieve them. The whole structure of the Guide makes it clear, in our view, that a competence standard was applied. That conclusion is supported we consider by ***Burke***, as addressed below where we set out further reasoning on this aspect. We concluded that the exception applied, and as a result the terms of section 20 of the Act were not breached.

(viii) Did doing so put disabled persons at a substantial disadvantage compared to those who are not?

316. We considered that, if contrary to our findings, these were PCPs under the Act, that the first and second PCPs did put disabled persons at such

a substantial disadvantage, but the third being related to the claimant only did not do so.

(ix) Did doing so put the claimant at a substantial disadvantage?

317. The claimant relies on the following, in summary

(i) An inability to reach the same milestones of achievement.
(ii) An inability to produce work, paperwork and performance at work.
(iii) An inability to interact as effectively with colleagues, supervisors, administrators and assessors.

318. We considered that the evidence was that each of the first and second PCPs did not do so. The report from Dr Woodward did not address this matter in any detail. His conclusion was that "on balance of probability there would have been a detrimental effect on her completing her competencies for ARCP, although this opinion is not formed with knowledge of the specific deficiencies described in her ARCP, the report of which has not been made available to me". It is not therefore clear from that report (as addressed above) what the detrimental effect was, the extent of it, and why that arose. A detrimental effect is not enough for the claimant to succeed. In simple terms that effect must be more than minor or trivial. It appears to us that to assess that we must know what the impairment caused by the disability is. We require to appreciate the nature and extent of the substantial disadvantage imposed on the claimant by the PCP and it is for the claimant to establish that as she bears the onus of proof. In our assessment of this issue we shall repeat many of the comments made above.

319. We were concerned firstly that the claimant's evidence was that her clinical work was not affected at all by her disability, but her training work was. She said that she was able to perform what might be described as the service part of the work, which is of its nature highly complex, stressful, and challenging, unaffected by any of the impairments. It did therefore seem at the least very surprising that all of the impairments were said to have been felt solely within the training aspect. That we did not consider could be right, again as addressed above, but particularly so when part of the training aspects and some of the criteria for

assessment related to what happened at the service aspect of work. Patients are not treated by a doctor at the level of the claimant working alone, in isolation from others. It was to the functioning of the claimant as part of a team in that service setting that many of the criticisms were directed.

320. Secondly, the list of impairments included the physical and the non-physical. We accept that there was some evidence of the claimant suffering from psychological symptoms, including anxiety and depression, that included what was described by Dr Peebles as low mood. There is also reference to “brain fog”. But the OH report did not find psychological symptoms, and there was no other evidence that did so as addressed above, even though it was raised by Dr Jollands in March and October 2019 as a potential issue.

321. Thirdly, we had some concerns over the extent to which we could rely on the claimant’s evidence given that she made some comments during the processes referred to that were contradictory to her position before us, which included that she was “OK” or “fine”. She also stated that she wished to bring forward the ARCP prior to introduction of the new curriculum. These are not comments easy to reconcile with there having been substantial effect from impairments on her training.

322. Fourthly and perhaps of greatest significance is that a major part of the concern throughout the ARCP process was her communication with others, her working within a team, and related matters. Such concerns predated any question of her being a disabled person under the Act. It seems therefore very unlikely that it could have been caused by her disability. We accept that there is the potential for it to be exacerbated by the disability, but we have not found evidence we regarded as reliable that that was the case. In her written witness statement the claimant stated “For example, comments about my demeanour and ‘engagement’ were made and acted upon, without any thought to whether fatigue and sleep loss may be a causal factor”. But what fatigue and sleep loss caused the claimant in relation to those issues identified in the ARCP process was not clearly set out either in her written witness statement or oral evidence. The onus of proving the impairment caused by the

disability, and the substantial disadvantage caused by the PCPs, rested on the claimant. The Tribunal can see that it is possible that fatigue, including sleep loss, headaches, and the gastro-intestinal symptoms, as well as depression, anxiety and brain fog, can affect someone's performance in general terms, but the sole evidence for that was from the claimant, it was not in detailed terms, and it was from a witness whose evidence we did not consider reliable all as discussed above.

