T

EMPLOYMENT TRIBUNALS

Claimant: Ms E Ellis

Respondent: St Helens and Knowsley Teaching Hospitals NHS Trust

Heard at: Manchester (by CVP) **On:** 15-19 February 2021 (in chambers on 19 February 2021)

Before: Employment Judge McDonald
Ms S Howarth
Ms A Berkeley-Hill

REPRESENTATION:

Claimant: Ms J Ferrario (Counsel)
Respondent: Mr A Williams (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that she was unfairly dismissed succeeds. The dismissal was an "ordinary" unfair dismissal in breach of s.94 of the Employment Rights Act 1996 ("the ERA").

2. The claimant's claim that that dismissal was automatically unfair contrary to s.104C fails.

3. The claimant's claim that the respondent failed to deal with her application for flexible working under s.80F ERA in a reasonable manner as required by s.80G(1)(a) fails.

4. The claimant's claim that the respondent made its decision on her application for flexible working under s.80F ERA on incorrect facts in breach of s.80H(1)(b) ERA fails.

5. The claimant's claim that the respondent indirectly discriminated against her because of sex in breach of s.19 of the Equality Act 2010 succeeds.

6. The respondent did unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

REASONS

Introduction

1. By a claim form received by the Tribunal on the 19 November 2019 the claimant claims that she was constructively dismissed and that that dismissal was unfair either under "ordinary" unfair dismissal principles or because the reason or principal reason for the dismissal was that she had made a request for flexible working under section 80F of the Employment Rights Act 1996 ("ERA"). She also claims that the respondent failed to comply with its obligations in relation to that flexible working request, and that she was indirectly discriminated against because of sex contrary to sections 19 and 39 of the Equality Act 2010 ("the 2010 Act").

2. The "Code V" at the start of this Judgment indicates that this hearing was held by remote video link using the CVP platform. All parties and the Tribunal members attended remotely.

Preliminary Matters

3. We heard evidence from the claimant and from Angela Cunliffe ("Ms Cunliffe"), her trade union representative from the Royal College of Nursing. For the respondent we heard evidence from Oonagh McGugan (Ms McGugan"), the claimant's line manager from August 2018; from Sue Redfern ("Mrs Redfern"), the respondent's Director of Nursing, Midwifery and Governance and Director of Infection Prevention and Control; and from Mike Babbs ("Mr Babbs"), a matron in the respondent's Cardiology and Respiratory Medical Care Group who heard the claimant's grievance in 2019. Each witness had provided a written witness statement and was cross examined and answered questions from the Tribunal.

4. The hearing bundle consisted of pages numbered 1-444 ("the Bundle"). In electronic pdf format it consisted of 497 pages due to the insertion of some additional pages. At the start of the hearing we added one further document, which was an email string between the respondent HR team and Ms Cunliffe's office dated between 8 and 16 August 2019. That document was inserted as pages 275a-275g of the Bundle. References in this Judgment to page numbers are to the page numbers appearing in the bottom right-hand corner of documents in the Bundle rather than the page number in the pdf of the Bundle.

5. In addition to the Bundle we had a helpful chronology and cast list which were agreed by the parties.

6. After a brief discussion with the parties we took the morning of the first day to read the witness statements and the pages in the Bundle referred to in those statements. We heard evidence from the claimant on the afternoon of the first day and the morning of the second day. We then heard evidence from Ms Cunliffe on the second day and from Ms McGugan on the afternoon of the second day and the

morning of the third day. On the afternoon of the third day we heard evidence from Mrs Redfern. We heard Mr Babbs's evidence on the morning of the fourth day.

7. Both counsel provided written closing submissions. After an extended break at lunchtime on the fourth day to allow the Tribunal to read those submissions and to allow counsel to finalise their oral submissions we heard those oral submissions.

8. The Tribunal sat in chambers on 19 February 2021 to deliberate on its decision. At the end of the fourth day's hearing we told the parties that we would email them at 12.30 p.m. on the chambers day to indicate whether we would be able to deliver our judgment orally. The number of issues we needed to decide meant we were not able to do so and the Tribunal emailed the parties at lunchtime on the fifth day to confirm that it would reserve its decision. The Employment Judge apologises for the delay in finalising these written reasons.

9. The parties had been asked to provide their dates to avoid for a remedy hearing (should one be necessary) to be listed for one day in the period April-October 2021. As the parties would no longer be attending the Tribunal on 19 February 2021 to hear oral judgment the parties were instead asked to provide their dates to avoid in writing to the Tribunal by Friday 26 February 2021.

10. A remedy hearing is required and the parties will be sent a notice of hearing in due course.

The Issues

11. The parties and the Tribunal had agreed a List of Issues at the preliminary hearing held by Employment Judge Benson on 25 February 2020. That List of Issues was attached to the Case Management Orders sent to the parties on 2 March 2020 (pages 49-56). It is attached as an Annex to this Judgment.

Findings of Fact

12. Before we set out our findings of fact we deal with two matters relevant to those findings. The first is the relative credibility of the claimant and Ms McGugan and the reliability of their evidence. The second is the status and relevance of contemporaneous file notes made by Ms McGugan of meetings between her and the claimant.

<u>Credibility of witnesses and reliability of their evidence</u>

13. There were a number of occasion in this case where the claimant and Ms McGugan disagreed about what was said or done at various meetings and how things were said. We set out here our general findings about their relative credibility and the reliability of their evidence.

14. We found the claimant to be a credible witness in the sense that she sincerely believed the truth of what she was telling us. She did at times admit that events had taken place a long time ago and so it was difficult to remember. Ms McGugan on a number of occasions in her cross-examination evidence suggested the claimant "fabricated" evidence. We do not accept that she did so. However, we did not find

the claimant's evidence to be entirely reliable, in particular when it came to when things happened, e.g. at which meeting specific discussions took place.

15. For the respondent, Mr Williams submitted that even if genuinely held, the claimant's recollection of events wasn't a reliable guide to what, objectively, had happened. He said that she tended to view matters that happened negatively. We accept that there is something in that submission. We found the claimant's evidence less reliable when it came to why things happened and others' motivations.

16. We found Ms McGugan to be a forthright witness. As with the claimant, we found her to be sincere but we did not always find her evidence reliable. At times it seemed to us she lacked insight into how her words and actions would appear viewed objectively. We found her recollection of events to be strongly influenced by her conviction that she had acted correctly throughout. As with the claimant, that reduced the reliability of her evidence as an objective account of what had happened. In general, when it came to a conflict of evidence, we preferred the evidence of the claimant to that of Ms McGugan but that was not always the case.

Ms McGugan's file notes

17. In the Bundle there were a number of file notes made by Ms McGugan relating to meetings or conversations between her and the claimant (pp. 166-168, 170,198, 205, 207 and 220). Ms McGugan's evidence that she made those notes immediately after the relevant meeting or conversation had taken place was not disputed. It was also not disputed that these notes were never disclosed to the claimant at the time they were made. She saw them for the first time when they were disclosed in March 2019 in response to her subject access request (SAR). They do not, therefore, represent an agreed note of those interactions. It is part of the claimant's case (issue 1.1.7) that those notes were "inaccurate and misleading". In her Closing Note (para 21) Ms Ferrario submitted that Ms McGugan purposefully recorded the content that she did to omit the negative and disparaging comments that she made on more than one occasion to C during their discussions. Ms McGugan denied that.

18. At this point we are dealing solely with the reliability of those file notes as evidence of what happened during the meetings or conversations to which they relate. We find that the file notes are contemporaneous notes but not verbatim records. We do not accept Ms Ferrario's submission that Ms McGugan "purposefully" created a distorted record of what happened at the meetings and during conversations by omitting negative and disparaging comments she made. However, we do find that the notes record what Ms McGugan saw as the important points from those meetings and conversations. Remarks or comments which the claimant may have viewed as significant might not have appeared important to Ms McGugan so would not be included in her notes. We accept the notes are reliable as evidence of Ms McGugan's perception of the important things that happened at those meetings or during those conversations. We do not accept that they are necessarily a complete record of what, objectively, happened at those meetings or during those conversations.

Background Facts

19. The respondent is an NHS Trust which operates over three sites. The claimant was employed from 9 September 2013 until her resignation on 23 August 2019. She was employed as a Band 7 Aseptic Non-Touch Technique (ANTT) Nurse Specialist. She was part of the Infection Prevention and Control Team ("the IPC team") based at Whiston Hospital but worked across all the respondent's sites. She had various direct line managers during her employment. In summary, the purposes of her role were to help the respondent reduce infections and improve patient outcomes relating to the use of all invasive devices and procedures. That meant auditing invasive practices such as surgery, insertion of cannulas or putting in airways to ensure they did not result in infections, identifying lessons learned when infections or other adverse outcomes for patients did take place, and providing training and education for staff.

20. The role was a new one for the respondent and the claimant was the only one carrying it out. A core dispute was the extent to which the role required on-site presence from the claimant. We have set out our findings about this issue at paras 116-128 when discussing the claimant's formal flexible working request and its outcome in June-July 2019.

Events up to April 2016

21. The claimant took maternity leave for her first child on 23 November 2014. She was due to return to work on 23 November 2015. However, because of a serious birth injury she was on extended sick leave after her maternity leave. She returned to work on 1 April 2016. As a result of the birth injury the claimant at this period had mobility issues and in particular needed to ensure that she had easy access to toileting facilities, sometimes on an urgent basis. In July 2017 the respondent's Health, Work and Wellbeing team ("HWWB") which is in effect its Occupation health team was of the view that the effects of the injury meant that it was likely that the claimant was a disabled person for the purposes of the Equality Act 2010 (pp.162-163).

22. During that period the claimant's line manager was Valya Weston ("Ms Weston"). By a flexible work request form dated 8 March 2016 approved by Ms Weston the claimant asked to reduce her contracted hours from 37.5 hours per week to 18.75 hours per week spread over 2.5 days. That was agreed and her contract varied to reflect those new hours with effect from 1 April 2016 (p.104).

23. Ms Weston also agreed that when the claimant returned to work from 1 April 2016 she would work from home and return on a phased basis using the annual leave she had accrued but not used during her maternity leave and sick leave (p.106).

24. Ms Weston also agreed that the claimant could work flexitime "to be agreed with line manager" (p.103). There was no written record of what those flexitime arrangements were. However, we find that from 1 April 2016 the working pattern agreed between the claimant and Ms Weston was that the claimant could work compressed hours. That involved her working 16 hours split over her usual working days of Monday and Friday with the remaining 2.75 hours to be made up during the

other days of the week, e.g. by working on emails when time. We find that flexibility suited the claimant's child care commitments.

Backfilling the claimant's role

25. At paragraph 6 of her claim form the claimant alleged that when she told Ms Weston at a meeting in 2016 that she wanted to return part time Ms Weston's response was "I'm relieved you said that because we have already spent half the money", going on to explain that they had recruited Jackie Crute as a Surveillance Assistant using 50% of the budget for the claimant's role. We have said that we found the claimant a credible witness and we accept that Ms Weston said something along those lines to her. Given the good relationship which the two had we find it was likely said jokingly. The claimant raised no complaint about it at the time.

26. We find, however, that whatever Ms Weston said did not reflect the reality of the situation. We accept Mrs Redfern's evidence that she would not have authorised "spending" half the budget from the claimant's role on employing someone else until it was confirmed that those funds were available, i.e. when the claimant confirmed in March 2016 she was reducing her hours. We find that Jackie Crute was employed as an Audit and Surveillance Assistant (Band 3) on a 0.5 WTE basis from September 2016 and the decision to employ her was made after the claimant reduced her hours.

27. When the claimant reduced her hours, the respondent did not "backfill" her role by recruiting another ANTT Specialist Nurse at Band 7 to cover the 18.75 hours the claimant was no longer working. Instead, the budget released by the reduction in her hours was used to fund more junior non-ANTT posts within the infection Prevention Team. In addition to Jackie Crute, the team recruited Tracy Kelly as a Band 4 Assistant Practitioner from September 2016 onwards.

28. Part of the budget released was also used to confirm Alice Cruz in post as a Band 6 permanent IPC Specialist Nurse. She provided cover for the ANTT role while the claimant was absent on maternity leave and sickness absence prior to 1 April 2016 and continued to work alongside her after her return. The claimant's role was unique, however, and there was no amendment to her job description to reduce its scope in light of the reduction in her working hours from April 2016.

The position by the start of April 2017

29. By the start of April 2017, the claimant had completed her phased return to work. Ms Weston was still her manager and her hours were 18.75 per week. Her fixed days of work were Monday and Friday to accommodate her childcare arrangements (the claimant at that point had a nursery place for her child on Monday and Friday). She worked compressed hours with two "long" days of 8 hours on Monday and Friday with the remaining 2.75 hours worked "as and when" on the other days around her childcare commitments. She was occasionally on site but worked predominantly from home. There was no formal (or informal) written confirmation of her flexible working arrangements either in terms of the balance

between home and on-site working nor the extent to which she was entitled to work compressed hours.

30. By April 2017 the IPC Team consisted of Ms Weston (Band 8a), the claimant (Band 7), 2 x IPC Specialist Nurses (Band 7), Alice Cruz IPC Specialist Nurse (Band 6), Tracy Kelly - Assistant Practitioner (Band 4), Jackie Crute - Audit and Surveillance Assistant and an administrator (band 4). The claimant was the only one whose role was explicitly ANTT but we find that up to and including April 2017 Ms Weston and Alice Cruz carried out some "on-site" ANTT duties including some training and assessments not least because for a significant period of time the claimant was not on-site because she was working from home. We also accept Mrs Redfern's evidence that Ms Crute's work also fed into the ANTT brief by carrying out some of the surveillance and audit work on wards which did not need to be carried out by a registered nurse. We find that reflects Mrs Redfern's view that to be effective the ANTT work needed to include a focus on what was going on "on the ground" and being a visible ANTT presence on the wards alongside policy and "desk-based" audits. At this point that visibility was provided primarily by Ms Weston because the claimant was not often on site.

31. By April 2017 the claimant was pregnant for a second time. She experienced pregnancy-related illness which meant that she was away on sick leave from 30 March 2017 until 10 April 2017 (page 144).

The meetings in April 2017

32. By April 2017 it was known that Ms Weston was going to move to another Trust. No replacement had been recruited by when she was due to leave so Mrs Redfern took over the role of overseeing the IPC team, supported by the clinical IPC lead, Dr Kalani Mortimer (Dr Mortimer). At some point prior to 19 April 2017 Mrs Redfern and Ms Weston had a handover meeting at which they discussed how they would cover Ms Weston's absence. Ms Weston had been very proactive and visible in her ANTT role and there was a concern at that time about a rise in MRSA and bloodstream infections and Mrs Redfern felt the ANTT nurse had a key role in preventing those. They discussed how to increase the competence of staff to prevent such infections and decided that as the specialist nurse expert the claimant should be asked to come on site more regularly. That was partly because some ANTT tasks could only be done by a registered nurse which meant the claimant or Alice Cruz. Ms Weston explained to Mrs Redfern that the claimant was currently working flexibly and returning from a period of sick leave and maternity leave. They discussed asking the claimant to come and work on site for a second day a week (at that point the claimant was usually working one of her days on site).

33. On 19 April 2017 the claimant had a meeting with Ms Weston and Diana Lewis (HR business Partner) to discuss her working arrangements in the light of Ms Weston's forthcoming departure. They told her that departure meant that there was an increased need for the claimant to be present on site.

34. The claimant in her evidence characterised this as an expectation on Mrs Redfern's part that she would "cease or reduce her flexible working" on Ms Weston's departure. We find that what Mrs Redfern wanted was for the claimant to attend on site for 2 rather than 1 day per week. We find that was partly because the claimant would be required to stand in for Ms Weston until her replacement was recruited.

However, the primary reason was that there had been a number of MRSA infections on the respondent's premises. That meant an increased focus on infection prevention which in turn meant a focus on increased surveillance and audit of staff competency when it came to ANTT and increased demands on the IPC team in supporting the staff to improve their ANTT practice. The departure of Ms Weston meant a reduced resource to deliver that. We find that it was also in Mrs Redfern's judgment important that the claimant, as the ANTT specialist nurse, be a visible presence on site to raise the profile of ANTT. We find that the claimant was concerned that she would be unable to comply with the working arrangements Mrs Redfern wanted because she was concerned that the effects of her birth injury would cause her difficulty if she had to spend more time on site (and specifically on the wards). She needed to have ready and occasionally urgent access to toilet facilities and that was obviously easier at home.

35. We do not accept that at the meeting on 19 April 2017 the claimant referred to herself as having a disability or suggested that it was a reasonable adjustment for her role to be static/desk based rather than ward based so she could have quick and easy access to toilet facilities. We do however find that the impact of the claimant's pregnancy on her underlying health condition was discussed at the return to work meeting on 21 April 2017 and that it was agreed that the claimant would be referred to HWWB (p.146-147).

36. On 24 April 2017 the claimant had a meeting with Mrs Redfern and Diane Lewis of the respondent's HR team at which there was a further discussion about her working hours. Mrs Redfern set out the reasons why she needed the claimant to attend on site 2 days a week. They discussed what hours the claimant could work on site given she needed to drop her daughter off at nursery on those days (which they agreed would be Monday and Friday) before leaving for work.

37. Mrs Redfern told her that she managed another Nurse Specialist who worked flexibly and that Mrs Redfern required her to email her at the start of the day and at the end of the day and keep her updated about the progress of her work. Mrs Redfern proposed that the claimant do the same. The claimant perceived this as Mrs Redfern questioning her honesty, effectively saying that she needed to check up on the claimant if she was going to be allowed to work flexibly. We accept that was the claimant's genuine perception but find that was not Mrs Redfern's intention. We find that in the absence of the claimant having a direct line manager this approach was a way of her keeping abreast of the progress of the ANTT work and ensuring she had oversight of the claimant's welfare. We do not accept that providing the emails was a pre-condition for being allowed to work flexibly. There was no evidence that the claimant sent any such reporting emails to Mrs Redfern once she started the new working pattern nor that Mrs Redfern chased her for any such emails.

38. We find that Mrs Redfern during the meeting did say that no-one had made allowances for her when she had children. There was also a discussion about start and finish times and what time the claimant could attend at work given her need to drop her child off at nursery before she started work. We prefer the claimant's evidence that during that discussion Mrs Redfern asked her what her postcode was, what the postcode of the nursery was and when the nursery closed, and then used Google to work out what the journey time was. The claimant perceived that as another example of Mrs Redfern challenging her honesty and said she appeared annoyed and exasperated with her. We heard evidence about the claimant having a

tendency to want to talk things through before getting to a decision whereas our impression of Mrs Redfern is that she prefers to get straight to the point and sort things out. We also bear in mind that the breadth of her role within the respondent and the fact that she was covering the absent IPC manger's role meant she had less time to spare than the claimant. It seems to us eminently plausible that she decided to work out the claimant's start and finish times using Google or a similar search engine so they could reach an agreement about what the claimant's working hours would be there and then, rather than as her questioning the claimant's honesty.

