EMPLOYMENT TRIBUNALS

Claimant: **V**
Respondents: **1. Sheffield Teaching Hospitals NHS Foundation Trust**
2. Ms L Cook
3. Ms A Marshall
4. Ms H Westwood
5. Mr A Jones
6. Ms S Townsend
7. Ms E Hawkshaw

Heard at Leeds **On: 6, 7, 8, 9, 10, 13, 16 and 17 June 2022**

Before **Employment Judge Davies**
Ms J Noble
Mr D Wilks

Appearances
For the Claimant: **In person**
For the Respondent: **Mr B Williams (counsel)**

RESERVED JUDGMENT

1. To the extent that any of the Claimant's complaints were not presented within the time limit in the Equality Act 2010, it is just and equitable to extend time for bringing them.

2. The Claimant's complaints of direct disability discrimination in relation to the pleading of the statutory defence and the failure to pay her correctly when her employment ended are dismissed on withdrawal by the Claimant.

3. The Claimant's complaints against the Third Respondent (direct gender reassignment discrimination) are dismissed on withdrawal by the Claimant.

4. The Claimant's complaint of direct gender reassignment discrimination against the First Respondent in respect of questioning about underwear at a meeting on 25 June 2021 is well-founded and succeeds.

5. All of the Claimant's remaining complaints are not well-founded and are dismissed.

REASONS

Introduction

1. These were complaints of direct gender reassignment discrimination, direct disability discrimination, unfavourable treatment because of something arising in consequence of disability, harassment related to gender reassignment, harassment related to disability, harassment related to sex or of a sexual nature, failure to make reasonable adjustments for disability and victimisation brought by the Claimant, V, against her former employer, the Sheffield Teaching Hospitals NHS Foundation Trust, and six named Respondents.

2. The Claimant represented herself and the Respondents were represented by Mr B Williams (counsel). The Tribunal discussed reasonable adjustments with the Claimant at the outset. All documents had been provided on yellow paper for her. She did not identify any other adjustment she needed. The Tribunal made clear that we would take regular breaks and that the Claimant should ask if she needed a break. The Judge helped the Claimant with formulating her questions.

3. When the hearing had been listed, it was anticipated that one of the Respondents would give evidence from overseas. Following the publication of the Employment Tribunal Presidential Guidance on Taking Evidence from Persons Located Abroad on 27 April 2022, steps were promptly taken to secure appropriate permission. That permission had not been obtained by 14 June 2022, when all the remaining witnesses had given evidence. However, permission was received on 15 June 2022, so the evidence and closing submissions were concluded on 16 and 17 June 2022. Although that meant the hearing could conclude in the scheduled dates, it did mean that there was very little time for the Tribunal to carry out its deliberations, so the judgment was delayed.

4. The Tribunal was provided with a hearing file of almost 2400 pages. Two additional documents were admitted by agreement during the hearing. The Tribunal made clear that we would read those documents to which the parties drew our attention and we did so.

5. The Tribunal heard evidence from the Claimant. For the Respondents, we heard evidence from Mrs L Cook (Head Chef), Mrs A Marshall (Catering

Assistant), Ms H Westwood (Food Production Manager), Mr A Jones (Facilities Director), Mrs S Townsend (Catering Assistant), Mrs E Hawkshaw (Catering Manager), Mrs E Wilson (Head of Catering), Mr J Swallow (Catering Manager), Mr J Ashton (HR Business Partner), Mrs M Mahon (Waste Manager/Facilities Health and Safety Lead), Mrs M Taylor (Facilities Learning Development and Compliance Manager), Mrs S Edwards (Head of Equality, Diversity and Inclusion) and Mrs S Over (Head of Domestic Services).

Complaints and issues

6. There was a detailed, agreed list of the complaints and issues for the Tribunal to decide, which had been discussed and finalised at previous preliminary hearings. That list of issues is annexed to this judgment. Many of the legal complaints related to the same factual allegations. The Tribunal grouped the complaints by reference to the underlying factual allegations in its analysis, although we ensured that we considered each complaint on the detailed agreed list. For ease of comprehension, in this judgment we make findings of fact in relation to different periods and events and then determine the complaints relating to those periods and events, before moving on to the next period and set of events.