323. Fifthly the claimant in her written witness statement argued that the respondents did not make efforts properly to investigate the impact of her disability in achieving the same standards as other trainees, but the claimant did not lead direct evidence before us on that matter. The Tribunal was left in the position of not knowing what the detail of those effects were, in particular to what extent, if at all, fatigue, sleep loss, depression or all the other aspects of the impairments the claimant suffered from had on her training and ARCP process. It appeared to the Tribunal (as lay people in this respect) that, by the time of the meeting that led to the ARCP Outcome 4, the issues which had been identified were not those likely to have been caused, or contributed to, to a significant extent, by impairments caused by Coeliac disease. The issues were the ability to work independently at consultant level, particularly the ability to manage challenging situations and conflict, team working, reflective practice, insight into the challenges faced, professionalism, and probity.

324. The claimant's evidence, to paraphrase it briefly, was that the symptoms made her more "irritable", and that there was a "siege mentality", but that latter phrase did not emanate from Dr Woodward's report and was her own description, which we did not consider reliable. In our view her evidence does not show an impact from the impairments on the issues as to ability to work as a consultant. She said that she found it hard to process information in stressful situations, and she found preparations for the ARCP and the presentations for it extremely stressful. She said that her symptoms affected her mood, ability to process things quickly, and written communication which was more terse. She said that she was more judgmental and angry when writing emails. She said that "Whilst my symptoms did not effect the quality of my patient interactions and my

clinical judgment, they did affect the quality of my interactions with my clinical peers." That was however evidence that was not supported by any form of independent or expert report, or evidence before us from any of her colleagues, family or friends, nor was it explained in adequate detail, and we considered from all of the evidence that it was not reliable. It appeared to us to be extremely unlikely that the effect of an impairment could be as selective as that – not affecting clinical judgment with a patient, but affecting training issues with colleagues– as the claimant claimed.

325. The Tribunal considered the detail of the report from Dr Woodward. The impairments that might be referred to as psychological are low mood, depression, anxiety and consequent panic attacks, and brain fog. That report did not appear to the Tribunal to support the claimant's more generalised description of the effect of her impairments such as her having a siege mentality.

326. That point also arises in relation to an email sent by the claimant to Dr Jollands that led to the meeting with Dr Fardon at which she received a form of warning. The claimant now accepts, as we understand it, that that email was not in appropriate terms. What we do not see, however, in evidence we regard as reliable, is any link between her writing that email, and the impairments caused by her disability. The claimant does not set out such a specific link in her witness statement. Rather it appears to us that if a link exists it is to the issues with how she interacts with colleagues identified during the ARCP process, including aspects identified before disability status commenced.

327. We then considered the issue of "brain fog". It is referred to both in Dr Woodward's report and the claimant's evidence both in the written witness statement and orally. What she said about that was that it did not prevent her from discharging her professional duties, impair her judgment or initially last long. It was intermittent. Latterly it happened she said most days, and towards the end of her shift. She said "but it did have the effect of slowing me down." Again, that did not appear to us to be something that affected the ability to work at consultant level for the issues set out above

328. The claimant alleged that without the impairments she believes that she would have successfully progressed through training without incident. We did not consider that that was reliable evidence. The claimant did not appear to appreciate the extent of the issues that had existed throughout her training, and the history of concerns as to progress which pre-dated her becoming a disabled person. That was consistent with the suggestions that she had a lack of insight, which we have commented on above.

329. We concluded from all the evidence before us that substantial disadvantage in this context has not been proved by the claimant.

(x) If so, did each of the respondents not take any step that was reasonable to take to avoid the disadvantage under the terms of section 20 of the 2010 Act?

330. Once again we address this issue lest we are wrong on the foregoing. The claimant relies on the following –

(i) Permit the claimant more time to meet the milestones, being a period of six months initially, and some further time if sufficient progress was being made but CCT not achieved within six months.