39. We also prefer the claimant's evidence that at the meeting Mrs Redfern said something to the effect that she would question the value of the claimant's input if she was unable to work on site. We do not find that this was a personal attack on the claimant (although she may have perceived it a that). Instead, we find that it reflected Mrs Redfern's honest opinion that to be effective and of value the claimant's ANTT Specialist Nurse role needed to be both more visible on site and more focussed on ward-based audit and surveillance work rather than being a remote or desk based and paper based audit function. We find that Mrs Redfern's focus was on the needs of the respondent and where the ANTT role could contribute to those but find that the claimant perceived the comment an attack on her performance in the role. We think that arose from their different perspectives rather than any malice or deliberate attempt by Mrs Redfern to belittle the claimant. We certainly do not accept that (as the claimant suggested) it was an indication that Mrs Redfern was seeking to ensure that the claimant was not going to return to work after maternity leave or that she was going to be managed out.

40. We find that the claimant did at the meeting express reservations about signing up to the proposed work pattern. We find that she did refer to the need to be within close vicinity of a toilet but do not accept that she referred specifically to having a disability or needing a static work location as a reasonable adjustment. We note that HWBB did not provide its opinion that the claimant was likely to be a disabled person for the purposes of the Equality Act until July 2017 and the issue had not been raised in those terms before. We find it implausible given the respective personalities of the claimant and Mrs Redfern that she would have put matters in such strong and definite terms at their meeting. We accept there was a discussion about the impact of her pregnancy on her underlying health condition and on that basis it was agreed that there should be a referral to HWWB. At the meeting it was proposed the claimant should self-refer but in the follow up letter dated 28 April 2017 (p.148) it was proposed Ms Weston should make the referral and she subsequently did so.

41. One of the claimant's allegations (issue 1.1.5) is that the respondent failed to make any or adequate enquiries into the reasonable adjustments she required at work. As we have said, we do not think that as at April 2017 the claimant would have characterised this in terms of reasonable adjustments under the Equality Act 2010. In any event, we find that the respondent did make such enquiries. On 28 April 2017 Ms Weston submitted an HWWB referral relating to the claimant (pp.141-143). On 2 and 18 May 2017 Mrs Redfern was asked by HWWB to provide some additional information (p.149-150), Ms Weston by then having left. The referral form specifically refers to the claimant's underlying medical condition, the proposal to increase her days at work (i.e. on site) from 1-2 and asks whether she is fit to do so.

<u>April-July 2017 – new working pattern, absences and HWWB referral</u>

42. Mrs Redfern sent the claimant a letter on 28 April 2017 (page 146). It confirmed her new working pattern would be working on site two days per week between dropping off her daughter at nursery at 8.30am and collecting her at 5.30pm with the shortfall of weekly hours to be undertaken at home. The letter does refer to the claimant expressing reticence to sign up to something so prescriptive when she was not sure it would work, but records that she was happy to give matters a try working on Mondays and Fridays starting from Friday 28 April 2017. The final paragraph of the letter confirms that Mrs Redfern said she would be attending the IPC Team meetings in the future and as those meetings took place early Friday morning before the claimant could get in to work the claimant would catch up with Dr Mortimer later in the day regarding any actions agreed at those meetings. The letter referred to "arranging to meet up with you in the near future" to review.

43. The claimant's new working pattern as set out in Mrs Redfern's letter started on Friday 28 April 2017. The claimant was absent from work from 8 May 2017 up to and including 31 May 2017 because her eldest child was ill, having been admitted to Alder Hey hospital from 8 to 26 May 2017. The claimant was then off sick from 1 June 2017 until her maternity leave started in July 2017. The end result was that the claimant only worked the new working pattern for one week (Friday 28 April to Friday 5 May 2017) before her second maternity leave started (p.155).

44. The claimant was due to attend an HWWB appointment on 23 May 2017 but cancelled it because of her daughter's illness. She also cancelled the rearranged appointment on 6 June 2017 so did not see HWWB until 26 June 2017 (p.157). By then she was signed off sick with pregnancy related back pain (p.159).

45. The HWWB report dated 24 July 2017 by Dr Minaxi Shah, Wellbeing Department Physician, (pp.162-163) confirmed that the claimant continued to experience complications and was under specialist care because of her birth injury. It reported that her symptoms were worse because of her current pregnancy and she was also off work with pelvic girdle pain for which she was having physiotherapy. It advised that when she returned to work prior to the birth of her child she would benefit "from continuing to do flexible working as at present, if operationally feasible". It said those "temporary restrictions" would be required until her maternity leave because the claimant needed access to washroom facilities urgently and unpredictably and that she also had to plan activities in advance due to the complications. The letter advised that in HWWB's opinion, "with regards to the disability legislation, her impairment is likely to be considered long term and which has a substantial adverse effect." It recommended that a risk assessment should be performed.

46. Unhelpfully, the letter does not spell out what the "flexible working as at present" referred to. By June 2017, strictly speaking the "present" flexible working arrangements were those set out in Mrs Redfern's letter of 28 April 2017, i.e. working on site 2 days a week. However, given the rest of HWWB's report, it would seem to us more likely it was referring to the claimant continuing to work one of those two days from home to enable quick access to washroom facilities. In any event, the claimant did not return to work prior to the birth of her second child so there was no opportunity to carry out a risk assessment or put in place the "temporary restrictions" HWWB recommended.

<u>The position as at July 2017</u>

47. The position as at July 2017 when the claimant started her second maternity leave was that she was working 18.75 per week which equated to 2.5 days. Her fixed days of work were Monday and Friday. On both those days she was due to attend and work on site after dropping her daughter off at nursery at 8.30 a.m., leaving in time to pick her up at 5.30 p.m. She would work the remainder of her hours at home. Compared to her previous work pattern the biggest change was that she was required to work on site on both Monday and Friday every week. In practice, the claimant had worked his new pattern for one week because of her absences from work since 8 May 2017. Although the HWWB report seems to us to be recommending that she continue working one day at home that recommendation applied only up to the start of her second maternity leave.

May to August 2018 – return from second maternity leave and first meetings with Ms McGugan

48. Ms McGugan was appointed as Lead Nurse, IPC Team in April 2018. She was the claimant's line manager from that point but they did not meet until 18 June 2018 because the claimant was on maternity leave. That meeting came about because Ms McGugan wrote to the claimant on 2 May 2018 (p.165) to introduce herself and invite her to meet.

49. The meeting on 18 June 2018 took place in Ms McGugan's office. The claimant had her baby with her. We find that Ms McGugan's primary purpose was to meet the claimant and understand her role and working arrangements. She had not read the claimant's personnel file prior to the meeting, preferring instead to find out about her current situation by speaking to her. We accept her evidence that she adopted the same approach with the other members of her new team. When she met the claimant Ms McGugan did not know what her working hours were nor what her working pattern was. There is no evidence that she had seen Mrs Redfern's letter of 28 April 2017 (p.148) which set out the working pattern agreed between her and the claimant.

50. The claimant and Ms McGugan discussed the claimant's intention to have treatment for her underlying medical condition. Ms McGugan suggested she make use of Keeping in Touch (KIT) days and she also suggested the claimant use her accrued annual leave to have a phased return to work. The claimant was asked to explain her current working pattern. She explained that prior to her maternity leave she had been granted flexi working arrangements which were to enable her to manage her childcare commitments and the consequences of her underlying medical condition and that that included working from home.

51. Ms McGugan attempted to clarify what the claimant meant by "flexi" working and to understand what work the claimant did from home. She told the claimant she could not guarantee that the claimant could work fixed days but was happy to accommodate her as much as she could. We find that Ms McGugan's expectation was that the claimant would work her hours spread evenly over 3 days. That seems to us consistent with the fact that when the claimant returned to work in August 2018 she was working Wednesdays. The claimant's evidence was that she explained how working 3 days rather than 2 compressed days on Monday and Friday would impact on her childcare. Her evidence was that Ms McGugan responded by saying that she was the claimant's boss and she would decide the shifts she was going to work – that she would give her plenty of notice and the rotas would be out in advance. We

find it more plausible that this conversation happened at the meeting on 22 August 2018 given the context of that meeting and we discuss the "boss" allegation below.

52. Ms McGugan understood the claimant's role as an ANTT specialist nurse to have an on-site focus and so asked the claimant to explain what work she could do from home. We find that she was sceptical of the extent to which the role could be done from home. We also find that she did express the view that the respondent would need the claimant to be flexible in terms of availability. The claimant explained that she had childcare on Monday, Wednesday and Friday and that she was the primary childcarer so would have to leave to pick up her children as required. We find that, as the claimant suggested, Ms McGugan did ask about the claimant's partner's role and that she explained that he was an Anaesthesia Associate at another hospital who worked long and unpredictable hours so could not pick up and drop off the children at nursery.

53. Ms McGugan's evidence was that the meeting was an informal and pleasant one. The claimant saw it differently. It is her case that from that first meeting Ms McGugan was hostile and dismissive to the concept of her working flexibly. We find it plausible that Ms McGugan's approach to the meeting was brisk and business-like. We also find that she may well not have been sensitive to the genuine anxiety which the claimant felt about how she would balance her childcare requirements with the respondent's requirements of her. We find that Ms McGugan was somewhat frustrated by the claimant referring to "flexi" working without being clear about what exactly that meant in her case and sceptical of the extent to which she could do her role from home. She did tell the claimant that she would not be able to 100% guarantee that she could work fixed days and expected her to work 3 days a week. We find the combination of those factors led to the claimant perceiving Ms McGugan's approach to the discussion about her working pattern as "hostile and dismissive" but do not find that was Ms McGugan's intention.

54. It is part of the claimant's case that Ms McGugan's file note of the meeting (pp.166-167) was "wholly inaccurate and misleading" (issue 1.1.7). We find it reflects the substance of the discussions without capturing everything that was said. It does not, for example, focus on the change from 2 compressed days to 3 days a week but that, we find, is because Ms McGugan did not find that a significant change (though it clearly was from the claimant's point of view). We find that Ms McGugan created the file note as a record of their discussion for her own future reference and that it was kept on her own personal computer drive and not added to the claimant's personnel file. We find making such notes was part of her process in managing the 7 staff in the IPC Team.

55. The claimant had two KIT days in August then returned to work after maternity leave on 20 August 2018. On that day she told Ms McGugan that she was moving her children to a new nursery. She no longer had childcare on Wednesday but could work the remaining days of the week. Ms McGugan told her she would try and accommodate her as much as she could.

56. Ms McGugan made a file note of that conversation (p.167). The claimant did not suggest it was inaccurate.

57. On Wednesday 22 August 2018 the claimant and Ms McGugan met for a 1:1 "return from maternity leave" meeting. At that meeting Ms McGugan confirmed her

expectation that the claimant would work her hours over 3 days, with 2 days of 6 hours and 1 of 6 hours and 45 minutes. She confirmed there could be flexibility around start and finish times but she could not guarantee fixed working days a week. However, she would attempt to accommodate the claimant's childcare requirements when setting the shifts and off duty rosters.

58. As we said at para 51 we think it more plausible that it was that at this meeting that the alleged "boss" conversation happened. Whichever is correct, Ms McGugan denied using that term and we find it unlikely that she would have used it. We note the claimant does not make that allegation in her grievance (pp.200-204). We do, however, find that Ms McGugan would have made it very clear to the claimant that it was for Ms McGugan to set the working pattern and shifts. We find that would be consistent with her no-nonsense attitude and her view that the team she had inherited had grown somewhat free-range in the absence of a direct line manager. We find that Ms McGugan felt it was important to reiterate some management discipline over the team. That seems to us consistent with the evidence we heard about the team member's hours now having been standardised as 9-5.

59. At that meeting the claimant told Ms McGugan that the previous working pattern had allowed her flexibility including being allowed to work from home to accommodate her childcare needs and her underlying health condition. In answer to Ms McGugan's question, she confirmed that there had been no formal change to her contract to reflect those flexible working arrangements. She also said that the failure to correctly document the arrangements had put her job in jeopardy by putting her at risk of not being able to comply with her "official" working pattern.

60. The claimant suggested to Ms McGugan that she should make a formal flexible working request. We understand that to be a suggestion that she should request that she revert to her work pattern in April 2017, i.e. two long compressed days on Monday and Friday with one of them being worked from home. The claimant alleged that Ms McGugan responded by seeking to dissuade her from making such a request and suggesting that if she did and it was rejected it would be very difficult for her to continue working for the respondent. We do not think it plausible that Ms McGugan would have said that. We do, however, think it plausible that Ms McGugan sought to manage the claimant's expectations by setting out her view that there was an expectation within her role of flexibility in terms of when she did her hours and on which site, i.e. that there was a significant risk that any such application would be rejected. The claimant did not at that point make a formal flexible working request.

61. Ms McGugan's file note of that meeting (p.170) said that she would "clarify this in writing to [the claimant]" but it is agreed she did not do so. The claimant does not allege this file note is inaccurate or misleading.

<u>The position as at August 2018</u>

62. The position as at August 2018 after the claimant returned from her second maternity leave was that she was working hours her 18.75 per week over 3 almost equal days (2 of 6 hours and one of 6 hours 45). On those days she was due to attend and work on site after dropping her daughter off at nursery at 8.30 a.m., leaving in time to pick her up at 5.30 p.m. The days of the week when those 3 days were to be worked could change every week. Ms McGugan had agreed to try and

roster the claimant's shifts so as to accommodate her childcare (which in practice meant avoiding her working on a Wednesday). Compared to her previous work pattern from July 2017 the biggest change was that she was required to work three days a week on site which could be any day of the week (rather than two long days on site on Monday and Friday and the balance of her hours from home).

August 2018 to January 2019 – appraisal, job application and disputed references

63. The claimant had her appraisal with Ms McGugan on 31 August 2018 (pp.173-185). That was less than two weeks after the claimant returned from maternity leave so she and Ms McGugan had not been working together many days when it was completed.

64. The claimant answered "no" to "I have concerns which are affecting my workplace experience" and "yes" to being happy with the support she was receiving form her immediate manager (p.177). She answered "no" to "I believe [the respondent] provides equal opportunities for career progression or promotion" and "no" to "generally I have been able to make suggestions to improve the work of my team/department" (p.177).

65. The appraisal included Job Specific and Personal Objectives (p.181). In summary they were:

- Demonstrating a commitment to equality, diversity and inclusion;
- Reviewing and updating the ANTT policy, and the ANTT e-learning package and contributing expertise to the draft blood culture an IV polices;
- Reviewing the existing ANTT service to make sure the respondent was compliant with ANTT competencies and training;
- Re-establishing ANTT and IV networks to share best practice and learn from other organisations, highlighting the good work undertaken by the respondent in relation to ANTT;
- Attend the annual ANTT conference.

66. The claimant worked the 3-day pattern from August 2018. We have set out our findings about the disadvantage to her of doing so at paras 154-156 below under the heading "individual disadvantage". The claimant was not happy working that work pattern and in October 2018 applied for the post of Practice Nurse at the Penny Lane GP Surgery. That was nearer to her home. She was successful in her application and agreed that she would be working 20 hours a week over 3 days which would not include a Wednesday (pp.187). However, the job offer was withdrawn by a letter dated 22 November 2018 (p.197) because the Surgery found the two references provided for the claimant unsatisfactory.

67. Those references had been provided by Dr Mortimer on 14 November 2018 (p.194-195) and Ms McGugan on 16 November 2018 (p.196). There are two aspects of those references which the claimant says are "misleading and unfair" (1.1.9). First, both references included a table setting out the claimant's sickness absences but

without identifying whether any of those absences were related to the claimant's pregnancy or a disability. Dr Mortimer's reference referred to the claimant having had "extensive episodes of sickness absence".

68. The claimant brought a Tribunal case about that aspect of the references (case number 2402519/2019). She claimed that Dr Mortimer's comment was unfavourable treatment because of something arising from the claimant's disability and so a breach of s.15 of the 2010 Act. She also brought claims of indirect sex and indirect disability discrimination under s.19 of the 2010 Act. She relied on three provisions, criteria or practices ("PCP"s) which she said the respondent applied. PCP1 was listing absences within references without providing any detail of the reasons for the absences. PCP2 was commenting negatively on substantial sickness absence records without specifying the reasons for the absences. PCP3 was commenting negatively on the employee's substantial sickness records. By a judgment dated 19 November 2020 (pp.301A-301GG) a Tribunal chaired by Employment Judge Aspinall ("the Aspinall Tribunal") held that all the claims failed. In summary it accepted that Dr Mortimer's comment had been accurate and so not unfavourable treatment, that the respondent had not applied PCP2 and PCP3 and that PCP1 was objectively justified by the need to provide a true and accurate reference. We agree with the Aspinall Tribunal that when it came to the claimant's sickness absences, the references provided were accurate and did not contain any negative comments.

69. The second aspect of the references which the claimant said were unfair or misleading were the responses given to the request for feedback on her "Interpersonal/communication skills" and "Problem solving skills". This was not part of the case considered by the Aspinall Tribunal.

70. Dr Mortimer in her reference provided positive comments on the claimant's "Clinical Skills" and "Timekeeping". Under "Interpersonal/communication skills" she commented that the claimant's communication skills were very good but added that "she would benefit from further developing skills for constructive criticism to improve engagement with other staff groups with whom she interacts". Under "Problem solving skills" she commented that "[the claimant] is able to identify problematic issues well. She needs to further develop skills for taking ownership for resolving problems she identifies within available and practicable means and to balance ideal solutions to problem with those that are realistic and pragmatic".

71. Ms McGugan in her reference provided positive feedback on the claimant's "Clinical Skills" and "Interpersonal/communication skills". In relation to "Problem solving skills" she commented that "[the claimant] can identify problems and in most cases provide solutions to clinical staff when necessary. There are occasions when she has identified problems but escalated to senior staff to action when perhaps she could have addressed herself."

72. Dr Mortimer's and Ms McGugan's each had a professional duty to ensure that the references were true and accurate and we find their comments reflected their honestly held views about the claimant. The concerns expressed in the references had not, however, been raised with the claimant at the point the references were given. As noted above, the only appraisal meeting which Ms McGugan had had with the claimant was in August 2018 when they had only been working together for a few

days. We accept Ms McGugan's evidence that at that point she had not formed the views expressed in her reference.