7. The generic issues to be decided for each type of complaint were as follows:

Time limits

7.1 In relation to any complaint that was presented to the Tribunal more than 3 months (plus early conciliation extension) from the act complained of, was the act part of discriminatory conduct over a period, and was the complaint presented within three months of the end of that period?
7.2 If not, is it just and equitable for the Tribunal to extend time for bringing that complaint?

Statutory defence

7.3 Where the statutory defence is relied on, has the First Respondent shown that it took all reasonable steps to prevent the unknown employees from doing the admitted incidents or anything of that description?

Direct discrimination

7.4 Did the Respondents do the things complained of?
7.5 If so, was it less favourable treatment?
The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

7.6 If so, was it because of gender reassignment or disability?

Harassment

7.7 Did the Respondents do the things complained of?
7.8 If so, was that unwanted conduct?
7.9 Did it relate to gender reassignment or disability or sex or was it of a sexual nature?
7.10 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
7.11 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
7.12 In the complaints of harassment related to sex relating to the underwear comments, if the conduct was unwanted conduct related to sex or of a sexual nature and had the proscribed purpose or effect, did the Respondents treat the Claimant less favourably by applying the MA Policy to her because she had rejected the unwanted conduct in relation to the underwear comment?

Victimisation

7.13 The protected act is the Claimant's complaint of unlawful gender reassignment discrimination in respect of the admitted incidents.
7.14 Was the Claimant subjected to the detriments complained of?
7.15 If so, was it because she did the protected act?

Discrimination arising from disability

7.16 Did the First Respondent treat the Claimant unfavourably in the ways alleged?
7.17 Did the identified things arise in consequence of the Claimant's disability?
7.18 Was the unfavourable treatment because of any of those things?
7.19 Was the treatment a proportionate means of achieving a legitimate aim?
7.20 The Tribunal will decide in particular:
- 7.20.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
- 7.20.2 could something less discriminatory have been done instead;
- 7.20.3 how should the needs of the Claimant and the First Respondent be balanced?

Failure to make reasonable adjustments for disability

7.21 Did the Respondent have the PCP?
7.22 Did the PCP put the Claimant at a substantial disadvantage compared with somebody who did not have the Claimant's disability? What was it?
7.23 Did the Respondents know or could they reasonably be expected to know that the Claimant had the disability and that it put her at the relevant substantial disadvantage?
7.24 What steps could have been taken to avoid the disadvantage?
7.25 Was it reasonable for the Respondent to have to take the steps?
7.26 Did the Respondent fail to take the steps?

Legal principles

Discrimination and victimisation

8. Claims of gender reassignment and disability discrimination and victimisation are governed by the Equality Act 2010. The Equality and Human Rights Commission's Code of Practice on Employment is relevant to discrimination claims and the Tribunal considered its provisions.

9. The burden of proof is dealt with by s 136 Equality Act 2010. The Tribunal had regard to the authoritative guidance about the burden of proof in *Igen Ltd v Wong* [2005] ICR 931. That guidance remains applicable: see *Royal Mail Group Ltd v Efobi* [2021] ICR 1263. In essence, the guidance outlines a two-stage process. First, the complainant must prove facts from which the Tribunal *could* conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable Tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA. The second stage, which only applies when the first is satisfied, requires the Respondent to prove that it did not commit the unlawful act. However, as the Supreme Court again made clear in *Efobi*, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. The burden of proof provisions of course apply to each different type of discrimination complaint.

10. Under s 109 Equality Act 2010, anything done by a person in the course of their employment must be treated as also done by their employer. However, under s 109(4), in proceedings against the employer in respect of such a thing, it is a defence for the employer to show that it took all reasonable steps to prevent the person from doing that thing or anything of that description.