(ii) Assess the quality of the claimant's work and her competency having regard to her disability and the frequency and severity of the symptoms.

(iii) Assess the effectiveness of the claimant's interactions with colleagues, supervisors, administrators and assessors having regard to her disability and the frequency and severity of the symptoms.

331. These adjustments were directed at the third respondent given their terms, and the circumstances of the ARCP process, and we comment subject to the same issues as to the potential argument under sections 110 and 111 as above. We did not consider that these were reasonable adjustments such that they required to be made under section 20. The first was open-ended to at least some extent, but more significantly we did not consider it likely that it would have avoided any disadvantage. In short, we did not consider that it had been established that it would have

made any difference, save of delay to the Outcome 4. The fundamental issues to which we have referred remained, and were not affected by her disability to more than a minor extent. The second and third matters were considered at least to an extent, particularly by the appeal panel which had far more detail of health issues. Professor MacVicar came to the conclusion that such further time was not reasonable, and as discussed above that evidence we accepted.

332. In our view the proposed second and third adjustments are also very vague ones. It is hard to know what is meant in practical terms by them. In submission Mr Flood accepted, very properly, that the standard to achieve in order to be a consultant was not one that could be lowered for a disabled person. It was a matter of allowing more time and providing support to achieve that standard. We consider that he is right to make that concession, but it is not easy to square it with the second and third proposed adjustments. We considered the terms of the Code of Practice, but did not conclude that it assisted the claimant.

333. We have concluded that, given the evidence before us, it was not a reasonable step to require of the third respondent to make any of the proposed adjustments.

(xi) What was the reason or principal reason for the claimant's dismissal?

334. The termination of the claimant's national training number was the reason for dismissal, or the principal reason, and we considered that that was some other substantial reason under section 98(2) of the 1996 Act. It was accepted by the claimant that the reason could be some other substantial reason under section 98(2). It was potentially a fair reason. In so far as there was an argument under the ***Jhuti*** principle with regard to the reason for dismissal, we address that below.

(xii) Was it fair or unfair under section 98 of the 1996 Act?

335. This issue is determined by the terms of section 98(4). We took into account the circumstances overall including the size and resources of the first respondent, which are substantial. The claimant argues that the following factors rendered the dismissal unfair, in summary:

(i) Lack of support after bereavements.

(ii) Lack of support when the claimant was complaining of symptoms.

(iii) Lack of support after diagnosis including not acting on OH recommendations.

(iv) Lack of support in the time to complete training.

(v) Permitting the claimant to be moved to a specialist neo-natal role from 8 October 2019 after five years in a more general paediatric role.

(vi) Lack of support in the feedback for the ARCP assessment and appeal.

336. These are allegations however made essentially against the second and third respondents. We did not in any event consider that the allegations were established. The claimant had received support, indeed a substantial amount of support. There were three extensions in the ARCP process. She was referred to the PSU and to OH. She was given support and advice by her Educational Supervisors and others, but not always did she take that advice. The move to the neo-natal unit for example was to try and give the claimant a new start with different people, and was intended to be for her benefit. We did not consider that any of these issues bore on the fairness of the dismissal even if there had been some merit in them for the reason that they were not actions of the first respondent.

337. The position must be considered in the round. The contract contained an express provision as to retaining a training place. That place was ended by decision of the third respondent. That was not a decision of the first respondent. It was based on the third respondent's assessment of matters, as was the decision on appeal.

338. The first respondent followed what we consider to be a fair process. It held a consultation meeting with the claimant, and reviewed opportunities for redeployment. Ms Lloyd referred to messages to the claimant with regard to redeployment. Whilst it could arguably have done more, or done things earlier, the test is not best practice, and in any event we take account of the circumstances including the pandemic to which Ms Lloyd referred in her statement. She explained the position

with regard to two roles that the claimant had argued she was not considered for, one having closed applications before she was on the Redeployment Register, and the other not being with the first respondent. The claimant was able to apply for that second role. She did initially apply for one role with the first respondent, but withdrew it latterly. She did not persist in arguments as to redeployment in any event.