73. The claimant had, however, been working with Dr Mortimer for some time and there had therefore been opportunities for Dr Mortimer to raise the concerns she expressed in her reference with her. Although she was not the claimant's line manager, they worked together closely and met regularly. We did not hear evidence from Dr Mortimer and so do not know why she never did so.

74. The claimant had asked the GP surgery to let her know before references were requested so she could tell Dr Mortimer and Ms McGugan that she had put them down as her referees. The GP surgery had failed to do that so the claimant had not had an opportunity to talk to either about their being her referees before they completed the references.

75. Understandably, the claimant was upset and confused by the withdrawal of the job offer. She asked Dr Mortimer and Ms McGugan about the references they provided. The claimant hoped that seeing the references would help her understand why the job offer had been withdrawn and move on. At a meeting on 22 January 2019 Ms McGugan showed the claimant the reference she had provided. The claimant told her she was upset by what had happened and Ms McGugan offered to ring the Penny Lane Practice to see if that would resolve matters. She told the claimant she thought her references was fair and accurate. We find that the claimant was more upset by Dr Mortimer's comments because they had worked together for longer.

<u>February 2019 - emergency leave, grievance, photocopier incident and deletion of appraisal</u>

76. In the week of 4 February 2019 the claimant had to take leave to look after one of her children who had chicken pox. She was then on annual leave for a week. On her return to work on 18 February 2019 Ms McGugan asked her to come into her office. She presented her with a carer's leave form in relation to her absence in the week of 4 February 2019 (p.206). Ms McGugan informed the claimant that she had used her total carer's leave for the next 12 months (which was 11.1 hours). She asked the claimant what she would do if the children got sick during the remainder of the year and queried whether her partner would be able to help out with child care. The claimant explained her partner would only be able to help out on Tuesdays.

77. The claimant's evidence was that Ms McGugan's behaviour was intimidating (allegation 1.1.10). We find it plausible that Ms McGugan would have asked the questions in a brisk or even brusque way but prefer her evidence that it was a genuine attempt to explore what contingency plan the claimant had. It was a genuine concern because given the age of the claimant's children there seemed a realistic risk that there would be other occasions when the claimant needed to take more time off for childcare reasons. We accept that Ms McGugan's concern was with how the claimant was going to balance her work life and childcare commitments. She had a focus on ensuring that the respondent was able to deliver its service and the claimant had a part to play in that. We find that the claimant genuinely perceived Ms McGugan to be unsympathetic but find that viewed objectively Ms McGugan's approach was not intimidating.

78. We find that Ms McGugan's file notes of the telephone call on 4 February 2019 (p.198) and the meeting on 18 February 2019 (p.206) were not inaccurate or misleading.

79. In the meantime, on 6 February 2019, the claimant submitted a formal grievance (page 200-204). It was sent to Claire Scrafton, the respondent's Deputy Director of Human Resources. The grievance was submitted on behalf of the claimant by Ms Cunliffe, her trade union representative. She headed her email, "Sensitive grievance involving HR" and asked that it be considered urgently (page 199). We set out our findings about the grievance process at paras 82-104 below. In summary, it focussed on the references provided by Dr Mortimer and Ms McGugan to the Penny Lane Surgery and the impact of the withdrawal of the job offer on the claimant's confidence and on her relationships with Dr Mortimer and Ms McGugan. Ms McGugan did not know anything about the grievance until July 2019. It asked for an apology, compensation, clarity about what absence information would be provided in future references and for the claimant's working pattern "to be formalized whether under the flexible working procedure or as part of my grievance" (p.204).

80. On Friday 22 February 2019, Ms McGugan was photocopying some personnel documents relating to the claimant – most likely the special leave form completed on 18 February 2019. While she was doing so, she dropped an envelope which included one of the claimant's fit notes on the floor by the side of the photocopier. The envelope was addressed to Val Weston in the claimant's handwriting. Later that day when the claimant went to the photocopier she saw the envelope, opened it because it was addressed in her handwriting and found that it was a fit note. The claimant took it to Ms McGugan in her office and said, "I think you dropped something" and then left. Ms McGugan was in the middle of something so did not look at the envelope. When she did and realised what was in it she went to find the claimant but the claimant had left for the day. When a few days later she did speak to the claimant about the incident we find that Ms McGugan did not apologise in the sense of saying she was sorry but did say she was mortified about what had happened. It is accepted that the fit note was not seen by anyone because it was in the envelope throughout the incident. We find that Ms McGugan did not think the incident was a significant one but the claimant found it very upsetting because of the sensitivity she felt about the medical history. It was sufficiently serious for the claimant to add it to her grievance (para 91 below).

81. Towards the end of February 2019, the claimant was due to have her performance review with Ms McGugan. When the claimant went to complete the paperwork she found her appraisal from August 2018 was no longer on the shared G:Drive 1.1.13). The claimant thought this was suspicious. There was no evidence from which we could conclude whether it had been moved or deleted in error or deliberately and, if so, by whom. The claimant's allegation is that the appraisal was deleted after she issued Tribunal proceedings. The claim form in the Aspinall Tribunal proceedings was issued on 19 March 2019. We found it difficult to understand why it would benefit the respondent to delete the claimant's appraisal. In the absence of any evidence it was deleted deliberately we find that it was not.

<u>March to July 2019 - the Claimant's Grievance and first secondment request</u>

82. As we have said, on 6 February 2019 the claimant submitted a written grievance (pages 200-204). In it, she said her grievance "relates to discrimination:

initially problems with agreeing flexible working, culminating in references sent to a future employer that results in withdrawal of a job offer". She explained about the inclusion of pregnancy related and disability related absences in her reference and her view that "this clearly caused problems for my prospective employers" (p.200). She then set out a narrative of events since her first pregnancy. In summary, she said she had felt supported by Ms Weston who had allowed her to work flexible hours and from home as well as attending the office; said that Ms Redfern had confirmed in April 2017 that she would not support the current working arrangements which had led to her applying for the job at the Penny Lane GP Practice which would have provided better flexibility for childcare options. She described the meetings with Ms McGugan in 2018 in which she had told the claimant she would want her based on site three days a week but was not willing to agree fixed working days which caused the claimant concern about what would happen were she rota'd on days when she did not have childcare. She referred to Ms McGugan having dissuaded her from pursuing a formal flexible working application at the time because that "might pose difficulties for the claimant continuing in post". She confirmed that in fact she was rota'd to work on days when she had childcare and her start and finish times were flexible around core hours.

83. The claimant then described what had happened when Dr Mortimer and Ms McGugan had provided their references to the Penny Lane Surgery and said that despite the surgery providing an explanation for the job withdrawal, she believed the real reason was her level of sickness absence set out in the references. She explained that Dr Mortimer and Ms McGugan had reassured her there were no issues with the references they had provided and expressed how much her work was valued. Despite that, the claimant was unsettled and confused and very upset. She reported the discussion she had had with Ms McGugan on 22 January 2019 and that felt that relationships had been strained and damaged. She said that "care was not taken in providing information that would likely (and has) result in discrimination against me as an individual" and that attempts to resolve the issue informally with Dr Mortimer and Ms McGugan had failed. She referred to damage to her reputation, the stress and upset she had felt and the undermining of professional relationships and that she was "struggling to see how the relationships can be fully repaired".

84. The grievance concluded by setting out (p.204) the outcomes the claimant was seeking:

- A formal apology and compensation
- Clarification of what absence information (and for what period) would be provided to any future prospective employers.
- An assurance that if details of any absence were provided in any future references, the fact that they were pregnancy related or disability related will be clearly stated.
- Her working pattern to be formalized whether under the flexible working procedure or as part of her grievance.

85. By 28 February 2019 when there had been no acknowledgement of the grievance, Ms Cunliffe telephoned the respondent's HR team. She was told that Claire Scrafton was seconded two days a week and this was leading to delays. On 1

March 2019 Ms Cunliffe re-sent the grievance to Victoria Collins who was the Interim Assistant Director of HR (page 209).

86. On 10 March 2019 Ms Collins confirmed receipt, apologised for the delay in response to Ms Cunliffe's email and confirmed she would review the grievance and make arrangements to progress it (page 210). On 10 March 2019 Ms Cunliffe also received an email from Ms Scrafton (page 212). That email did not contain an apology.

87. Ms Collins had alerted Kate O'Driscoll ("Ms O'Driscoll"), the respondent's Head of HR about the grievance. On 14 March 2019 she confirmed in a telephone call with Ms Cunliffe that the respondent was now investigating the case as a priority (page 213). However, neither the claimant nor Ms Cunliffe heard anything further from the respondent, and on 28 May 2019 Ms Cunliffe spoke to Mrs Redfern about the lack of progress in arranging a grievance hearing. Mrs Redfern promised to speak to the respondent's HR about it (page 221).

88. The respondent's grievance policy states (section 6.2 – pp.330-331) that the first stage one hearing should take place within 14 calendar days of receipt of the grievance subject to shift arrangements and leave or any other exceptional circumstances. It envisages that witnesses may be called to that hearing and that the decision would normally be announced immediately following the hearing. Whenever that is not possible the employee will normally be advised of the decision within 10 calendar days unless extensive investigation is required.

89. On or around 29 May 2019 Ms O'Driscoll asked Mr Babbs to be grievance manager. He was sent her grievance document and Ms O'Driscoll gave him some background to it. On 3 June 2019 Mr Babbs wrote to the claimant telling her of his appointment and inviting her to a stage one grievance hearing on 13 June 2019 (page 222). The letter advised her of her right to be accompanied and asked her to provide any relevant additional papers prior to the meeting and notify Mr Babbs if she intended to call any witnesses. The claimant received that letter on 6 June 2019.

90. That meeting had to be cancelled because Ms Cunliffe was not available at such short notice (p.223). It was rearranged for Friday 5 July 2019 (p.224). In the meantime, on the 30 June 2019, the claimant submitted her formal flexible working request dated 28 June 2019 (p.225). In her covering email to Ms McGugan dated 30 June 2019 (p.226) she told her she had been feeling unwell for some time due to workplace stress and had self-referred to HWWB. We set out our findings about the flexible work request and its outcome at paras 105-115 below. Although in her covering email to Ms McGugan dated 30 June 2019 (p.226) the claimant had written "As you are aware I have been feeling unwell because of workplace stress for some time" we find that Ms McGugan was oblivious to the level of stress which the claimant was feeling until the claimant raised it in that email and discussed it with her at the flexible working meeting on 11 July 2019.

91. The grievance meeting took place on 5 July 2019. It was chaired by Mr Babbs with Sandra Cole ("Ms Cole") of the respondent's HR taking notes. Ms Cunliffe attended with the claimant. At the meeting the claimant went through the events set out in her grievance. She emphasised that the trust between her and Ms McGugan and Dr Mortimer had broken down. In addition to the matters set out in the grievance she set out her shock when she saw the file notes made by Ms McGugan (which had

been provided in responses to her Subject Access Request), the deletion of her appraisal and referred to the "photocopier incident" and what she saw as Ms McGugan's failure to apologise. That "photocopier incident" was added to the grievance by a handwritten note dated 5 July 2019 (p.233). During the meeting the claimant made it clear that the working relationship with Dr Mortimer and Ms McGugan had been damaged with trust between them gone and it being very difficult to carry on working.

92. At the end of the meeting Mr Babbs told the claimant and Ms Cunliffe that they would need longer than 14 days to provide the grievance outcome because Mr Babbs was on leave for a week from that evening.

93. Immediately after the meeting, Ms Cunliffe emailed Ms Scrafton highlighting the strain the claimant was under "without her previously agreed reasonable adjustments and dreading every interaction with [Ms McGugan and Dr Mortimer]" (p.240). She suggested that a secondment to "somewhere else entirely" would be beneficial and suggested Alder Hey. She reported that the claimant felt trapped waiting for the grievance outcome which would be delayed for at least 3 weeks as a result of Mr Babbs being on leave. We find that email accurately sums up the claimant's state of mind at that point.

94. On Thursday 11 July 2019 Ms Cole emailed Dr Mortimer and Ms McGugan to tell them the claimant had in a formal grievance raised concerns about the references they had provided and "some more recent issues". That email (pp.238H-I), sent at 8:07 asked to meet them separately with Mr Babbs to discuss those concerns.

95. Ms McGugan knew nothing about the grievance. She replied to Ms Cole within the hour expressing puzzlement, asking to see a copy of the grievance and providing four dates in July when she could meet Ms Cole and Mr Babbs (pp.238G-H). Ms Cole responded by email at 11:56 that same day (pp.238F-G). She told Ms McGugan that none of the dates she had suggested were suitable for her and Mr Babbs. Instead she asked Ms McGugan to respond in writing to 9 questions. 4 were about the reference. The next 4 asked about her working relationship with the claimant since the withdrawal of the Penny Lane job offer, about "the recent incident when [the claimant] found her fit notes on the team photocopier and gave them to you", about the progress of the flexible working request and about whether Ms McGugan had "previously said [to the claimant] that if her request was refused, this may pose difficulties to you continuing in post". The final question was "any other information you feel relevant" (pp.238F-G). Ms Cole did not send Ms McGugan a copy of the grievance.

96. Ms Cole adopted the same process with Dr Mortimer (pp.237A-E) because she was due to be on leave from 11 July to 29 July. Dr Mortimer was asked 4 questions. She answered them by an email at 13:15 that day (pp.237B-D). In summary, she stood by the comments in the reference she had provided to Penny Lane Surgery, confirmed that she had not discussed the reference with the claimant before submitting it because the claimant was on leave and that she had provided a copy to the claimant when the claimant came to see her after the job offer was withdrawn. She also confirmed that the claimant had not told her she was raising a grievance and reported that their working relationship remained professional.

97. Ms McGugan provided her written answers on 18 July, having been chased by Ms Cole (pp.238A-E). She stood by her reference which she regarded as being a positive one overall, confirmed she had not discussed the reference with the claimant before sending it and stood by her comment about the claimant's tendency to escalate issues to senior colleagues which she was more than capable of dealing with herself. She did not suggest she had raised that tendency with the claimant in a 1:1 or other meeting and said their working relationship was a professional one. She confirmed the progress of the claimant's flexible working request and denied saying that if a formal request was refused it could cause difficulties for the claimant continuing in post, quoting her file note of the meeting on 22 August 2018. Asked about "the recent incident when [the claimant] found her fit notes on the team photocopier and gave them to you" she responded, "This is not the case". She accepted the envelope with "an old fit note" had fallen on the floor and that the claimant had returned it to her. She said that when she realised what happened she "went straight to [the claimant] and explained how it happened and apologised". She said it was reported to her that the claimant "appeared to be unhappy" about what had happened but that she seemed satisfied with her apology and "never mentioned it again" (p.238C).

98. In answer to the final question ("any information you feel relevant") Ms McGugan said she did not believe that the reference she provided would have resulted in the job offered being withdrawn. She also said that the claimant had "never come to me with any issues following the last conversation we had about her reference in January. I was surprised to see in her email regarding flexible working that she said she is unwell due to work related stress. I have since referred her to HWWB and I have strongly advised that she see her GP." She said she had a good professional relationship with the claimant and been flexible in dealing with requests she made around working hours or leave for childcare reasons (p.238E). We find that the claimant had already self-referred herself to HWWB when Ms McGugan made a secondary referral.

99. By the time she was writing her answers, Ms McGugan had received the claimant's formal flexible working request and on 11 July 2019 held a meeting with the claimant to discuss it. The claimant had also on 14 July 2019 asked to work compressed hours in the first two weeks of September to cover her daughter's settling in sessions at school. We set out our findings about those requests at paras 105-115 below.

100. By 24 July 2019 Ms Cunliffe had had no response from Ms Scrafton to her 5 July emailing requesting that the claimant be seconded elsewhere. She sent a follow up email this time to Ms O'Driscoll and copying in various of the respondent's HR staff and Mrs Redfern (p.239-240). In that email she stressed the impact that delay in resolving her flexible working request was having on the claimant, referring to it as the "single greatest stress" and asked that the decision be expedited and provided by 10 a.m. the following day. She advised that the claimant had seen HWWB that day but the appointment was a screening one rather than a substantive counselling appointment. She reiterated the request for a secondment to support the claimant because the ongoing Aspinall Tribunal case "cannot help but affect relationships within her team". She stressed the seriousness of the situation by saying that if secondment was not an option "please advise us now and [the claimant] will review her future with [the respondent]". Ms O'Driscoll responded within minutes with an

offer to discuss when Ms Cunliffe was free. Ms Cunliffe responded to say she was free and then tried to ring Ms O'Driscoll twice but was unable to get through to her.

101. Ms Cunliffe was on leave from 26 July, returning to work on Monday 5 August 2019. By Tuesday 30 July 2019 it had been over 3 weeks since the grievance meeting. Mr Babbs had been back at work since Monday the 15 July and by Thursday 18 July 2019 had received Dr Mortimer and Ms McGugan's response to the questions emailed to them. The claimant emailed Mr Babbs at 13:30 to ask when she could expect to receive the grievance outcome (p.241). He replied that afternoon to apologise for the delay and explain he had been awaiting further information regarding references. He said he was to meet with Ms Cole and they would provide a response by the end of that week. We find it was the claimant's email which prompted Mr Babbs to take the steps needed to finalise the grievance outcome including meeting with Ms Cole.

102. Mr Babbs set out the grievance outcome in a letter to the claimant dated 30 July 2019 (pp.247-249). It was sent by registered post but not emailed to her. It was emailed to Ms Cunliffe on 1 August 2019 (p.250). Mr Babbs was unable to explain why the letter was not also emailed to the claimant. Because Ms Cunliffe was on leave she did not forward the emailed letter to the claimant. Having not received the promised outcome letter by the end of the afternoon on Friday 2 August 2019 the claimant sent Mr Babbs a chasing email (p.251). He responded by email first thing on Monday 5 August telling her that the letter was sent via recorded delivery on Thursday 30 July. The claimant did not get the letter until that Monday. She had to collect it from the post office depot. That was because it was a registered letter which had to be signed for and she had not been in to do so on the Saturday when an attempt had been made to deliver it.

103. Mr Babbs's overall conclusion was that there was "insufficient evidence" to uphold the claimant's grievance. He noted that the flexible working request was being dealt with as a separate process and that the issue of compensation was being dealt with by the RCN's legal team. His specific conclusions about the matters he saw as being within the compass of the grievance were as follows:

- As regards the request that future references set out the reason for absences, Mr Babbs had "been advised" that the respondent's Reference Policy was "currently being revised" including standardised provision of sickness absence information. If the claimant wished to provide further information about reasons for absence to a prospective employer she was free to do so.

- As regards the working relationships between the claimant and Ms McGugan and Dr Mortimer, they had not noticed any changes in the professional working relationship with the claimant. Ms McGugan believed that she was approachable and had been very reasonable in accommodating childcare related leave requests and supported the claimant in relation to work-related stress including by referring her to HWWB. Dr Mortimer had tried very hard to ensure the ongoing issues had not affected her working relationship with the claimant.