339. There was no argument raised at the consultation meeting to the effect that there was in train, or would be, a further challenge to the withdrawal of the national training number, such as by Judicial Review or otherwise. Nothing was said to the first respondent to lead to such an issue being thought to arise even potentially. Similarly the claimant did not argue at that hearing that there had been flaws in the process leading to the Outcome 4 and appeal, such as the nature of the review, or documentations she had submitted to the appeal not being seen by the panel. These were not issues that were known to Dr Coleman. We do not consider that he can be criticized for not taking into account something of which he was unaware. It may be that at that time the claimant was also not aware of these points, but the fairness of the dismissal is not judged with the benefit of hindsight. No point was taken before us as to redeployment. We did not consider against that background that the dismissal could be said to be unfair under the basic principles applying to such a claim.

340. The claimant argued under reference to ***Jhuti*** and ***Uddin,*** and also by reference to the EAT case of ***Cadent Gas Ltd v Singh [2020] IRLR 332***, that the dismissal was unfair, and in essence sought to bring in to the fairness of the decision of the first respondent what were said to be failures in the ARCP process which had been conducted by the third respondent. We do not consider that the circumstances of this case can fall within the principles from those two cases. Firstly here all persons acted in good faith. There was no form of manipulation. Whilst some errors were made, as we comment on below, they were innocent ones. That is entirely different to the facts of ***Jhuti*** in particular, which involved manipulation in entirely different circumstances. Manipulation was also present in ***Singh.***

341. Secondly, none of the persons who committed the errors in the present case were employed by the first respondent. It would be extending the principle very substantially indeed to make it fit the circumstances of this case, and there is no warrant to do so from the authorities relied on.

342. Thirdly, and related to that last matter, there are three separate legal entities involved. That was not suggested to be a sham, and there is no evidence of that in any event. The respondents each function separately. The first respondent is employer but that is not particular to the claimant, it applies for all trainees in the northern part of Scotland. Why that is so was not explained in evidence, save that it was a matter of convenience. The second respondent was responsible for the hospital at which the claimant performed her role. The role of the third respondent is essentially for educational purposes, directing and assessing the training of the claimant. It carries out its role under the general authority of the GMC, which itself performs a statutory function. Its role is therefore very different in kind to that of the first and second respondents who have been described as performing a service or operational role. When performing their role, the third respondent includes employees of the second respondent but they do not act alone. There are employees of other health boards, and those not employed by health boards at all, who are included. The people as well as the functions are different in the case of the three respondents.

343. We did not consider that given those facts we could accept the claimant's argument to the effect that the respondents should be treated as if one. They are not. That may make matters more complex in a claim such as the present, and it may be different than had all the functions only been carried out by one respondent as employer, placement board, and educator. That is not however the factual position in this case, and we cannot proceed as if it were.

344. The conclusions reached above are also we considered supported by the case of ***County Durham and Darlington NHS Foundation Trust v Jackson UKEAT/0068/17,*** which also considered claims under section 15 and 20 of the Equality Act 2010, and a separate claim of constructive dismissal that rested on an alleged failure to make reasonable

adjustments. The circumstances of that case were accordingly different, but the comments of the EAT in relation to the claims under the 2010 Act are worth quoting:

> "It seems to me that this submission really highlights the fundamental difficulty for Dr Jackson on this appeal. As stated above, a failure to "make enquiries and compile information" cannot of itself amount to a breach of the duty to make reasonable adjustments. Such a failure may of course provide evidence which leads to a finding that a body has failed to make such adjustments but failures by third parties (the Host Training Trusts etc) to make "properly informed decisions" cannot give rise to liability on the part of the Respondents for breach of their duties to make reasonable adjustments."