- As regards the photocopier incident, Mr Babbs repeated Ms McGugan's version of what had happened as set out in her answer of 18 July 2019 (para 97 above).

- He suggested the claimant consider mediation with Ms McGugan and Dr Mortimer to try and resolve the "relational matters you believe you have with them both".

104. Mr Babbs confirmed in cross examination evidence that he had not raised the possibility of mediation with Ms McGugan or Dr Mortimer prior to including the suggestion in his letter. He had not spoken to either about the grievance but based his decision on their written answers. He did not speak to the claimant after receiving those written answers before making his decision, e.g. to give a right to respond.

July 2019 - the claimant's flexible working request and request to work compressed hours for the first two weeks of September 2019

105. In her formal flexible working request submitted on 30 June 2019, the claimant asked for:

- Flexi-time around core hours

- Agreement to compress hours and/or work a weekend (e.g. during school holidays)

- Agreement to work from home, including Skyping into meetings (e.g. HIPG/team meetings) if required to reduce pressure on childcare. (p.226).

106. In essence, the request was to return to the claimant's working pattern in April 2017, i.e. working 2 long days instead of 3 days and with increased time working from home rather than on site. Unlike in April 2017, the claimant did not request that the 2 long days be fixed on specific days of the week.

107. The relevant version of the respondent's Flexible Working Policy ("the FW Policy") was version 5, approved in May 2018 (pp.340-362). The FW Policy described the different kinds of flexible work available and the procedure to be followed. It included a standard form to be used by employees making a statutory request for flexible working which the claimant used in making her request (p.225). The FW Policy said that the manager and employee should meet where possible within 28 days to discuss the request and that the manager would notify the employee of the decision within 14 days of the meeting.

108. On 11 July 2019 the claimant and Ms McGugan met to discuss the request. The claimant explained that she was struggling with juggling child care, caring responsibilities for her partner's mother and her work commitments. Her children were in nursery apart from on Wednesdays but her daughter was due to start school that September. The claimant was concerned that the difficulties of juggling childcare and work would increase when that happened particularly during school holidays.

109. The claimant's view was that Ms McGugan was sceptical about her request from the start. Her evidence was that Ms McGugan told her that granting it would

"open the floodgates" to other requests. Ms McGugan denied she had said that. We prefer Ms McGugan's evidence that that phrase was not used. Although not recorded in Ms McGugan's note of the meeting (pp.235-237) we do find that she did explain to the claimant that she had had to turn down other requests because of the needs of the service, giving as an example her refusal of a request by Alice Cruz to vary her start and finish times. We find Ms McGugan also questioned how the claimant would deliver her role if she was working on a weekend and was sceptical about the extent to which the respondent's available IT systems would enable the claimant to join meetings from home, e.g. by Skype. Ms McGugan confirmed that she would not have any difficulty with the claimant being flexible in her start and finish times. We find that Ms McGugan had not pre-determined the outcome of the claimant's request but did have genuine concerns about how the claimant could deliver the ANTT role if she was working from home or working on a weekend. The claimant expressed the view that the only part of her role which she could not deliver on the weekend was training. She would still be able to attend on site during the weekend. She also explained that she would intend to spend some of the 2 long days working from home and some on site.

110. At the end of the discussion about flexible working, Ms McGugan explained that she would discuss the request with Mrs Redfern and HR and let the claimant know the outcome in due course. They then had a discussion about the stress the claimant had been experiencing at work and the impact of the references incident on the claimant's relationship with Dr Mortimer in particular. The claimant explained that she had been experiencing panic attacks on the way in to work and had self-referred to HWWB. Ms McGugan advised her to see her GP as soon as possible and also confirmed she would be making a management referral to HWWB. As we have already recorded, we find Ms McGugan was oblivious to the stress the claimant had been experiencing until she raised it in the covering email to her flexible working request.

111. On 14 July 2019 the claimant emailed Ms McGugan to ask for a one-off variation to her working hours during the first two weeks of September. That was because during those "settling in" weeks her daughter would not be attending full days at school. The claimant asked to work compressed hours, working 2 days on Monday and Tuesday of each of those weeks (p.238).

112. On 30 July 2019, Ms McGugan sent the claimant the outcome of her flexible working request by email and in the post (pp.242-246). That is more than the 14 days after the meeting stipulated in the FW Policy. By the time it was sent Ms Cunliffe had chased Ms O'Driscoll for the outcome, highlighting the importance of the issue to the claimant and the stress she was under (para 100 above).

113. Ms McGugan based her response on the template outcome letter at Appendix 4 to the FW Policy (pp.359-360). In reaching her decision Ms McGugan had reviewed the claimant's job description and discussed the matter briefly with Ms Redfern and Dr Mortimer. We find that discussion was little more than rubber stamping exercise at the end of one of their regular meetings.

114. Ms McGugan agreed to the claimant's request to work compressed hours for the first two weeks of September. She also agreed to the claimant's request for flexible start and finish times (within the range 8.00-17.00). However, she rejected the requests to work compressed hours over 2 days, rejected the request to work

from home and the associated request to join meetings by Skype. The claimant's working patterns would remain 3 days (2 x 6 hours and 1 x 6h 45 mins) and based on site.

115. In summary, her reasons were:

- There would be a detrimental impact on quality: the claimant's role required a "constant visible presence" in clinical areas so she could carry out observational audit of practice and provide education and training to sustain improvements in ANTT;

- The change would have a detrimental effect on the ability to meet patient care demands: reducing the claimant's time in clinical areas could negatively impact on safe practice, risk assessment and promotion of best practice;

- There would be a detrimental impact on performance: the claimant's absence from clinical areas might lead to a decrease in the targets around ANTT (e.g. ANTT compliance training to be over 85%) and to a decrease in the audit and surveillance essential to the service;

- There was insufficient work during the periods proposed to be worked: 70% of the claimant's role was clinical and working from home or working outside of core hours (e.g. on weekends when fewer staff were working) would reduce the visibility of the ANTT role and the time the claimant was on site when staff were available for training or might need to seek her advice. Ms McGugan listed tasks within the claimant's role which could not be delivered from home or if working compressed hours including ward based audit and surveillance functions and ward based teaching sessions.

- Reducing the claimant's visibility would have a negative impact on communications and interpersonal relationships for the claimant and the department.

- As regards attending meetings by Skype, the requirement to attend HIPG meetings was limited to attending 50% of those meetings which were held every two months for 2 hours, i.e. the claimant was only required to attend for 2 hours 3 times a year. Ms McGugan noted that she had not required the claimant to attend the infection prevention meetings every Friday morning but agreed that she could instead submit a written update.

116. It is part of the claimant's case that Ms McGugan based her decision on incorrect facts. Specifically, the claimant says that the reasons given by Ms McGugan did not reflect the reality of her job. It is convenient at this point to record our findings of fact about the claimant's role and what it involved in practice.

117. The job description for the claimant's role (pp.66-71) included a "Job Summary" which said her role was to "work with the IPC service to provide advice, education and support for all staff, patients and public throughout the [respondent Trust] in relation to ANTT" and "carry out duties relating to prevention, surveillance,

audit and control of infection, working within a defined framework as directed by the Service Manager".

118. The Job Description then set out the post-holder's "Duties and Responsibilities" in a bullet point list under 12 main headings. There are more than 60 bullet point duties so we do not list them all here. Instead we focus on those relevant to what we find to be the core dispute between the claimant and the respondent about her role, namely the extent to which it required her to be on-site interacting directly with staff and patients on the ward. At the heart of Ms McGugan's reasons for refusing the claimant's requests to work from home and work compressed hours was her view (shared we find by Mrs Redfern) that the ANTT role required a greater presence on the wards than the claimant's requested working pattern would allow.

119. Perhaps the starkest contrast was between Ms McGugan's assessment in her flexible request decision of the percentage of the claimant's role which was "clinical" (70%) and the claimant's (10%) (p.256). By "clinical" we understand both to mean work undertaken on the wards, either in terms of actively auditing on-ward practices as they impacted on infection control, directly teaching staff on the ward or being a visible presence on the wards who staff could seek advice from about ANTT.

120. "Clinical" is the first heading in the "Duties and Responsibilities" section of the claimant's Job Description. The bullet points under it do include duties which would seem to require on-ward presence, e.g. ensuring ANTT compliance with IV-line insertion, monitoring compliance relating to ANTT guidelines, regularly providing training and education to staff. The fourth bullet point is to "maintain a high profile promoting a positive relationship with clinical and non-clinical areas on behalf of the IPC service." There are also duties relating to investigating, managing and reporting on infection outbreaks in clinical areas which would require at least some presence in the clinical area when investigating. There are other duties listed under that heading which are more "hands off" and which it seems to us could be done remotely, e.g. ensuring policies are up to date, providing infection control advice in relation to the proposed purchase of medical equipment, collecting clinical data for use by the IPC team.

121. Of the duties listed under the other headings, we find that they were also a mix of "hands off" and "hands on". To give some examples, the duties under "Clinical Governance/Quality" were primarily "hands off" duties involving providing specialist advice to the respondent and to colleagues on quality assurance or risk management issues arising from ANTT as well as developing a performance monitoring framework from ward to board level. "Communication" involved more "hands on" duties such as providing advice to patients, relatives and the general public and "communicating significant microbiology reports to ward staff". Under "Education" the duties were a mix of "hands on" duties such as participating in specific and relevant teaching programmes and study days for all grades of staff and more "hands off" work such as developing training packages and programmes and identifying training needs. There was a similar mix under the heading "Surveillance, Audit and Research", which included "hands on" tasks such as being involved in targeted surveillance, carrying out audits of clinical and non-clinical departments and more "hands off" tasks such as developing IPC indicators relating to ANTT training and competence. We accept that some "audit" or "surveillance" work could also be

"hand off" in the sense that it might involve a desk audit of data or reports rather than on-site surveillance of what staff were actually doing on the wards.

122. We find that the job description was broad enough to encompass both "hands on", ward based duties and more "hand off", policy based duties. The reality was that the claimant could not carry out all those duties given that she was working part time. As she accepted in cross examination, Ms McGugan as her manager (and by extension Mrs Redfern when she was fulfilling that managerial role) were entitled to decide which of the duties within her job description she should prioritise. We find that as far back as Mrs Redfern's letter of 28 April 2017 (p.148) the respondent's emphasis was on on-site audit and surveillance work with the aim of reducing outbreaks of infection.

123. The claimant's evidence, however, was that in practice by July 2019 she was spending very little of her time carrying out such "hands on" audit and surveillance work. For her appeal against the refusal of her flexible working request she carried out an analysis of her diary to produce a table and chart showing how her time had been spent in the period March-August 2019 (pp.259). She allocated the time spent into one of 6 categories and worked out the average percentage for each category in percentage terms. Her analysis showed on average over the 21-week period she spent 58% of her time on Admin (office based); 12% on Teaching/Assessing (delivered); 4% on Ward/patient visit (clinical); 6% on Audit; 8% on Meetings; and 12% on training/education (received).

124. In her cross-examination evidence, the claimant clarified that the "audit" category included both desk based paper audit work and ward-based audit work. The "ward/patient" category did not include ward-based audit work but included visits to patients, e.g. because they had had an infection. This was work which she carried out both to reassure patients and their relatives but also to learn lessons from what had happened. The admin/office category included emailing, writing reports and developing policies.

125. Although the claimant's appeal against the refusal of her flexible working request was not heard because her employment ended, Ms McGugan was asked about her analysis in cross examination. She did not suggest it was inaccurate. Instead she confirmed it reflected what the claimant was doing in practice at that time, i.e. spending little time on the ward. Her view was that the claimant was not being proactive enough and was not visible enough for her role. She felt there was a need to re-envision the role as a proactive, ward focussed one. She suggested that "vision" of what the role should involve would have been raised with the claimant at her next performance review which would have been due in August 2019 or thereabouts. She accepted, however, that the claimant had as at July/August 2019 been given no indication that she was not performing her role as she should despite their having regular catch ups.

126. In summary, then, we find that the role as the claimant was carrying it out at the time she made her flexible working request was primarily a desk-based one. We also find, however, that Ms McGugan and Mrs Redfern's view was that the role the claimant should have been carrying out was a more proactive, ward-focussed role prioritising ward-based audit, training and advice-giving rather than one focussed on policies and reports. They were also of the view (expressed since 2017) that the

claimant's presence "on site" was important in itself as she was the visible representative of ANTT (something specifically referred to in her job description).

127. We heard brief evidence about the interaction between the claimant and the IPC team. Our conclusion was that the claimant's role was in it but not of it. The ANTT was a stand-alone role although there was clearly a need for interaction with the IPC team. For example, information about infections gained by the IPC team was part of the "data" used by the claimant for the audit part of her role. However, Ms McGugan confirmed that the claimant was not required to cover the work of her IPC colleagues. To that extent, when she was required to work was not dictated by the IPC capacity during a particular week and so would not, e.g. depend on how many of the rest of the IPC team were on leave in any particular week.

128. Although there was a reactive element to the ANTT role, it was not a role where the claimant was "on call" in any sense. She would not, for example, be required to attend on a non-working day if there was an infection outbreak. If there was such an outbreak, it would be a priority on her next working day and might therefore require a ward visit.

<u>5 August 2019 to 13 August 2019 – appeals against grievance and flexible working request outcomes and HWWB appointments</u>

129. By 5 August 2019, when Ms Cunliffe returned to work after leave, the position was that the claimant's grievance and her formal flexible working requests had been rejected (except in relation to working compressed hours for the first 2 weeks of September and flexibility around start and finish times). There had been no decision about the proposal put forward by Ms Cunliffe on 5 July 2019 and chased on 24 July 2019 that the claimant be seconded to a different hospital. The claimant had self-referred to HWWB and Ms McGugan had also made a management referral to HWWB.

130. By 5 August the claimant had also spoken to Nick Bennett, the respondent's Head of Learning and Development, about the possibility of transferring to the Clinical Education team under his line management. He was happy with that suggestion, subject to the budget for the claimant's role transferring with her.

131. On 5 August the claimant lodged an appeal against the refusal of the majority of her flexible working request. She also on that day emailed Mr Babbs to express her disappointment with the outcome of her grievance and the delay in dealing with it. She confirmed she would be asking for a Stage 2 Grievance hearing, i.e. appealing the grievance outcome (pp.260-261).

132. At 17:46 on 5 August Ms Cunliffe emailed Ms Scrafton and Ms O'Driscoll asking to discuss the possibility of the claimant being transferred to Mr Bennett's management. Her email (p.261A) noted the lack of progress with the suggestion of a secondment elsewhere and said that the claimant's relationship with Ms McGugan "is beyond fixing with mediation". She suggested that the move to Mr Bennett's team was "the only way we can think of keeping her in work". She asked for a discussion the following day "as a matter of urgency".

133. Ms O'Driscoll replied at 11:15 the following day to ask why the claimant felt her relationship with Ms McGugan was beyond fixing and why the claimant felt

working in Clinical Education was a better fit for her role. She copied Mrs Redfern into the thread because she would be the ultimate decision maker about the proposed move (p.261). Ms Cunliffe replied half an hour later, emailing to say that the idea of mediation with Ms McGugan as proposed by the grievance outcome "makes [the claimant] feel quite sick" and that the claimant had been terribly hurt by how she had been treated. Ms Cunliffe reported that the claimant felt Ms McGugan had no regard for the challenges faced by a working mother when children are ill and did not value the extra hours she put in to get the job done after the remaining 0.5 of her role was not filled following her reducing her hours. Ms Cunliffe reported that the claimant felt trapped at the respondent while the reference issue was unresolved and that that a change of line management or secondment to another trust would be the only tolerable option to allow her to remain in work (p.260). Ms Cunliffe offered to have a chat with Ms O'Driscoll if she was free but we heard no evidence to suggest that any such chat took place on 6 August 2019.

134. The claimant's evidence, which we accept, was that she did not tell Ms Cunliffe that her relationship with Ms McGugan was "beyond fixing" but she accepted that she had at that point said that she felt mediation was not appropriate which was also what she had been advised by ACAS and the RCN (a point she made in her grievance appeal at point 14 on p.265). We find that the claimant had not ruled out mediation at some future point but her immediate priority was to arrange a "time-out" move away from the IPC team and Ms McGugan's line management because of the stress continuing to work in the team was causing her and the effect of that stress on her mental health and wellbeing.

135. From 8 August 2019 the claimant was signed off sick due to stress and anxiety until 16 August 2019 (p.301). She attended a counselling session on the 8 August and was also that day seen by an HWWB Nurse Adviser. The Nurse Adviser's opinion was that the issues in the case were not primarily medical but arose from the underlying issues at work. They recommended that there should be dialogue with management about "perceived issues at work" and that "the best way forward would be to support [the claimant] with a transfer to another department as mediation in this case would most likely no longer apply." They recognised however that this was a management decision and would depend on what was operationally feasible (pp.270-271).

136. An appointment was made for the claimant to see Dr Manzoor, an HWWB Occupational Health Physician, on the following day at 2.30 pm. Dr Manzoor's report to Ms McGugan was dated 15 August 2019 (pp.280-281). Dr Manzoor assessed the claimant as not being fit to return to work due to her workplace stress. The report said that the breakdown of workplace relationships was likely to make it difficult for her to return to her current workplace location unless there was a substantial repair of those relationships. It noted that there may be merit in the claimant working in a different department due to the significant breakdown in relations and "this should be discussed directly with HR" (pp.280-281).

137. In the meantime, on the 8 August the claimant had filed her appeal against the grievance outcome (pp.262-265). She recorded her disappointment with the delay in dealing with the grievance and with the outcome. She said that Mr Babbs had disregarded her perspective of the state of the working relationships with Ms McGugan and Dr Mortimer in favour of theirs and expressed incredulity that neither had noticed any deterioration in the working relationship since the reference incident.

She said the comments in the references were subjective and unfair, had never been raised with her and that no performance issues had ever been raised with her. She expressed the view that including pregnancy and disability related absences in the reference without explanation was unlawful and discriminatory (and was by then subject to the Aspinall Tribunal proceedings). She disputed that Ms McGugan had been flexible and accommodating in terms of her childcare needs, noting her refusal to confirm fixed working days despite the claimant having explained the difficulties that caused due to her not having nursery places for her children five days a week. She stated that Ms McGugan herself worked flexibly, starting early and leaving early to avoid traffic congestion. She concluded by noting that Ms Cunliffe had asked for a transfer of line management with immediate effect but had heard nothing further and said that if Dr Manzoor was of the "same view as the [HWWB] Nurse today that the strain of continuing to work under such unsupportive management is damaging to my health then I will consider that I have no alternative but to submit my resignation."

138. On receipt of the grievance appeal on 8 August 2019, Nicola Stephens, an Assistant HR Adviser at the respondent, contacted Ms Cunliffe's office to check when she would be available to attend meetings to hear the claimant's grievance appeal and flexible working request appeal from the week commencing 18 August 2019. Ms Cunliffe was on leave from 12-19 August 2019. As a result of a further exchange of emails between Ms Stephens and Christine Moore of Ms Cunliffe's office it was agreed both appeals would be dealt with at one meeting. On 16 August 2019, having checked diaries Ms Stephens confirmed the meeting would take place on Friday 23 August at 2.30 p.m. (pp.275a-275g). In her final email to Ms Cunliffe's office (p.275a) she said "Yes, Friday 23rd! Looking for a room/facilities now". It is clear from that email trail that the claimant had been told of the proposed meeting and asked for her availability. It was, at the very least, "pencilled in" for that date and time subject to room availability.

Events on 13-14 August 2019 – the cancelled meeting

139. It was agreed that after the appointment with Dr Manzoor on 9 August the claimant was upset and rang and spoke to Ms O'Driscoll who agreed to meet her. They discussed potential ways forward and it was agreed that a further meeting would be set up between the claimant, Ms O'Driscoll and Mrs Redfern. At 17:03 on 14 August 2019 Katie Fielding, Mrs Redfern's PA, emailed the claimant to tell her that Ms O'Driscoll and Mrs Redfern had some availability at 10-12 the following day. Ms Fielding acknowledged this was short notice and might not be convenient but asked the Claimant to call her. Ms Fielding had tried unsuccessfully to reach the claimant by phone earlier that afternoon (p.276-7).

140. The claimant replied to confirm she could attend a meeting at 10:00 or 10:30 the following morning and at 18:48 Ms Fielding emailed back asking her to confirm which time she would prefer and that she would call at 8:30 on the morning of the 15 August to confirm (pp.278-279). At 20:36 on the 14 August the claimant asked that the meeting take place at 10 and that she would be bringing someone to the meeting because Ms Cunliffe was on leave. She explained that she would be dropping her children at nursery around 8:30 so might not be able to take a call from Ms Fielding but would ring her back if she missed her call. The claimant in her statement stated that she was "not told the reason for the purpose of the meeting (para 84)". Although it is strictly correct that Ms Fielding did not spell out what would be discussed at the

meeting, we find that the claimant was fully aware of the purpose of the meeting, resulting as it did from her meeting with Ms O'Driscoll on 9 August.

141. On the morning of the meeting Mrs Redfern and Ms O'Driscoll agreed that it would be preferable if the meeting was postponed. At 9:30 Ms O'Driscoll emailed Ms Fielding asking her to call the claimant to tell her they would re-arrange the meeting "so that the claimant could attend with her RCN Rep Ms Cunliffe" (p.280). By the time Ms Fielding made that call at around 9:49 the claimant had already arrived and was sitting in her car in the Hospital car park. The claimant was upset by this late cancellation of the meeting and spoke to Ms O'Driscoll on the phone. Ms O'Driscoll explained that it would be in the claimant's best interests if Ms Cunliffe was at the meeting and that she would contact Ms Cunliffe's PA to ensure the meeting was re-arranged as soon as possible. She also said she would chase up the report from Dr Manzoor which was needed to inform the way forward. We find that Ms O'Driscoll did take those steps resulting in Ms Stephens confirming the 23 August as the date for the meeting with Ms Cunliffe's office (see para 138).

142. In the exchange of emails after the claimant's resignation (pp.289-290 and 294-295), Mrs Redfern stated that the meeting on the 15 August was only ever a "provisional" one and that the claimant should not have assumed it was going ahead without a confirmatory phone call from Ms Fielding at 8:30 on the morning of the meeting. It seems to us that given the email exchanges between her and Ms Fieldling by email the claimant was entitled to assume the meeting was going ahead either at 10.00 or 10.30 and was not as "provisional" as Mrs Redfern suggested in her evidence.

<u>16-22 August 2019 – the "last straw" events and resignation</u>

143. Ms Cunliffe returned from leave on Monday 19 August 2019. Since the meeting on 15 August was cancelled the claimant had been leaving messages for Mrs Redfern and Ms O'Driscoll but no one had got back to her. On 19 August Ms Cunliffe emailed Ms O'Driscoll and Ms Scrafton expressing her surprise that the claimant had not yet heard the outcome of her request for a change of line management. She noted that the claimant was not off sick so her position was unclear and needed to be regularised as soon as possible. She stressed the urgency of the situation and that the claimant's view was that if she could not change line managers "she feels she has no opportunity but to resign" (p.283). She said she was available that day or the following day to discuss next steps and availability for a meeting.

144. The respondent did not respond to that email, so Ms Cunliffe sent another email on 22 August 2019 to Ms O'Driscoll but this time copying in a number of the respondent's HR employees and Mrs Redfern (p.285). Ms Cunliffe had spoken to the claimant who had told her she had received no confirmation that the meeting "provisionally in our diaries for [the 23rd]" was going ahead. Ms Cunliffe asked for urgent confirmation that the meeting was going ahead and again chased for the outcome of the claimant's request to change managers.

145. Ms Cunliffe also raised the claimant's concern that she had out of the blue received a letter dated 19 August 2019 setting up an appointment for her to see "an external psychiatrist, Dr Barry Lewis" on 1 October 2019 (p.283A). The claimant did not understand how the appointment had come about because it had not been

mentioned by Dr Manzoor during their meeting on the 9 August 2019 or in his subsequent report dated 15 August 2019.

146. Ms O'Driscoll replied by email within 15 minutes (p.284-285) to say that the claimant's meeting on the 23 August was "not confirmed due to manager availability". She apologised if that had not been communicated to Ms Cunliffe. With regards to the appointment with Dr Lewis she offered to ask Delia Gheoghiu, Assistant Director of HWWB to look into the matter and get back to the claimant direct. She also confirmed that Mrs Redfern would be getting back to Ms Cunliffe direct about her meeting with Mr Bennett about changing the claimant's line management.

147. Ms Cunliffe replied accepting the offer of Ms Gheorghiu's help in clarifying the source of the appointment with Dr Lewis. She said she was still available to meet Mrs Redfern the following afternoon to discuss her meeting with Mr Bennett. She also against stressed the need to urgently clarify the claimant's position. The claimant was no longer on sick leave but was not being expected to attend work so Ms Cunliffe asked "can we assume she is on garden leave?" (p.284).

148. An hour and 15 minutes after Ms Cunliffe's initial email of that day Ms Scrafton emailed her and Ms O'Driscoll to clarify that Dr Lewis was a psychologist rather than a psychiatrist and that he was employed directly by the respondent within HWWB to offer support to staff experiencing stress, anxiety or mental health conditions. The appointment was an offer of support and did not require referral by a physician (p.287).

149. At 15:14 that afternoon Mrs Redfern emailed Ms Cunliffe and the claimant to say that having met with Mr Bennett and "after lengthy discussions" she had concluded that the transfer of the claimant's post to Clinical Education was not possible. She set out her reasons in 6 bullet points. In summary they were that the claimant's role was closely aligned to the IPC team and involved a need for surveillance and a requirement to be visible within the ward area and to continuously monitor clinical practice and quality initiatives. She also cited the need to work core hours to support clinical areas during the normal working day because staff cannot be released at weekends or evenings for training sessions. In essence, her view was that the claimant's role was a clinical role not an educational one. Mrs Redfern noted that the claimant said she was unable to work collaboratively and in conjunction with the IPC team or undertake mediation with Ms McGugan. She did not explain why this was a reason against granting the request. We find that the claimant had not said she could not work with the IPC team – her issue was reporting to Ms McGugan. Mrs Redfern noted that she had not had communication direct from the claimant or via Ms McGugan requesting a transfer. She reported that Mr Bennett had said that he had vacancies within his team he would be happy to discuss with the claimant and that she was happy to discuss her decision and how the claimant's absence would be managed going forward with both of them (p.286).

150. Although in her email Mrs Redfern referred to "lengthy discussions" we find from her evidence that her telephone conversation with Mr Bennett about the possible transfer was a brief one which took place on our around 5 August 2019 (para 32 of her statement). It consisted of Mrs Redfern seeking an explanation of why the claimant had approached Mr Bennett direct rather than via her and of Mr Bennett apologising and confirming there was no funding within his team for the claimant's role. We find Mrs Redfern had a clear view of what the claimant's role was

and where it fitted and there was no open-minded discussion of the possibility of a transfer with Mr Bennett. There was also no discussion of the issue with the claimant and/or Ms Cunliffe prior to the decision being reached. Mrs Redfern did not provide an explanation for why, if the discussion with Mr Bennett took place on or around 5 August 2019, the outcome of her decision not to allow the transfer was not communicated until 22 August 2019.

151. The claimant resigned by an email to Mrs Redfern at 10:53 on 23 August 2019 (pp.292-293). She referred to the cancellation of the meeting on the 15 August, her efforts to contact Ms O'Driscoll and Mrs Redfern in the wake of the cancellation and the lack of response. She referred to the last-minute confirmation that the meeting on 23 August meeting to hear her appeals was not going ahead. She accepted that Dr Lewi's role and status within HWWB had been clarified but said she was still unclear who had set up the appointment with him or its purpose. She said she disagreed with Mrs Redfern's decision to reject her request for a transfer to Clinical Education and expressed her disappointment that Mrs Redfern had not felt the issue worthy of discussion with her prior to making her decision given the impact of the decision on her future with the respondent. She expressed the view that if there was any desire for her to remain with the respondent a transfer would have been possible and at the very least an effort would have been made to speak to her. Having set out the impact of events on her well-being she concluded that she was "unable to see a way forward, I do not feel valued, supported or fairly managed and have completely lost faith in my relationship with the organisation". She said she considered the respondent to have breached her employment contract, felt unable to continue, and resigned with immediate effect.

Findings of fact relevant to "disadvantage"

152. For an indirect discrimination claim to succeed, the claimant must show that the PCP complained about puts (or would put) those sharing a protected characteristic at a particular disadvantage ("group disadvantage") and put the claimant at that disadvantage ("individual disadvantage"). The disadvantage alleged in this case is that of female employees "having less flexibility in meeting the PCP's requirements than male employees".

Group disadvantage

153. We heard very limited evidence about the group disadvantage of the PCP. In submissions, Mr Williams accepted that women are more likely to be the primary childcarer than men. That accords with the Tribunal's own knowledge. We heard brief evidence from Mrs Redfern and Ms McGugan that the majority of those they manage who work part-time are female.

Individual disadvantage

154. We find that the claimant was the primary childcarer in her family. Her partner also works in the NHS and works four days a week, but we find that the childcare burden did fall primarily on the claimant. Her unchallenged evidence was that was was because her partner had other commitments on his non-working day. The claimant did not have family living locally who could provide childcare support. In fact, the evidence was that the claimant's partner's family required care at times from the claimant and her partner rather than being in a position to assist with childcare.

155. For the majority of the period relevant to the case the claimant had nursery places for her children four days a week but not for Wednesdays. In practice, we find there was only one occasion when she was required to work on a Wednesday. She was due to attend the Hospital Infection Prevention Group meeting which was held on a Wednesday. Because the claimant had no childcare she arranged for her mother to travel up from London to look after her children so she could attend the meeting. In the event, the meeting was cancelled and moved to another day.

156. Other than that occasion, we find that Ms McGugan managed to roster the claimant so that she did not have to find childcare on a Wednesday. Ms McGugan would not, however, agree to rostering the claimant for fixed days a week so she could be sure that she would not have to work Wednesday on a future date. We accept the claimant's evidence that the possibility of that happening played on her mind and was a source of concern for her throughout the period when she was manged by Ms McGugan.

The Law

Unfair dismissal

The right

157. S.94 ERA gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the effective date of termination, which the claimant had in this case.

158. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

159. If the employer shows a potentially fair reason for dismissal then whether the dismissal is fair (having regard to that reason) will depend 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 sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case (s.98(4) ERA).

160. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken".

Constructive dismissal

161. A constructive dismissal occurs where "the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct" (s.95(1)(c) ERA). To be a constructive dismissal the employer's actions or conduct

must have amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**.

162. There is implied into every contract of employment a duty of mutual trust and confidence. Each party to the contract is under an obligation not, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (**Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**).

163. For the implied term to be breached the conduct must be such as, viewed objectively, is calculated or likely to undermine the duty of trust and confidence and must be conduct for which there is, objectively, no reasonable and proper cause (**Bradbury v BBC [2015] EWHC 1368 (Ch)** and **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**).

164. If the employer is found to have been guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

165. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there can be a final act or "last straw" before the resignation. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that that "last straw" need not itself be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of has to be more than very trivial and has to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach

166. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it (**Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] I.R.L.R. 589**).

167. It does not automatically follow that an act of unlawful discrimination also breaches the implied term in **Malik**. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of that implied term (**Amnesty International v Ahmed [2009] I.C.R. 1450**).

168. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55:**

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a breach of the **Malik** term?

(5) Did the employee resign in response (or partly in response) to that breach?"

169. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp1978 ICR 221, CA**, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

170. In **Gordon v J & D Pierce (Contracts) Ltd [2021] UKEAT 0010_20_1201** the EAT held that an employee does not affirm a contract of employment by engaging in a grievance process available under that contract.

Automatic unfair dismissal

171. Section 104C of ERA provides that an employee is unfairly dismissed if the reason, or where there is more than one reason, the principal reason why they were dismissed was having made an application under s.80F ERA for flexible working.

172. For an employee to bring a claim of automatic unfair dismissal under s.104C based on a constructive dismissal, the reason for the repudiatory breach by the employer which causes the employee to resign must be the fact that the employee made a s.80F application.

173. Where there is a dispute about the real reason for the dismissal, the case law says that the Tribunal has to identify one reason or one principal reason for the dismissal. That reason or principal reason is a question of fact for the Tribunal. As such it is a matter of either direct evidence or inference from the primary facts, and the burden of proving the reason or principal reason for dismissal is on the employer. (**Kuzel v Roche [2008] IRLR 530**).

174. When the employee contests the reason for dismissal put forward by the employer there is no burden on the employee to disprove it. However, where an employee is positively asserting a different reason he must produce some evidence to support the positive case as having made protected disclosures.

<u>Request for flexible working - s.80F of ERA</u>

175. S.80F of ERA gives a qualifying employee (but not a worker) a right to apply for flexible working. It was not disputed that the claimant was a qualifying employee. The application is to change their terms and conditions as to:

"(i) the hours he is required to work,

(ii) the times when he is required to work,

(iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations" (s.80F(1)(a)).

176. An employee cannot make an application under s.80F if they made such an application to the same employer in the previous twelve months (s.80F(4)). That applies regardless of the outcome of the previous application.

177. The right is a right to request flexible working not a right to flexible working. A Tribunal can only interfere with an employer's decision in relation to a request if:

- the employer has failed to comply with its obligations under s.80G(1) to deal with the application in a reasonable manner, notify the employee of the decision within the relevant decision period and based a decision to refuse on one of the valid business reasons set out in s.80G(1)(b); or
- the employer has based its decision on incorrect facts (s.80H); or
- the employer has treated the employee's conduct as a withdrawal of the application in circumstances set out in s.80G(1D).

"In a reasonable manner"

178. ACAS has issued a Code of Practice on dealing with flexible working requests in a reasonable manner. It advises that an employer should meet with an employee as soon as possible after a request is made, consider the request carefully and looking at the benefits of the requested changes in working conditions for the employee and its business and weighing these against any adverse business impact of implementing the changes. Under the heading "deal with requests promptly" it reminds employers that the legislation requires that requests should be dealt with and the decision notified within 3 months of the request being made.

"Incorrect facts"

179. In order for the Tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the Tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the Tribunal are entitled to enquire into what would have been the effect of granting the application, e.g., Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? and matters of that type (**Commotion Ltd v Rutty 2006 ICR 290, EAT**). However, it is not for a Tribunal to judge the reasonableness of an employer's refusal to provide flexible working in a S.80H(1)(b) claim: it simply needs to investigate the facts on which the decision was based (**Singh v Pennine Care NHS Foundation Trust EAT 0027/16**).

<u>Indirect sex discrimination</u>

82. Section 19 of the 2010 Act provides that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's;

(2) for the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to persons with whom B does not share the characteristic;

(b) it puts, or would put, persons with whom B shows the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) it puts, or would put, B at that disadvantage; and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

83. For a claim to succeed, four conditions set out in section 19(2) must be met. The first condition is that there must be a PCP which the employer applies to the claimant and to employees who do not share the protected characteristic of the claimant. The second condition is that the PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic. Thirdly the claimant must experience that particular disadvantage herself and the fourth condition, the defence of objective justification, is that the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

84. The 2010 Act provides for a shifting burden of proof. Section 136 says:

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

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

85. In indirect discrimination cases, the burden of proof lies with the claimant to establish the first, second and third conditions within section 19(2). Only when the claimant has established those does the burden shift to the respondent to establish its objective justification (**Dziedziak v Future Electronics Limited EAT 0271/11**). This approach was affirmed by the Supreme Court in **Essop and others v Home Office (UK Border Agency) 2017 ICR 640 SC**.

86. The Equality and Human Rights Commission (EHRC) Code confirms that a PCP can arise from a one off or discretionary decision. In **Ishola v Transport for London [2020] EWCA Civ 112** the Court of Appeal confirmed that an act that has occurred or is likely to occur more than once will usually be regarded as a PCP.

87. Section 19(2) of the 2010 Act requires that the employer applies *or would apply* the PCP equally to people who do not share the protected characteristic of the claimant. It allows for a hypothetical comparator group (**British Airways plc v Starmer 2005 IRLR 862)** and for adverse disparate impact to be measured by reference to that group.

88. **Essop** clarified previously conflicting Court of Appeal authorities by confirming that it is not necessary for the claimant to show *why* the PCP puts people sharing a protected characteristic at a disadvantage.

89. The purpose of indirect discrimination legislation is to challenge practices which appear neutral, in that they apply to everyone, but have a disadvantageous effect on the protected group ("group disadvantage") when compared to other people who do not share the protected characteristic.

90. There are different methods of establishing group disadvantage.

91. The EHRC Code says that sometimes "a link between the protected characteristic and the disadvantage might be obvious (para 4.11). Tribunals have been willing to assume that certain working patterns will cause women a particular disadvantage because of childcaring responsibilities. In **Shackletons Garden Centre v Ms D Lowe, UKEAT/0161/10/JOJ**, the EAT held that the Tribunal was entitled to come the conclusion that significantly more women than men are primarily responsible for the care of their children and that accordingly the ability of women to work particular hours is substantially restricted because of those child care commitments in contrast to that of men. More recently, in **Essop** (para 26) Lady Hale in discussing the reasons why one group may find it harder to comply with a PCP than others gave as an example "social [reasons] such as the expectation that women will bear the greater responsibility for caring for the home and family than will men".