345. We are aware of there having been issues as to the procedures by which the review and appeal were conducted. They were raised in submission, and were argued to be unfair. They were not however the acts of the first respondent and we did not consider that what the third respondent did in relation to those matters should be in some way taken to be acts of the first respondent for the purposes of assessing fairness. They were matters over which the first respondent had no control or influence. We make further comments in relation to those matters below. We did not consider that those acts of the third respondent could render the dismissal by the first respondent unfair.

346. We concluded that the first respondent had acted as a reasonable employer could act in dismissing the claimant, and accordingly that the dismissal by the first respondent was not unfair for the purposes of section 98(4) of the 1996 Act

(xiii) Is any claim outwith the jurisdiction of the Tribunal under section 123 of the 2010 Act?

347. We considered this issue as it goes to our jurisdiction to hear the case at all. Whilst Early Conciliation was commenced against a party not entirely correctly designed no issue was taken on that and we considered it not to be a material issue.

348. We did not consider that there was sufficient evidence of acts extending over a period for the purposes of section 123 of the 2010 Act. There was no evidence of an underlying policy or similar, and decisions were taken discretely for different reasons at different times. They were also taken by each of the second and third respondents. For the purposes of the present claim the material decisions were mainly taken by the third respondent but having applied the authorities referred to above we did not consider that the claimant had established that there were acts extending over a period.

349. We then considered the issue of whether or not it would be just and equitable to allow the claim to be heard under section 123. In that regard there were arguments both ways. It was clear that the decision on detriment of the Outcome 4 was taken at the ARCP hearing on 26 February 2020. Whilst that was not the only matter raised, it is the central issue in the case. That is we consider the starting point for our assessment. On that basis Early Conciliation ought to have been commenced by May 2020. In fact it was in December 2020. It is therefore substantially late. The appeal decision was in June 2020. It too is therefore substantially out of time, although less so.

350. The claimant both had access to advice from the BMA from March 2019 to about November 2020, and that included their seeking advice from solicitors in around July 2020. She was able to conduct online research and that included going to the ACAS pages. These are factors that militate against extending jurisdiction on this basis.

351. On the other hand, the claimant did have an appeal in place, and wished to give that an opportunity to be considered. The BMA advised that she required to allow that appeal to be heard, which was not correct but was the advice she was given. She presented substantial documentation for that appeal, about a third of which was not passed to the panel. She then wished to have redeployment considered by the first respondent as her employer. She made arguments in support of her position. She was abroad from late March to late October 2020. She has no prior experience of employment law issues, and English is not her first language. She had a number of health issues in 2020, as has been

referred to above. There was no real evidence of prejudice to the respondents by the date on which the claim was presented. These factors tend to support the claimant's arguments.

352. The Early Conciliation was commenced on 16 December 2020, such that events prior to 16 September 2020 are potentially out of time. That therefore includes the appeal decision in relation to the ARCP, but not the later dismissal in so far as a claim is made under the 2010 Act for that dismissal.

353. The Tribunal considers that the line of authority to the effect that all matters should be taken into account is to be preferred over those in the ***Habinteg*** line of authority. That, it appears to us, is in accordance with the terms of section 123. It is also in accordance with the Court of Appeal decision in ***Morgan*** and its reference to the "widest possible discretion", and with ***Adeji.*** The former in particular appears to us to favour the view that no single factor is determinative, although the issue of the explanation and reason for delay is clearly important. In our opinion even if there is not what is considered to be an adequate explanation for the delay that is not determinative, and that is so particularly where matters are more complex. We consider that there should be an overall consideration of what is just and equitable in which all relevant facts are weighed in the balance. That, it appeared to us, is also supported by a very recent authority from the EAT – ***Concentrix CVG Intelligent Contact Ltd v Obi [2022] EAT 149***, although that authority is another at the same level as those in the ***Habinteg*** line, such that it does not resolve the matter finally.

354. Taking account of all of the evidence we heard that bears on this issue, we have concluded that it is just and equitable to extend jurisdiction to allow consideration of all the claims made to us.

355. We should add for completeness that there is no such issue with regard to the claim of unfair dismissal. The dismissal took effect on 26 November 2020, and the claim was presented timeously thereafter for that. In so far as there is a claim of discrimination against the first respondent, that too is not out of time.

(xiv) Was the third respondent in breach of the terms of section 53 in respect of the Outcome 4 and rejection of the claimant's appeal?

(a) Section 120(7)

356. We deal firstly with the arguments over jurisdiction under section 120(7) of the Act. It did not appear that this had been pled either in the Response Form or the response to the Further and Better Particulars, but as it is a matter of jurisdiction we require to consider it in any event and it was raised during submissions. We do not consider that the internal appeal provided for in the Gold Guide is sufficient to exclude the jurisdiction of this Tribunal. That appeal is not "by virtue of an enactment". The only enactment relied on was the Medical Act 1983. In Part 4A that Act has provision for post-graduate training, and sets the responsibilities and powers of the GMC. It does not in terms provide for any right of appeal against the decision made under a process set up by the GMC. The Gold Guide is that, a guide – it has as its title that it is a Reference Guide. Those words and the full terms of the Guide do not have the indicators of a binding document. Where it uses words such as "must" that cannot be intended to be a legal requirement. ***Michalak v General Medical Council [2018] IRLR 60*** supports the view that a specific statutory provision is required in order to oust jurisdiction. There the Supreme Court stated the following:

> "The point was put succinctly and clearly in terms with which I fully agree by Moore-Bick LJ at para [53] of his judgment in the Court of Appeal in the present case, where he said:
>
> '… the words "by virtue of an enactment" in s 120(7) are directed to cases in which specific provision is made in legislation for an appeal, or proceedings in the nature of an appeal, in relation to decisions of a particular body, as, for example, in ***Khan v General Medical Council [1996] ICR 1032.***'"

357. We concluded that the appeal allowed by the Guide, and which took place in practice, is not a matter that excludes the jurisdiction of the

Tribunal as that appeal was not “by virtue of an enactment”, in the sense of a term of a statutory provision within the definition of section 212.

(b) Section 53(7)

358. Assuming therefore that the matter is before us, the next issue is whether the conduct of the ARCP process, and issues related to it, fall within the definition of a competence standard for the purposes of section 53(7) such as to limit jurisdiction to claims of indirect discrimination. Again this did not appear to have been pled, but as it was an issue of jurisdiction we required to consider it and it was raised during submissions. A competence standard is defined in section 54. This appears to be a novel point, on which we have found no direct authority at least under the 2010 Act or in the context of a Consultant under training. We addressed the issue briefly in relation to the PCPs under the exclusion terms of Schedule 8. The same essential point arises under section 53(7).

359. Firstly we note that paragraph 11.52 of the EHRC Code of Practice: Employment refers to obligations on Qualifications Bodies to those on whom they confer qualifications, and adds “The nature and effect of the obligations on qualification bodies and trade organisations will be set out in a separate Code of Practice.” The Tribunal has not found any such Code of Practice issued under the 2010 Act, although there was one issued under the Disability Discrimination Act 1995 referred to below.

360. Secondly, although the third respondent carries out functions in relation to assessment of competence, it is not itself the body that awards the qualification of the CCT. That is awarded by the GMC. Qualification body is defined in section 54(2) as an authority or body which can confer a relevant qualification, and includes in (3) “certification ….for a particular….profession.” What the third respondent does is award an Outcome 6 where satisfied with the training that has been undertaken which in turn leads to the award of CCT, and an Outcome 4 if not. We consider that the Outcome 6 is a certification in the sense of the definition in section 54, and that that definition also covers an Outcome 4. There was no submission directly on this point to the contrary by the

claimant (or in relation to it by the third respondent, which had admitted in the response to Further and Better Particulars that it was a qualifications body).

361. Thirdly, if the third respondent's acts otherwise fall within the terms of section 53 and 54 the issue is whether the provision of section 53(7) is engaged, which limits disability discrimination to indirect discrimination where there is the application of a competence standard.