92. The EHRC Code states that where it is less obvious how people sharing a protected characteristic are put (or would be put) at a disadvantage, statistics or personal testimony may help to demonstrate that a disadvantage exists (para 4.11). In **Essop** (para 28) Lady Hale noted as a salient feature of indirect discrimination claims "that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence."

93. In addition to group disadvantage, the claimant has to show individual disadvantage. In **Ryan v South West Ambulance NHS Trust [2021] I.R.L.R. 4,** para 55, the EAT derived the following "important principles" from Essop, particularly paragraphs 31-33:

> **"(i) In claims of indirect discrimination such as a the present, both group and individual disadvantage must be established. (This is not a case where rights under Art 9 ECHR are engaged and where additional considerations may apply);**
>
> **(ii) Once group disadvantage has been established by a claimant, the individual claimant "has to show that he has been put at "that disadvantage". "That disadvantage" is the same disadvantage that the group to which s/he belongs to is, or would be, put; there must be 'correspondence' between the two.**

(iii) It is not, however, necessary for the claimant to show the reason for the group disadvantage; all that is required is that there is a corresponding group and individual disadvantage (as to which see (iv) below). This is a complete answer to the assertion made (in *Essop* case, and to some extent in *Ryan*) that one cannot know whether a claimant is at that disadvantage unless one knows the reason for it.

(iv) The reason why a claimant does not have to show the reason for a group or individual disadvantage is to be found in the principles underlying the prohibition of indirect discrimination and the manner in which the statutory tort is constructed (see the above, particularly paragraph 30).

(v) However, what is required by the language of the statute is "correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual." This is important. To some extent, I regard this as the flip side of the coin on which 'no need to show the reason for the disadvantage' is stamped: the claimant does not have to show the reason for the disadvantage, but s/he must show that she has suffered a corresponding disadvantage to the group.

(vi) It must be open to a Respondent to show that a particular claimant was not put at a disadvantage by the relevant PCP, or, in other words, to show that there was no causal requirement between the PCP and the disadvantage suffered by the individual. In practice, and on the facts, it may be easier to prove this if the disadvantage is defined in terms of actual achievement or occurrence of a particular event than if it is expressed in terms of likelihood of achieving that event or that event occurring.

(vii) Similarly, if the reason for the disadvantage is known, it may be easier to prove the causal connection between the PCP and the disadvantage suffered, both for the group and for the individual. Proving that, however, is a matter of fact, not law. (Paragraph 33 of *Essop*).”

94. The EAT at para 56 of **Ryan** also noted two important points which arise from the way that the group and corresponding individual disadvantage are framed:

(i) “**In general terms, if the disadvantage is expressed as a likelihood of a particular outcome in respect of a particular group, then any person in that group suffers that disadvantage. In other words, a disadvantage expressed as a likelihood of an outcome will generally affect more people. (See paragraph 31 of *Essop* and also the end of paragraph 32).**

(ii) If the disadvantage is framed in terms of achievement of a particular event, or, of an event occurring, only those who actually achieve that event or in respect of whom the event occurs will suffer the same disadvantage.”

95. **Ryan** noted at para 58 that

“**that it is clear from [the Supreme Court’s judgment in Essop] that it must remain possible for a Respondent to prove that there was not the relevant causal link between a PCP and an individual disadvantage. A Respondent may disprove, by reference to the relevant facts, the causal link between the PCP and the individual disadvantage in the Claimant's case. Logically, this would require a Respondent to establish why a particular event occurred in the Claimant's case. Alternatively, a Respondent may assert that the Claimant was not in a comparable situation for the purposes of s.23 of the [2010 Act] : i.e., that there was or is a material difference**

> **between the Claimant and (potentially) both the group and others who did not share the relevant characteristic for the purposes of s.19 . Finally, a Respondent could also seek to justify the disparate impact of a particular PCP."**

96. The EAT in **Ryan** (para 70) said that where the respondent failed to produce evidence to show that the discriminatory effect of a PCP is not in play in a particular claimant's case, evidence of ways in which the claimant could have mitigated or reduced the impact of the discriminatory effect of the PCP should be reflected in remedy.

97. If a claimant has met its burden of proof in establishing the first three parts of section 19 then the burden will shift to the respondent to establish its objective justification defence.

98. There is no statutory definition of a legitimate aim but the EHRC Code provides that must be legal and not discriminatory. It should represent a real objective consideration.

99. ECJ authorities established that the PCP must correspond to a real need on the part of the respondent, be appropriate with a view to achieving the objective in question and be necessary to that end. A balance must be struck when considering proportionality between the discriminatory effect of the PCP and the reasonable needs of the party who applies it. Section 19(2)(d) requires the Tribunal to carry out an objective balancing exercise between effect of and reasons for the PCP taking into account all relevant facts (EHRC Code para 4.30). It is not enough that a reasonable employer might think the criterion justified (**Hardy & Hansons plc v Lax [2005] IRLR 726 at paras 31-32)**.

100. Costs can be a factor. In **Heskett v Secretary of State for Justice [2020] EWCA Civ 1487** Underhill LJ reviewed the authorities on legitimate aim where that aim is to save costs

> **"83. It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate."**

101. The EHRC code at paragraph 4.30 provides an employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts'.

180. Lord Justice Sedley in **Allonby v Accrington and Rossendale College and ors** explained: '**Once a finding of a [PCP] having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the [employer]'s reasons demonstrated a real need to [dismiss] the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the PCP on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.'**

<u>Failure to comply with the ACAS Code on Disciplinary and Grievance procedures</u>

181. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A") gives the Tribunal a power to adjust compensation where there has been an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Compensation can be increased where it is just and equitable but by no more than 25%. That provision is relevant because in this case the claimant says that the respondent failed to deal reasonably with a grievance which she raised.

Discussion and Conclusions

182. We now apply the relevant law to the findings of fact we have made. We have used the issues identified in the List of Issues as the framework for setting out our discussion conclusions.

Constructive Unfair Dismissal

Was there a course of conduct, namely the course of conduct set out in paragraphs 52(a) – 52(o) of the ET1 Claim Form, which amounted cumulatively to a repudiatory breach of the implied term of trust and confidence? Specifically, was there the following course of conduct which amounted cumulatively to a repudiatory breach of the implied term of trust and confidence.

183. When it comes to the incidents which the claimant relies on as cumulatively amounting to a repudiatory breach of the implied term of trust and confidence ("the implied term") we have found it convenient to group some of those allegations together. The numbers in brackets cross refer to the List of Issues. As a general observation, we have no doubt that the claimant genuinely perceived the respondent's conduct as having undermined her trust in the respondent. As Mr Williams reminded us in his submissions, however, the question we must ask ourselves is whether the respondent's conduct, viewed objectively, was calculated or likely to undermine the duty of trust and confidence and was conduct for which there was, objectively, no reasonable and proper cause.

Not back filling C's role when she commenced part time hours as alleged in paragraph 6 of the ET1 Claim Form (1.1.1)

Unreasonable attempts to cease C's flexible working arrangements as alleged in paragraphs 9 and 10 of the ET1 Claim Form. (1.1.2)

A comment by Sue Redfern that she would question the value of C's input as alleged in paragraph 11 of the ET1 Claim Form (1.1.3)

Behaviour and comments by Sue Redfern which suggested without foundation that C was not being honest regarding her flexible working or childcare commitments as alleged in paragraphs 10 and 12 of the ET1 Claim Form (1.1.4)

184. These incidents happened in the period up to July 2017 and are dealt with in our findings of fact at paras 25-46. When it comes to "not backfilling" (1.1.1), we found that Ms Weston probably did make a remark about having spent the budget for the other half of the claimant's role but the reality was that the respondent had not done so. We note the claimant did not raise this comment at any point between it being said and her grievance in July 2019 and given her good relationship with Ms

Weston find that it was a light-hearted remark and not one that caused the claimant upset at the time. Viewed objectively, it was not conduct which could contribute to a breach of the implied term.

185. When it comes to the changes in the claimant's working pattern we considered two aspects. The first was the decision to change the claimant's working pattern and the second was the way it was done, specifically what was said at the meetings between the claimant and Ms Weston, Diane Lewis and Mrs Redfern in April 2017. We do not accept the claimant's characterisation of the decision to change her working pattern by requiring her to work two days on site as an "unreasonable attempt to cease her flexible working arrangements" (1.1.2). Viewed objectively, the situation was that the respondent had a greater need for the claimant to be on site because of Ms Weston's impending departure. The requirement was made more pressing by the concerns about recent MRSA infection outbreaks. Even after the changes set out in Mrs Redfern's letter of 28 April 2017 (p.148) the claimant's working pattern incorporated a significant amount of flexibility. She was allowed to work compressed hours over 2 days with total flexibility as to when she worked the balance of her hours from home. At that point there had been no formal variation of the claimant's working pattern to allow that compressed hours pattern or to formalise any entitlement to work from home on one of her compressed days. In those circumstances we find that the respondent's change to the claimant's working pattern was not without proper cause nor was it conduct which viewed objectively breached the implied term or could contribute to such a breach.

186. We considered whether the way the change to the claimant's working pattern was carried out could contribute to a breach of the implied term. The change was made after discussions with the claimant. Mrs Redfern acknowledged her reservations about the requirement to be on site 2 days rather than 1. We did find, however, that Mrs Redfern did say and do things during their meeting on 24 April 2017 which the claimant perceived as being a personal attack on her. We found that she questioned the value of the claimant's role if she was not on site (1.1.3), told her she should email her at the start and end of her working day and checked the time it would take her to drop off her children at the nursery (1.1.4). In relation to the "Input" comment we find that that reflected Mrs Redfern's honest opinion that to be effective and of value the ANTT role needed to be based more on-site. We do not accept that was conduct calculated or (viewed objectively) likely to seriously damage the employment relationship. In particular, we do not accept that (as the claimant suggested) it was an indication that Mrs Redfern was seeking to ensure that the claimant was not going to return to work after maternity leave or that she was going to be managed out. As to the provision of emails and the nursery google incident, we do not accept that this was a case of Mrs Redfern questioning the claimant's honesty. We found that in practice the claimant was never penalised for failing to provide those emails. When it comes to the nursery google incident we found that this was simply a case of Mrs Redfern taking the initiative in the meeting so they could reach a decision. We do not find Mrs Redfern's conduct to be such as could breach the implied term or contribute to such a breach.

187. In relation to incidents 1.1.1-1.1.4, therefore, we did not find that the respondent's conduct amounted to a breach of the implied term nor was it capable of contributing to such a breach.

A failure by R to make any or any adequate enquiries into the reasonable adjustments C required at work as alleged at paragraphs 11 and 14 of the ET1 Claim Form (1.1.5)

188. On the facts, we found that the claimant did not fail to make adequate enquiries. Following the discussions in April 2017 when the claimant raised the impact of her birth injury and tis practical consequences for her, Ms Weston submitted an HWWB referral relating to the claimant (pp.141-143). That referral form (completed by Mrs Redfern after Ms Weston left) reported the claimant's underlying medical condition, the proposal to increase her days at work (i.e. on site) from 1-2 and asked whether she was fit to do so. The recommendations for adjustments to be made when the claimant returned to work prior to the start of her second maternity leave could not in practice be implemented because she did not return to work between receipt of the HWWB report and the start of her second maternity leave. In the absence of a failure to make adequate enquiries, this alleged incident could not contribute to a breach of the implied term.

Summary for incidents 1.1.1-1.1.5 and the position as at July 2017

189. In summary we find there was no breach of the implied term (cumulative or otherwise) as at July 2017 nor were any incidents which occurred prior to that date which could contribute to a cumulative breach.

An unreasonable refusal by Oonagh McGugan to accommodate C's flexible working as alleged at paragraphs 17, 18, 21, 22, 35 and 38 of the ET1 Claim Form (1.1.6).

A comment by Oonagh McGugan that making a formal flexible working request would make it difficult for C to continue employment with R as alleged at paragraph 23 of the ET1 Claim form (1.1.8)

190. Allegation 1.1.6 relates to decisions made by Ms McGugan at two points in time. The first (paras 17, 18, 21 and 22 of the ET1) is in August 2018 when Ms McGugan made changes to the claimant's working pattern on her return from her second maternity leave. The second (paras 35 and 38 of the ET1) refers to her refusal of the claimant's formal flexible working request in July 2019.

191. When it comes to the decision in August 2018 to require the claimant to work her days on site over 3 near-equal days rather than 2 long compressed days, we find that Ms McGugan's decision for requiring the claimant to work in that way was one based on the needs of the service and her perception of the priorities for the ANTT role. Her view was that it needed to be a "visible" role to other staff which meant that the claimant should as far as possible work "core hours". She also shared Mrs Redfern's view that on-site surveillance and audit was an important part of the role and that required the claimant's presence on site. We find Ms McGugan did have a reasonable and proper cause for the changes she made insofar as they required the claimant to work on site over 3 near-equal days.

192. One matter which has given us pause is that, as we explain at paras 236-251 below, we have concluded that the refusal to allow the claimant to work fixed days (requested by the claimant to ensure her working days coincided with the days when she had nursery places) was indirect sex discrimination. **Ahmed** makes it clear that

a finding of discrimination does not automatically mean the employer has breached the implied term. We found that although the refusal to fix days was discriminatory, in practice Ms McGugan ensured that the claimant was not rostered to work on Wednesdays – something which she had told the claimant she would do her best to do at their meetings in August 2018. The claimant cited one example of a meeting (not set by Ms McGugan) which was set for a Wednesday and which did not proceed. In other words, Ms McGugan took steps to ensure the potential disadvantage to minimise any detriment to the claimant. In that context we have decided that the refusal to fix the claimant's working days was not itself a breach of the implied term despite our finding that it was discriminatory. It does not seem to us that viewed objectively it was conduct calculated or likely to seriously damage the employment relationship because of the steps Ms McGugan took to limit its impact on the claimant in practice. However, we do think it was something which could have contribute to a cumulative breach of that implied term.

193. Part of the claimant's case, as we understand it, was that Ms McGugan was hostile to flexible working in principle. Our findings do not bear that out. We do find that she and the claimants viewed matters from very different perspectives. Ms McGugan's primary concern was the needs of the service. For her, the question was how the claimant's childcare needs could fit in around delivery of the service. For the claimant it appears to us the question was how the service's demands on her could fit around her childcare needs. Coupled with the fact that Ms McGugan could be brisk and brusque in her approach to meetings, that fostered in the claimant a view that she was hostile to flexible working and dismissive of the burdens on employees with childcaring responsibilities. We do not think that was the case. There are numerous examples of the claimant being allowed time off at short notice for childcare reasons. Ms McGugan was also willing to be flexible about matters like start and finish times. The difference between them was where the balance lay between flexibility and the demands of the claimant's role if it was going to contribute as much as possible to the respondent's efforts at infection control.

194. Linked to this is the allegation (1.1.8) that Ms McGugan sought to dissuade the claimant from making a formal flexible working request and suggested that if she did and it was rejected it would be very difficult for the claimant to continue working for the respondent. We found it implausible that Ms McGugan would have said that. We did find it plausible that she would have sought to manage the claimant's expectations about the outcome of such an application. We do not find that her doing so was conduct in itself breaching the implied term or capable of contributing to a cumulative breach. It seems to us that, viewed objectively, Ms McGugan was trying to provide the claimant with a reality check by seeking to underline that ultimately the flexibility the claimant could be allowed had to fit in with the needs of the respondent's service.

195. In summary, we find that although the refusal to fix working days in August 2018 could contribute to a cumulative breach of the implied term, it did not in itself breach it. Nor did Ms McGugan's conduct in the way she dealt with the change of working pattern in August 2018.

196. When it comes to the refusal to allow the claimant's formal flexible working request, as we explain below in discussing the claimant's complaint about that formal request, we found that Ms McGugan did deal with that request promptly and on

correct facts. We did not find that refusal to be a breach of the implied term nor conduct which could contribute to such a breach. That request did not include a request for fixed working days and so the refusal is not "tainted" by indirect discrimination.

Misleading and inaccurate file notes by Oonagh McGugan of her discussions with C as alleged at paragraphs 19 and 28 of the ET1 Claim Form (1.1.7).

197. Although this allegation was part of the claimant's case she did not in evidence point to significant examples of the notes being "misleading" or "inaccurate". We accept the notes were not verbatim and captured those points which Ms McGugan saw as the important ones discussed at a meeting. That meant they did not always capture things said by Ms McGugan which the claimant had thought to be important from her point of view. However, we did not find them to be inaccurate or misleading. Ms McGugan did not purport to say they were an agreed record. We did not find any sinister intent on Ms McGugan's part in not sharing them with the claimant and they were not added to the claimant's personnel file. Ms McGugan was managing a new team of 7 people so we find it understandable that she would need to keep a note of what she discussed with those she managed. We do not find that making those notes were conduct in breach of the implied term or something which could contribute to such a breach.

Misleading and unfair references from Oonagh McGugan and Dr Kalani Mortimer as alleged at paragraph 24 of the ET1 Claim Form (1.1.9).

198. As we set out in our findings about the references (paras 66-75 above) we found that Dr Mortimer's and Ms McGugan's each had a professional duty to ensure that the references were true and accurate and we find their comments reflected their honestly held views about the claimant. The concerns expressed in the references had not, however, been raised with the claimant at the point the references were given. Ms McGugan had only been working with the claimant for a few weeks when the reference was given but it seems to us that if she had formed the view that aspects of the claimant's performance in role could be improved she should have raised that with the claimant. She suggested in evidence that that would have been done at the claimant's next appraisal which would be at least 6 months away. It seems to us that it would not be good practice for a line manager to wait until a formal appraisal to raise concerns with an employee's performance, particularly one 6 months away. Ms McGugan in evidence referred to meeting regularly with the claimant and it seems to us there were therefore opportunities for her to have raised concerns after giving the reference if not before. That applied the more so to Dr Mortimer who had worked relatively closely with the claimant over a far longer period of time. We heard no evidence from her so do not know what reason there was for her not raising her concerns. The effect of neither of them doing so was that their criticisms of the claimant were published to a third party before they were raised with the claimant. They came as a bolt out of the blue for the claimant. In that sense we accept the references were unfair. Even if the criticisms were justified, that failure does seem to us to be conduct which could contribute to a breach of the implied term although not sufficient in itself (or in combination with events up to that point) to amount to a breach. In practice it did undermine the trust particularly between the claimant and Dr Mortimer.