362. The third word of the initials ARCP is "competency". The procedure, and the Gold Guide itself, explains that its purpose is ensuring the competence of medical professionals, including those seeking to become Consultants. The ARCP process has 11 domains, which are essentially competencies for that role, and the procedure it outlines is clearly intended to be an assessment of the trainee's ability to meet them. That process takes the trainee through a series of stages. The outcomes can vary, but each one is an assessment of those competencies at that stage. As stated above, we considered that the whole structure of the Gold Guide made clear that the ARCP process involved the application of a competence standard. We consider that the competencies remain so if they include issues such as achieving what is required within a certain period of time, including if that period is extended. We consider that section 53(7) is engaged and there was the application of a competence standard.

363. Support for our view is we consider found in ***Burke v College of Law [2011] Eq LR 454*** albeit on different facts. The claimant there was a student suffering from multiple sclerosis who was given a number of reasonable adjustments for a course at the College, including 60 per cent extra time. He argued that he should have been given further additional time and permission to sit the exams at home. The EAT held that the College's requirement that students take exams within set time periods was a competence standard for the purposes of the definition in the predecessor provision under the Disability Discrimination Act 1995 which was in substantially the same terms. Although the case was appealed, the Court of Appeal in ***Burke v The College of Law [2012] EqLR 279*** did not consider that question. The Tribunal and EAT in that

case considered a Code of Practice issued under the 1995 Act which had guidance on what a competence standard was. As there is no Code under the 2010 Act, and as the same term of competence standard is used in the 2010 Act, we consider that that guidance remains of assistance and supports the view we have taken that there was the application of a competence standard. This case is not one of indirect discrimination under section 19, but has been pursued under sections 15, 20 and 21. Section 53(7) has the effect that for this separate reason the disability discrimination claims pursued against the third respondent must fail, as we consider that the claims under sections 15 and 20 are outwith the jurisdiction of the Tribunal.

(xv) If any claim succeeds to what remedy is the claimant entitled, including (a) what sum for injury to feelings is appropriate and (b) what were the claimant's losses?

364. As the claims have not succeeded, this issue does not now arise.

-Other matters

(xvi) The relevancy of aspects of evidence to which objection was taken

365. Nothing now turns on the objections raised beyond that we addressed above, but we did not consider that they should be sustained.

(xvii) The question of the confidentiality of some of the information given by the claimant

366. We have addressed this above.

(xviii) The application for a privacy order by the claimant

367. This was not opposed by the respondents. It is however a matter for the Tribunal. We require to give full weight to the principle of open justice. We do however accept that there are issues of fact dealt with in this judgment that are private, sensitive, and confidential, particularly related to the claimant's health conditions, and questions over her working with colleagues and related matters. We also accept that the identification of the claimant could involve harm to her career and reputation, or concern

for any of her past, current or future patients who read it. There is a right to private and family life under Article 8 of the European Convention on Human Rights, which we take into account under the Human Rights Act 1998 and balance against the principle of open justice referred to specifically in the terms of Rule 50.

368. There are further provisions in relation to disability cases, including evidence of a personal nature, in section 12 of the Employment Tribunals Act 1996. The issue of privacy has been discussed in case law. In ***British Broadcasting Corporation v Roden [2015] IRLR 627*** reference was made to the paramount importance of open justice and freedom of expression such that 'derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice'. The EAT reiterated that the fact that material ventilated in a tribunal hearing would be embarrassing or damaging to a party or individual is not, of itself, a good reason for restricting its publication. In ***Fallows v News Group Newspapers Ltd [2016] IRLR 827*** the EAT held that the general power to make an order under that Rule may be made in a case which does not involve sexual misconduct or disability but which involves sensitive medical information about one of the parties. The Court of Appeal considered matters further in ***L v Q Ltd [2019] IRLR 1033*.** The power must be used proportionately. The Court described as helpful a passage from the judgment in ***Ameyaw v Pricewaterhousecoopers Services Ltd [2019] IRLR 611*** in which it was held that: (i) the burden of establishing any derogation from the fundamental principle of open justice lies on the person seeking that derogation; (ii) it must be established by clear and cogent evidence that harm will be done to the privacy rights of the person seeking the restriction by full reporting of the case; (iii) where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, the public can be expected to understand that unproven allegations are no more than that; and (iv) where such a case proceeds to judgment, the tribunal can mitigate the risk of misunderstanding by making clear it has not adjudicated on the truth or otherwise of the damaging allegations**.** Authorities on the approach to derogations from the principle of open justice considered in ***Millicom Services UK***