Oonagh McGugan's handling of C's request for emergency leave to deal with the ill health of C's child as described at paragraph 27 of the ET1 Claim Form (1.1.10).

199. As we said in paras 76-77 above we found that although the claimant genuinely perceived Ms McGugan approach to this incident to be unsympathetic, viewed objectively Ms McGugan's approach was not intimidating. There was no suggestion the claimant was denied leave nor that the leave was in fact all she was entitled to. We do think that by this time, in the wake of the disclosing of the references, the claimant was perceiving Ms McGugan's conduct as being more negative towards her than it objectively was. That may have been exacerbated by Ms McGugan's manner at the meeting but we do not view it as something which could contribute to a cumulative breach of the implied term.

A failure by Oonagh McGugan to keep C's medical information confidential and a failure by Oonagh McGugan to apologise after C brought a breach of privacy to her attention as alleged at paragraph 29 of the ET1 Claim Form (1.1.11).

200. We accept that Ms McGugan did not deliberately drop the claimant's fit note when she was photocopying. However, it seems to us that doing so demonstrated a lack of care when dealing with what was an employee's sensitive personal data. While accepting that Ms McGugan did seek the claimant out when she realised what had happened we found that she was not alive to the impact of the potential disclosure of the fit note on the claimant and as a result her apology was not as full as it should have been. Her answers to Ms Cole's written questions in the grievance process (para 97) seem to us to demonstrate that she still regarded the incident as a trivial one. We do find that, viewed objectively, the failure to take care to protect the claimant's sensitive personal information was conduct which could contribute to a cumulative breach of the implied term. It was not in itself (or in combination with events up to that point) sufficient to breach the implied term.

Deletion of C's most recent appraisal after she issued Tribunal proceedings as alleged at paragraph 31 of the ET1 Claim Form (1.1.13).

201. Taking the issues in the list slightly out of order, we deal next with the deletion of the claimant's appraisal which she discovered towards the end of February 2019. As we said in para 81, there was no evidence on which we could base a finding that this was a deliberate act by the respondent or one of its employees. As such, it was not something which could contribute to a breach of the implied term.

Summary for incidents 1.1.6-1.1.11 and 1.1.13 and the position as at the end of February 2019

202. We have found that by the end of February 2019 (leaving aside the conduct of the grievance) the following acts by the respondent were capable of contributing to a cumulative breach of the implied term but none of them in themselves or cumulatively at this point amounted to such a breach:

- the refusal to fix the claimant's working days (part of 1.1.6);
- the provision of unfair references (1.1.9);
- a failure by Ms McGugan to keep the claimant's medical information confidential and to apologise for failing to do so (1.1.11).

A failure by R to deal with C's grievance in a reasonable manner as alleged at paragraphs 30, 34, 39, 40, 41 and 49 of the ET1 Claim Form (1.1.12).

203. We find there were serious failings in the way the claimant's grievance was dealt with by the respondent. The first was the delay in responding to the grievance. Our findings are set out at paragraphs 82-104 above. We find that there was a significant delay in responding to the grievance. There was an initial failure to acknowledge it at all which led to Ms Cunliffe having to chase for a response. Although on 14 March 2019 Ms O'Driscoll said that the respondent was investigating the case as a priority, nothing further happened until 29 May 2019 when Mr Babbs was appointed to manage the grievance. We heard no real explanation for that delay beyond the fact that Ms Scrafton, to whom the original grievance was addressed, was seconded elsewhere. That does not seem to us to provide any proper explanation for the delay, particularly from the point when Ms O'Driscoll was aware of the grievance. Although there was then a further delay before the grievance meeting was held on 5 July 2019, that delay was due to Ms Cunliffe's unavailability. The respondent had tried to set up a stage one grievance hearing on 13 June 2019.

204. We also accept that Mr Babbs did tell the claimant and Ms Cunliffe that there would be a slight delay in his providing the grievance outcome because he was going on holiday for the week following the grievance hearing. We do not regard the delay in providing the grievance outcome as a significant one, although we do note that it was the claimant who had to chase Mr Babbs on 30 July 2019 for the grievance outcome. The result of the respondent's initial delay in dealing with the grievance was that the stage one hearing was held five months after the grievance was lodged, way outside the 14 calendar days timeframe set out in the respondent's own grievance policy. We can find no proper or reasonable cause for the delay and we find that that was conduct likely to seriously damage the employment relationship. That is particularly so because in this case the claimant had in her grievance made it clear that the grievance was about a serious breakdown of professional relationships and that Ms Cunliffe had stressed the seriousness of the situation when chasing for a response. That should have flagged up to the respondent that this was a matter which needed dealing with at the very least promptly, if not urgently.

205. In addition to the delay, we find that the grievance investigation itself was superficial and cursory. Mr Babbs based his decisions on written answers provided by Dr Mortimer and Ms McGugan having, through Ms Cole, made only a half-hearted attempt to set up meetings to discuss the grievance. Given that the grievance included matters such as the breakdown of relationships between colleagues, it seems to us that it would be particularly important for the decision maker or an investigating officer to speak to the parties concerned. That was also the case because for some incidents, e.g. the photocopier incident, there was a dispute of fact as to what happened. We find it hard to understand how a decision maker could reach a conclusion on disputed events without hearing from the witnesses, or at least having a report from somebody who had interviewed them. As it was, we agree with the claimant's assessment that Mr Babbs took Dr Mortimer and Ms McGugan's written versions at face value. He did not give the claimant an opportunity to respond to those written answers.

206. Taking those failings alongside the delay, we do find that the way the grievance was carried out in this case was in itself a breach of the implied term. If we are wrong that it was in itself sufficient to breach the implied term, we find that cumulatively with the events we have summarised at paragraph 202 above, it was sufficient to amount to a breach of the implied term. As to when that breach occurred, we find that it occurred at the point when the grievance outcome was notified to the claimant, which we find was on 5 August 2019.

R handling C's secondment requests in an unreasonable and poor manner as alleged at paragraphs 33, 37, 42, 44 and 46 of the ET1 Claim Form.

207. As we have set out in our findings of fact, there were two secondment requests. The first was that made by Ms Cunliffe on 5 July which was a request that the claimant be seconded by way of transfer to another hospital (the suggestion being Alder Hey). There was, so far as we can see, no response to that request. That was despite Ms Cunliffe chasing on 24 July 2019, making it clear that matters were now so severe that the claimant was considering her future with the respondent. We do accept that Ms O'Driscoll did respond to Ms Cunliffe's email to offer a discussion when she was free, but Ms Cunliffe was then unable to speak to her. There was no indication that the respondent took any steps to follow that up with Ms Cunliffe or the claimant.

208. The second secondment request was made by Ms Cunliffe on 5 August. Noting the lack of progress with the suggestion of a secondment elsewhere, she suggested that there should be a move of the claimant's role to the Clinical Education team under Mr Bennett's line management. Ms Cunliffe said that this was "the only way we can think of keeping her in work". Ms O'Driscoll responses to that email so was clearly aware of it, but no decision was made (or at least communicated to the claimant) until Mrs Redfern's email on 22 August 2019 (paragraph 149).

209. We accept that Mrs Redfern would have been within her rights to decide that it was not appropriate for the claimant's role to be transferred to Clinical Education, particularly if that involved a loss of budget on her part. However, as we set out in our findings of fact, it seems to us that there was little evidence of any "lengthy discussion" between Mrs Redfern and Mr Bennett, nor any other explanation for the outcome of that suggestion not being conveyed to the claimant until 22 August 2019. We also accept the submission on behalf of the claimant that there was no attempt made by Mrs Redfern to discuss the proposal with the claimant.

210. Given the context for the secondment requests and the clarity with which Ms Cunliffe had set out the strain the claimant was under and the risk that her employment might come to an end if no solution was found, we do think that the failure to communicate with the claimant about her requests or to make a decision without delay was something which could contribute to a cumulative breach of the implied term.

An invitation to a meeting on 15 August 2019 and its last-minute cancellation as alleged at paragraph 45 of the ET1 Claim Form?

211. We found that the claimant was aware what this meeting was about because it resulted from a meeting she had with Ms O'Driscoll the previous week. We do accept that it was cancelled at the last minute on 15 August. We do not accept the submission made on behalf of the respondent that the meeting was never confirmed and that the claimant should have waited for a call from Ms Fielding at 8:30 on the morning of the meeting rather than assuming that it was going ahead. We find that the cancellation of the meeting was handled, at best, clumsily. Having agreed to the meeting going ahead and the claimant having notified the respondent that she would be bringing a friend because her trade union representative was on leave, it seems to us that at the very least the respondent should have made sure that any cancellation was communicated to the claimant before she left to attend the meeting. The claimant at that time was signed off with stress and it would have been evident to Ms O'Driscoll from their meeting the previous week that she was in some distress (hence her agreement to call a short notice meeting with her and Mrs Redfern). We can see some sense in the decision by Ms O'Driscoll and Mrs Redfern not to hold a meeting in the absence of Ms Cunliffe given her involvement in the various ongoing strands of discussion at that point. However, we do think that the way that the cancellation was handled, viewed objectively, could have contributed to a cumulative breach of the implied term.

Was there a final straw on 22 August 2019 as per paragraph 53 of the ET1 Claim Form - namely C receiving an uninvited appointment to see a psychologist, C's transfer request being rejected without discussion and C's grievance and flexible working appeal hearings being cancelled at short notice - which entitled C to resign?

212. Dealing with each of the three "last straws" in turn:

213. So far as the appointment with the psychologist was concerned, we find that when the respondent was notified that a letter of invitation to a meeting had been received, it acted quickly to clarify what the position was and explain to the claimant that Dr Lewis was a psychologist rather than a psychiatrist, that he worked for HWWB rather than any external organisation, and that the appointment was intended to support the claimant rather than anything else. We do not think that viewed objectively that was conduct which could contribute to a breach of the implied term.

214. We have set out our conclusions in relation to the rejection of the claimant's request to be transferred to the Clinical Education team under paragraph 1.1.14 above. As we said, we think that the way that the decision not to transfer was handled, viewed objectively, could have contributed to a cumulative breach of the implied term.

215. We find the same in relation to the cancellation of the meeting on 23 August. We heard submissions from the parties about whether or not that meeting was a "provisional" date or a fixed meeting. It seems to us that to a large extent that does not matter. What is clearly the case on the facts was that the claimant and Ms Cunliffe had been given the date of 23 August at 2.30pm for a meeting. That date had been agreed between Ms Cunliffe's office and the respondent's HR team. During that exchange, Ms Stevens of the respondent's HR team had confirmed that their meeting was booked subject to finding a room and facilities. The claimant in her evidence accepted that that might mean the meeting was not finally fixed.

However, it seems to us that that was only the case if no rooms or premises were available. In the event, it was cancelled at the last minute due to management unavailability. Since the date and time had been agreed between Ms Cunliffe's office and the respondent's office to accommodate management availability, we find that hard to understand. Accepting, however, that for an unforeseen reason management was not available on that date, it does seem to us that the respondent's failure to confirm whether the meeting was going ahead until prompted by Ms Cunliffe was another example of it being at best clumsy and at worse dismissive of the situation the claimant was in. That situation, i.e. that she was on the brink of resigning, had been made clear repeatedly to the respondent by Ms Cunliffe in her emails. In the circumstances, it does seem to us that the respondent's failure to proceed with the meeting on 23 August or, at the very least, to ensure that the claimant was proactively contacted so that she knew earlier than the day before the meeting that it was not going ahead, is something which viewed objectively could contribute to a cumulative breach of the implied term.

216. We find that these last two elements did amount to a last straw in the sense of being conduct which contributed to a cumulative breach of the implied term.

217. On our findings (para 206) there was a breach of the implied term as at the 5 August 2019. As we record in para 218, the claimant had not affirmed the contract since the breach. Following **Davies**, that means the last straw could be entirely innocuous. If we are wrong that the implied term was breached on 5 August then we would have found that it was breached by the last straw on 22 August 2019 consisting of the claimant's transfer request being rejected without discussion and her grievance and flexible working appeal hearing on 23 August 2019 being cancelled at short notice. That breach of the implied term was a repudiatory breach entitling the claimant to resign

Did C resign in response to that alleged final straw following the alleged course of conduct which amounted to a repudiatory breach?

218. We find that the claimant did resign in response to the last straw, specifically the rejection of her secondment request without discussion and the cancellation of the meeting on 23 August 2019. For the respondent Mr Williams suggested that the claimant had in fact decided to resign far earlier because of the breakdown of her relationship with Ms McGugan and Dr Mortimer. We find, however, that it was the respondent's failure to address the steps to try and resolve that breakdown which triggered the claimant's resignation. We therefore find that she did indeed resign in response to the final straw.

Did C by her conduct waive the repudiatory breach of her contract of employment?

219. We find that the claimant did not waive the repudiatory breach. As we have set out above, we find that the repudiatory breach occurred through cumulative events on 5 August 2019. While we accept that she had lodged appeals against the grievance outcome and against the rejection of her flexible working request, we do not find that that was sufficient to affirm the contract. The case of **Gordon** is authority for the fact that continuing to utilise an employer's appeal and grievance processes should not in itself amount to an affirmation. We think the same applies to other appeal processes such as the flexible work request. Even if we are wrong

about that, the last straw events on the 22 August 2019 post-dated the making of those appeals and would have "revived" the breach entitling the claimant to resign.

If the Employment Tribunal concludes that the Claimant was constructively dismissed, did R have a fair reason for dismissal, namely SOSR by reason of the Claimant's perception of the breakdown in her working relationship with her line manager Oonagh McGugan?

220. It seems to us that in identifying the reason for a constructive dismissal what we must focus on is the reason for the respondent's conduct which led to the claimant's resignation claiming constructive dismissal. The respondent has not satisfied us that the reason or principal reasons for the failings in dealing with the grievance and the other matters which we found cumulatively contributed to the breach of the implied term were the breakdown of the relationship with Ms McGugan. That was the context for what happened but not, we find, the reason of the respondent's behaviour. The onus is on the employer to establish a fair reason for dismissal and we find that they have failed to do so.

221. Our conclusion, therefore, is that the claimant was constructively dismissed and that that dismissal was unfair.

Automatic unfair dismissal contrary to section 104C ERA

Further to 1.1 – 1.5 above, was the Claimant entitled to terminate her contract of employment and treat herself as dismissed?

If so, was C's dismissal automatically unfair pursuant to s.104C ERA, in that the reason or, if more than one, the principal reason for her dismissal was that C:

(a) Proposed to make a flexible working request;

(b) Made a flexible working request under section 80F ERA; and/or

(c) *Alleged the existence of circumstances which would constitute a ground for bringing proceedings under section 80H ERA?*

222. We have found that the claimant was constructively dismissed. However, we do not accept that the reason for the respondent's treatment which led to the claimant's resignation (and so the reason for the dismissal) was that she proposed to make a flexible working request, made such a request and/or alleged the existence of circumstances which would constitute a ground for bringing proceedings under section 80H of the Employment Rights Act. The claimant did not make her flexible working request until 30 June 2019. Ms Ferrario did not in her submissions submit that the dismissal was because the claimant proposed to make such a request. Any event prior to 30 June 2019 could be for reasons (a) to (c) above. There was no evidence from which we can conclude that the failings in relation to the way the claimant's grievance was dealt with and the other events which we have found cumulatively to have amounted to a breach of the implied term were because she had made a flexible working request, or the associated reasons set out at (a)-(c) above. The flexible working request was a separate issue from the grievance and we found no evidence that the making of the flexible working request in any way

influenced the way the grievance was dealt with or those other matters. While the burden is on the respondent to show a fair reason for dismissal, where an employee is positively asserting a different reason for dismissal they must produce some evidence to support the positive case (**Kuzel**) and we find the claimant has not done so. The claim that her dismissal was automatically unfair fails.

Failure to deal with flexible working request in a reasonable manner pursuant to section 80H(1)(a) ERA

What were the reasons given by R for rejection of C's flexible working request? Were those reasons 'prescribed reasons' in accordance with section 80G(1)(b) ERA 1996?

223. In her submissions for the claimant Ms Ferrario accepted that the reasons given by Ms McGugan for rejecting the flexible working request were prescribed reasons within s.80G(1)(b).

If so, was it reasonable for R to conclude that C's flexible working request could not be accommodated for those reasons?

224. Although this is included in the List of Issues, the legislation is clear that it is not for the Tribunal to decide whether it was reasonable for the respondent to conclude that the request could not be accommodated. However, we are entitled to consider whether the rejection was based on incorrect facts and do so at paras 229-234 below.

Was C's request dealt with promptly?

Did R notify C of the flexible working outcome within the statutory decision period in accordance with section 80G(1B)(a)?

225. Taking these two issues together. We find that the claimant's request was dealt with promptly. As Ms Ferrario acknowledged in her submissions, Ms McGugan held the meeting to discuss the flexible working application with the claimant within 11 days. The decision was then provided by 30 July 2019, which Ms Ferrario accepts is "arguably prompt". We find that it actually was prompt. Ms Ferrario's criticism in her submission was that there was then a delay in dealing with the claimant's appeal which she lodged on 5 August 2019. She submits that in accordance with the respondent's own flexible working policy an appeal meeting should have taken place within the following 14 days. She points out that, as we have found, the meeting on 23 August which was set to consider the flexible working request appeal was cancelled by the respondent. The appeal did not take place because the claimant resigned on 23 August 2019.

226. We did not hear evidence about when the meeting would have been rearranged for. The three-month period during which the legislation requires the process (including any appeal) to be concluded would not have ended until 30 September 2019. This was not a case where the employer had refused to deal with an appeal against a flexible working request. It was the claimant who brought the process to an end by resigning. In those circumstances we find that the employer did

deal with the request promptly and (for the avoidance of doubt) in a reasonable manner as required by s.80G(1)(a).

Did R fail to consider the flexible working request reasonably as alleged at paragraph 56 of the ET1 Claim Form?

227. Paragraph 56 seems to us to related to the reasons for refusing the request rather than the way it was dealt with. To the extent that the contention is that the request was not dealt with reasonably because Ms McGugan did not approach it with an open mind and had an entrenched opposition to flexible working we reject that for the reasons given in para 193 above.

228. For the reasons given at paras 223-228 above the claimant's claim that the respondent failed to deal with her application for flexible working under s.80F ERA in a reasonable manner as required by s.80G(1)(a) fails.

Rejection of flexible working request on the grounds of incorrect facts pursuant to section 80H(1)(b) ERA

Further to 3.1 and 3.2 above, what were the reasons for rejection of C's request?

229. We have set out the reasons given by Ms McGugan at paragraph 115 above. We accept they were her genuine reasons for refusing the request.

Did R reject the flexible working request on incorrect facts as alleged at paragraphs 43 and 58 of the ET1 Claim Form?

230. As to whether the rejection was on incorrect facts, Ms Ferrario for the claimant submitted that Ms McGugan did not ask the claimant about her day-to-day duties and there did not appear to have been any discussion about the claimant's role and how she would complete her tasks if she was working from home. We do not accept that is accurate. As we have found at paras 108-109 above, Ms McGugan did at the meeting with the claimant on 11 July discuss the extent to which she could carry out her role from home. The central criticism made by Ms Ferrario was that the decision made by Ms McGugan was based not on the work which the claimant was then carrying out (as evidenced in the analysis she prepared for her appeal against the rejection of the request at pp. 253-259) but on the work which Ms McGugan thought she should be carrying out to fulfil her role. As we have already said, Ms McGugan and Mrs Redfern took the view that the claimant's role should be more hands-on than the work the claimant was actually carrying out in 2019.

231. We do not accept that Ms McGugan made the decision based on "incorrect facts" in the sense that the information on which she based her decision was incorrect. She had a clear picture of what the claimant was actually doing at that time. The question, it seems to us, is whether the fact that she rejected the claimant's request based on what she wanted the claimant to prioritise in carrying out her role meant that it was based on incorrect facts. The way Ms Ferrario put it in her submissions is that "the application was considered in line with the role that at that time the claimant was not necessarily performing".

232. For the respondent, Mr Williams submitted that the respondent was not limited to determining the request based on the claimant's current work. He submitted the respondent was properly entitled to consider the needs of the service, the job description and the manner in which it could reasonably expect the claimant's role to be performed going forward. We prefer Mr Williams' submission. We find that as far back as the conversations with Mrs Redfern in April 2017 Mrs Redfern and then Ms McGugan had made it clear that the focus of the ANTT the role was to be more on site and ward based to ensure both his visibility and fulfilment of the "hands on" aspects of the role which they saw as a priority. It was as a result of that that the claimant's working pattern was confirmed by Ms McGugan from August 2018 as requiring three days per week with attendance on site during core working hours Monday to Friday. As we noted previously, the claimant in her cross-examination evidence accepted that her managers were entitled to decide which aspects of her role she should prioritise.

233. We also accept Mr Williams' submission that it would be nonsensical for the respondent to have to decide a flexible working request without any regard to the needs of the service in the future. A request, if granted, leads to a variation of an employee's contract, and it would seem to us illogical for the legislation to require an employer to ignore the needs of the service and reach a decision on varying an employee's contract which would very soon be inconsistent with those needs.

234. We do not, therefore, accept that the respondent reached its decision on the claimant's flexible working request on incorrect facts. The claim that the respondent breached the flexible working legislation in that regard under s.80H(1)(b) ERA fails.

Indirect sex discrimination contrary to s.19 EqA

Is R's requirement that C work on site during core hours on any 3 out of 5 days in the working week (Monday to Friday) a PCP?

235. We find that from August 2018 (after the claimant returned from her second maternity leave) the respondent did apply to her a requirement to work on site during core hours on any three out of five days in the working week. We find that was a provision, criterion or practice which the respondent would apply to persons with whom the claimant did not share the protected characteristic of being female.

If the answer to 5.1 is 'yes', did the PCP put female employees at a particular disadvantage of "having less flexibility in meeting R's requirements" when compared with male employees?

236. The particular disadvantage contended for is "having less flexibility in meeting the respondent's requirements" when compared with male employees. Mr Williams did in oral submissions accept that it was still the case that women are primary child carers. However, he cautioned the Tribunal against assuming, because of that, that the PCP in this case would put female employees at the particular disadvantage. He submitted that the PCP was a far more nuanced one than simply being required to work full-time.

237. We accept the force of that submission. However, we do find it safe to assume that a working pattern which requires an employee to work on days or at

times when they did not have available childcare (whether by way of a nursery place or because a partner or family was available to provide childcare) would particularly disadvantage female employees compared to male employees because they are more likely to be primary childcarers.

238. It seems to us that the PCP in this case consists of three elements. The first was to work during core hours, i.e. between 8.30am to 5,30pm Monday to Friday. The second was to work (or at least to be available to work) on site on any of those working days. The third was the requirement to be available on any three out of the five days Monday to Friday, rather than being given fixed days to work e.g. Monday and Friday or Tuesday and Friday every week. The requirement to work three days (rather than two long days) flowed from the requirement to work during core hours.

239. The claimant did not provide any statistical or other evidence to demonstrate that one or a combination of these elements would put female employees at a particular disadvantage. Although some of the witnesses were questioned and confirmed that the majority of employees working part-time were female employees, we do not find that that in itself is a sufficient basis for assuming that the PCP would put female employees at a particular disadvantage. We do not find it safe to assume that a requirement to work on site rather than from home would put female employees at a particular disadvantage. The evidence was that the claimant lived near to her children's nursery, so we can see that for her there was a disadvantage if she was required to come in to work on site because it would then take her longer to get to the nursery if, for example, she was required to pick up one of her children because they were ill. We do not find it safe to assume that in the absence of evidence those specific circumstances can be generalised to establish group disadvantage.

240. We do think, however, that we can assume group disadvantage in the requirement to work during core hours, and the resultant requirement to work over three days rather than two. That is because a requirement which reduces an employee's availability for childcare would put female employees at a disadvantage. If, as the claimant was, an employee is allowed to work two long days, making up the balance of their hours as and when around childcare commitments, that gives them a greater flexibility and availability for childcare emergencies than the requirement to work three days.

241. We do therefore find that the requirement to work within core hours would put female employees at a disadvantage. Within that is the requirement to work weekdays rather than on weekends. We find it safe to assume that alternative childcare (whether by a partner or family) is more likely to be available on weekends which for most people is a non-working day, and that a requirement to work during Monday to Friday only would put female employees at a particular disadvantage compared to male employees.

242. As to the third element, namely working fixed days, we do find that this would put female employees at a disadvantage. Except for female employees with five day a week nursery cover or other full-time childcare, the inability to identify in advance which days of the week they were working would, it seems to us, put female employees at a disadvantage compared to male employees because they are more likely to be primary childcarers. As the primary child carers, if their working day did

fall on a day when there was no alternative childcare available (whether by way of a nursery place or otherwise) then the burden is more likely to fall on a female employee to provide that care, e.g. by taking leave to provide that childcare or to find and pay for ad hoc childcare. Given the difficulty of finding nursery places, the likelihood in those circumstances is that the female employee would have to undertake the childcare themselves.

243. In summary, then, we find that the PCP did put female employees at a particular disadvantage compared to male employees to the extent that it required working during core hours Monday to Friday and not to have fixed working days.

Did the PCP put the claimant at the alleged particular disadvantage? In particular, was C authorised to work flexibly across core hours as she required, authorised to choose what days to work and/or working temporary hours in relation to her daughter starting school and if so, did that negate any particular disadvantage?

244. As we recorded at paragraphs 154-156 above, the claimant was the primary child carer in her family. For the period when the PCP was applied the claimant had a nursery place for her children every day apart from Wednesday. Mr Williams submitted that the PCP did not put the claimant at a particular disadvantage because in practice she was never rostered to work on Wednesdays. He also submitted that she was allowed flexibility over start and finish times and that the evidence showed that Ms McGugan did provide flexibility and accommodate the claimant's childcare emergencies. We have found that Ms McGugan did on a number of occasions accommodate childcare emergencies for the claimant when they arose. However, we have decided that the PCP did put the claimant at the particular disadvantage experienced by female employees compared to make employees.

245. We accept that in practice there was only one occasion when the claimant had to ask her mother to travel up from London to provide childcare on a Wednesday for a meeting that was subsequently cancelled. We also accept, however, that claimant did throughout the period have a genuine concern that a requirement to work Wednesday might arise at any point. We accept Ms Ferrario's description of this as something which "preyed on her mind". We find that was sufficient to amount to a "detriment" to the claimant for the purposes of s.39 of the 2010 Act.

246. In terms of the elements of the PCP that we found caused a group disadvantage, we find that the claimant shared the disadvantage arising from the requirement to work her hours during core hours and the requirement not to have fixed working days. We accept that in her case the disadvantage was small, but we do not think that that means that it did not apply to her. She did not have a nursery place or childcare for the whole of the week, which would have meant that the PCP put her at no disadvantage. We accept that the evidence showed the disadvantage in practice was small but it seems to us that the correct analysis is that the disadvantage did exist but that the detriment the claimant suffered as a result was small, which is something that will need to be reflected in the remedy granted (in line with what was said in **Ryan** – see paragraph 96 above).

Did R have a legitimate aim of ensuring delivery of the ANTT service by C as required by the infection control and prevention department in which C worked?

247. We accept the respondent did have that legitimate aim.

If so, was the approach of R proportionate, such that its actions were objectively justified?

248. We remind ourselves that the elements of the PCP which the respondent is required to justify are the requirement to work during core hours Monday to Friday and the requirement to not have fixed working days. As to the first element, we have in discussing the flexible working request explained why we accepted that Ms McGugan was entitled to find that the needs of the service required the claimant to be available on site when other staff were available, either to be trained or so that the claimant could be a resource for them. We do find that element of the PCP to be a proportionate means of achieving the respondent's legitimate aim. That is particularly so given the level of flexibility shown by the respondent in relation to start and finish times and in relation to allowing the claimant to have time off for childcare emergencies when they arose.

249. When it comes to the absence of fixed days of work, we heard no clear evidence as to why it was necessary not to give the claimant fixed working days. That had been done prior to August 2018 when Mrs Redfern had agreed that the claimant would work Mondays and Fridays. We also found that the days when the claimant was required to work were not dependent on the availability of other IPC team members, nor did we hear any evidence that the claimant's role was reactive in the sense that she could be required to attend at short notice if there was an infection outbreak.

250. In those circumstances, even taking into account the flexibilities mentioned above, we find that the respondent has failed to discharge the burden of justifying this element of the PCP.

251. The claimant's claim that she was indirectly discriminated against because of her sex therefore succeeds to the extent that the requirement within the PCP not to have fixed working days was one which put female employees as a group, and the claimant as an individual, at a particular disadvantage and was not objectively justified.

<u>Breach of the ACAS Code of Practice on Disciplinary and Grievance procedures.</u>

Was there a failure by R, to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures as alleged in paragraph 60 of the ET1 Claim Form? Specifically, did R unreasonably fail to:

Arrange a formal meeting without unreasonable delay after C's grievance was received as alleged at paragraph 30 of the ET1 Claim Form;

Communicate the grievance outcome without unreasonable delay as alleged at paragraph 39 of the ET1 Claim Form.

Hear the appeal without reasonable delay and at a time and place which should be notified to the Claimant in advance as alleged at paragraph 51 of the ET1 Claim Form?

If the Employment Tribunal concludes that there was a failure by R to comply with the ACAS Code, what were the reason(s) for such failure? Did R act unreasonably in the circumstances?

Is the Claimant therefore entitled to a 25% uplift in any compensation because of an unreasonable failure to comply with the ACAS Code?

252. As we said in discussing the claimant's constructive unfair dismissal claim, there were serious failings in the procedure adopted.

253. The respondent did fail to arrange the first grievance meeting without unreasonable delay. We also found that the grievance itself was carried out in a superficial way. We do not think that the delay in providing the grievance outcome was in itself an unreasonable failure to comply with the ACAS Code even though it contributed to the constructive unfair dismissal. We do not find there was an unreasonable delay in holding the appeal – the appeal hearing did not take place because of the claimant's resignation.

254. We do find that the respondent did unreasonably fail to comply with the ACAS Code of Practice because of the unreasonable delay in holding the grievance meeting. We will hear submissions from the parties about whether it is just and equitable to award compensation for that and, if so, to what extent, at the remedy hearing.

Next Steps

255. The case will be listed for a remedy hearing to decide the appropriate compensation for the claimant's successful claims.

Employment Judge McDonald
Date 12 May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
14 May 2021

FOR THE TRIBUNAL OFFICE

ANNEX
List of Issues

1. Constructive Unfair Dismissal

1.1 Was there a course of conduct, namely the course of conduct set out in paragraphs 52(a) – 52(o) of the ET1 Claim Form, which amounted cumulatively to a repudiatory breach of the implied term of trust and confidence? Specifically, was there the following course of conduct which amounted cumulatively to a repudiatory breach of the implied term of trust and confidence:

1.1.1 Not back filling C's role when she commenced part time hours as alleged in paragraph 6 of the ET1 Claim Form;

1.1.2 Unreasonable attempts to cease C's flexible working arrangements as alleged in paragraphs 9 and 10 of the ET1 Claim Form;

1.1.3 A comment by Sue Redfern that she would question the value of C's input as alleged in paragraph 11 of the ET1 Claim Form;

1.1.4 Behaviour and comments by Sue Redfern which suggested without foundation that C was not being honest regarding her flexible working or childcare commitments as alleged in paragraphs 10 and 12 of the ET1 Claim Form;

1.1.5 A failure by R to make any or any adequate enquiries into the reasonable adjustments C required at work as alleged at paragraphs 11 and 14 of the ET1 Claim Form;

1.1.6 An unreasonable refusal by Oonagh McGugan to accommodate C's flexible working as alleged at paragraphs 17, 18, 21, 22, 35 and 38 of the ET1 Claim Form;

1.1.7 Misleading and inaccurate file notes by Oonagh McGugan of her discussions with C as alleged at paragraphs 19 and 28 of the ET1 Claim Form;

1.1.8 A comment by Oonagh McGugan that making a formal flexible working request would make it difficult for C to continue employment with R as alleged at paragraph 23 of the ET1 Claim form;

1.1.9 Misleading and unfair references from Oonagh McGugan and Dr Kalani Mortimer as alleged at paragraph 24 of the ET1 Claim Form;

1.1.10 Oonagh McGugan's handling of C's request for emergency leave to deal with the ill health of C's child as described at paragraph 27 of the ET1 Claim Form;

1.1.11 A failure by Oonagh McGugan to keep C's medical information confidential and a failure by Oonagh McGugan to apologise after C brought a breach of privacy to her attention as alleged at paragraph 29 of the ET1 Claim Form;

1.1.12 A failure by R to deal with C's grievance in a reasonable manner as alleged at paragraphs 30, 34, 39, 40, 41 and 49 of the ET1 Claim Form;

1.1.13 Deletion of C's most recent appraisal after she issued Tribunal proceedings as alleged at paragraph 31 of the ET1 Claim Form;

1.1.14 R handling C's secondment requests in an unreasonable and poor manner as alleged at paragraphs 33, 37, 42, 44 and 46 of the ET1 Claim Form; and

1.1.15 An invitation to a meeting on 15 August 2019 and its last minute cancellation as alleged at paragraph 45 of the ET1 Claim Form?

1.2 Was there a final straw on 22 August 2019 as per paragraph 53 of the ET1 Claim Form - namely C receiving an uninvited appointment to see a psychologist, C's transfer request being rejected without discussion and C's grievance and flexible working appeal hearings being cancelled at short notice - which entitled C to resign?

1.3 Did C resign in response to that alleged final straw following the alleged course of conduct which amounted to a repudiatory breach?

1.4 Did C by her conduct waive the repudiatory breach of her contract of employment?

1.5 If the Employment Tribunal concludes that the Claimant was constructively dismissed, did R have a fair reason for dismissal, namely SOSR by reason of the Claimant's perception of the breakdown in her working relationship with her line manager Oonagh McGugan?

1. <u>Automatic unfair dismissal contrary to section 104C ERA</u>

1.1 Further to 1.1 – 1.5 above, was the Claimant entitled to terminate her contract of employment and treat herself as dismissed?

1.2 If so, was C's dismissal automatically unfair pursuant to s.104C ERA, in that the reason or, if more than one, the principal reason for her dismissal was that C:

1.2.1 Proposed to make a flexible working request;

1.2.2 Made a flexible working request under section 80F ERA; and/or

1.2.3 Alleged the existence of circumstances which would constitute a ground for bringing proceedings under section 80H ERA?

2. <u>Failure to deal with flexible working request in a reasonable manner pursuant to section 80H(1)(a) ERA</u>

2.1 What were the reasons given by R for rejection of C's flexible working request? Were those reasons 'proscribed reasons' in accordance with section 80G(1)(b) ERA 1996?

2.2 If so, was it reasonable for R to conclude that C's flexible working request could not be accommodated for those reasons?

2.3 Was C's request dealt with promptly?

2.4 Did R notify C of the flexible working outcome within the statutory decision period in accordance with section 80G(1B)(a)?

2.5 Did R fail to consider the flexible working request reasonably as alleged at paragraph 56 of the ET1 Claim Form?

3. <u>Rejection of flexible working request on the grounds of incorrect facts pursuant to section 80H(1)(b) ERA</u>

3.1 Further to 3.1 and 3.2 above, what were the reasons for rejection of C's request?

3.2 Did R reject the flexible working request on incorrect facts as alleged at paragraphs 43 and 58 of the ET1 Claim Form?

4. <u>Indirect sex discrimination contrary to s.19 EqA</u>

4.1 Is R's requirement that C work on site during core hours on any 3 out of 5 days in the working week (Monday to Friday) a PCP?

4.2 If the answer to 5.1 is 'yes', did the PCP put female employees at a particular disadvantage of "having less flexibility in meeting R's requirements" when compared with male employees?

4.3 Did the PCP put C at the alleged particular disadvantage? In particular, was C authorised to work flexibly across core hours as she required, authorised to choose what days to work and/or working temporary hours in relation to her daughter starting school and if so, did that negate any particular disadvantage?

4.4 Did R have a legitimate aim of ensuring delivery of the ANTT service by C as required by the infection control and prevention department in which C worked?

4.5 If so, was the approach of R proportionate, such that its actions were objectively justified?

5. <u>Breach of the ACAS Code of Practice on Disciplinary and Grievance procedures.</u>

5.1 Was there a failure by R, to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures as alleged in paragraph 60 of the ET1 Claim Form? Specifically, did R unreasonably fail to:

5.1.1 Arrange a formal meeting without unreasonable delay after C's grievance was received as alleged at paragraph 30 of the ET1 Claim Form;

5.1.2 Communicate the grievance outcome without unreasonable delay as alleged at paragraph 39 of the ET1 Claim Form; and

5.1.3 Hear the appeal without reasonable delay and at a time and place which should be notified to the Claimant in advance as alleged at paragraph 51 of the ET1 Claim Form?

5.2 If the Employment Tribunal concludes that there was a failure by R to comply with the ACAS Code, what were the reason(s) for such failure? Did R act unreasonably in the circumstances?

5.3 Is the Claimant therefore entitled to a 25% uplift in any compensation because of an unreasonable failure to comply with the ACAS Code?