Limited v Clifford [2022] EAT 74*.** The extent of the derogation was one of the factors to take into account, although the circumstances of that case were very different. The question of balancing confidentiality and relevance of material, in the light of the public interest in openness of legal proceedings, was also recently considered in ***Frewer v Google UK Ltd [2022] IRLR 472.

369. We consider that this is something of a borderline case, but we have been persuaded, just, that it is in accordance with the overriding objective, and within the terms of Rule 50, to grant an order under that Rule that the identity of the claimant shall not be disclosed to the public and that her name and address, the terms of paragraph 16, and references to the hospital at which she worked found at paragraphs 17, 44 and 265 shall be redacted from the version of this Judgment entered on the public register. The claimant shall be identified by the letter "C".

370. That is as there are issues of the claimant's medical history, not only Coeliac disease, but also concerns over more general psychological matters, the public disclosure of which so as to identify her have a material risk of affecting her career or the confidence others may have in her adversely. That would not be in the interests of justice, but would also be contrary to the right as to privacy, and to that limited extent we consider takes precedence over the principle of open justice.

Further comments

371. The claimant's claim before us falls to be dismissed, but we consider that it is appropriate for us to make some additional remarks. There were some aspects of the evidence we heard that caused us concern. Those aspects are –

(i) The material presented to the ARCP meeting in February 2020 was not as full as it could have been. We have found that there was constructive knowledge of the claimant's disability before it took place. There was no question asked about whether she was disabled and if so what impairments were caused by that. Although the respondents had what has been described as constructive knowledge of the claimant's disability, that did not lead to the GMC

guidance referred to at paragraph 23 above as to seeking advice from an occupational health physician being followed by either the second or third respondents. Advice was sought from an occupational health nurse and manager, but having advice from a physician would be likely to provide more detailed and authoritative assistance.

(ii) Dr Fardon's evidence that the Dean had instructed him, in effect, not to follow the provisions of the Guide in relation to the review part of the appeal process. What seems to us to be an important part of that process did not take place. The reasons for that were not given, as the person who is said to have decided that was not a witness before us.

(iii) Dr Fardon's information given to the appeal panel was, unwittingly, not fully accurate or comprehensive. There was far more material available to us than to the Appeal Panel (and also the ARCP Panel which gave the Outcome 4).

(iv) The Appeal Panel did not have all of the material that the claimant had submitted. It is true that the claimant was copied in to the messages to the Appeal Panel, but we do not consider that that is a sufficient answer to the point. We would not expect someone in her position to have to check that all her documents had been passed on. She would expect them to be passed on, and would be reasonable to do so. We do not doubt that there was simple human error, and that is all the more understandable when there were a large number of documents not identified and indexed sent electronically. But the Appeal Panel did not have all the documentation that they should have had. It included some material that was at least worthy of consideration properly, and in that regard we have in mind in particular the letter from Dr Clerihew which was substantially supportive of the claimant.

372. These matters raise substantial doubts as to whether the terms of the Gold Guide in particular, but also the GMC guidance, have been adequately followed. Both documents are as they state, guidance. But the second and third respondents may wish to consider what lessons may be learned from the processes adopted in the present case.

Conclusion

373. For the reasons given above, the Claim is dismissed.

374. In the Judgment we have referred to some authorities not discussed in the submissions before us, and in the event that any party considers that it has suffered prejudice as a result an application for reconsideration may be made under Rule 71.

Employment Judge: **A Kemp**

Date of Judgment: **15th November 2022**

Date sent to parties: **21st November 2022**