11. The burden of proving the statutory defence is on the employer. The Tribunal must identify whether the employer took any steps to prevent the employee from doing such acts, and then consider whether there were any further acts they could have taken that were reasonably practicable [there is no material difference between the former statutory wording "reasonably practicable" and the current statutory wording "all reasonable steps"]. The question whether the steps would have been effective to prevent the conduct is a relevant factor, but is not determinative. If the employer takes all reasonable steps but they are not successful, it can still rely on the defence. Indeed, by definition, the matter would not be in front of the Tribunal if the steps had been successful. On the other hand, if the employer does not take all reasonable steps, it cannot rely on the statutory defence even if the steps would not have prevented the act from occurring. The potential effectiveness of the further steps is relevant to the consideration of what is reasonable. Steps that have been taken, such as delivering training, can become stale and require refreshing: see *Allay (UK) Ltd v Gehlen* [2021] IRLR 348, EAT and cases referred to in that judgment.

12. The time limit for bringing a discrimination complaint is governed by s 123 Equality Act 2010. The time limit is 3 months (plus early conciliation) from the act complained of, or such other period as the Tribunal thinks just and equitable. Under s 123(3)(a), conduct extending over a period is treated as being done at the end of the period. The Tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances, but bearing in mind that time limits are exercised strictly in employment cases, and that there is no presumption that a Tribunal should exercise its discretion to extend time. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule: see *Robertson v Bexley Community Centre* [2003] IRLR 434, CA.

13. Direct discrimination is dealt with by s 13 Equality Act 2010. Under s 13, direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual or hypothetical comparator whose circumstances were not materially different. The second question entails asking why the employee received less favourable treatment. Was it because of a protected characteristic or was it for some other reason? It is necessary to explore the mental processes of the employer, to discover what facts operated on his or her mind: see *R (E) v Governing Body of the Jewish Free School* [2010] IRLR 136, SC ("*JFS*"). The protected characteristic need not be the only or even the main cause of the less favourable treatment; it must be an effective cause: see e.g. *London Borough of Islington v Ladele* [2009] IRLR 154, EAT. It is not always necessary to answer the first and second questions in that order. In many cases it is preferable to answer the "reason why" question, first.

14. Discrimination arising from disability is governed by s 15 Equality Act 2010. Under s 15, unfavourable treatment does not require a comparator. It is to be measured against an objective sense of that which is adverse compared with that which is beneficial: see e.g. *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] IRLR 885. The EHRC Employment Code advises that this means that the disabled person "must have been put at a disadvantage". If there is unfavourable treatment, it must be done because of something arising in consequence of the person's disability. There are two elements. First, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be because of that something. The unfavourable treatment will be "because of" the something, if the something is a significant influence on the unfavourable treatment; a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment: *Pnaiser v NHS England* [2016] IRLR 170; *Charlesworth v Dransfields Engineering Services Ltd* [2017] UKEAT 0197_16_1201. It is a defence for the employer to show that the treatment is a proportionate means of achieving a legitimate aim. The employer must show that it has a legitimate aim, and that the means of achieving it are both appropriate and reasonably necessary. Consideration should be given to whether there is non-discriminatory alternative. A balance must be struck between the discriminatory effect and the need for the treatment. The EHRC Code advises that a legitimate aim is one that is legal, not itself discriminatory, and one that represents a real, objective consideration.

15. As regards failure to make reasonable adjustments: the Tribunal must consider the PCP, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant. It should analyse what steps would have been reasonable for the Respondent to have to take to avoid that disadvantage. The burden is on the Claimant to identify, at least in broad terms, the nature of the adjustment. It then shifts to the Respondent to show that the disadvantage would not have been eliminated or reduced, or that the adjustment was not reasonable: see *Environment Agency v Rowan* [2008] ICR 128, EAT and *HM Prison Service v Johnson* [2007] IRLR 951, EAT.

16. The words "provision, criterion or practice" are broad and overlapping words, and should be construed broadly. However, not every act of unfair treatment is covered. The words connote some form of continuum, in the sense that it is the way in which things generally are, or would be, done. The PCP has to be capable of being applied to others. A one-off act could amount to a practice, but it is not necessarily one: see *Ishola v Transport for London* [2020] ICR 1204. It will only be in highly exceptional circumstances that it could be considered a reasonable adjustment to give a disabled person higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences. The purpose of the legislation is to assist disabled

employees to obtain employment and integrate them in the workplace, not to put more money in their pockets; extending sick pay can act as a disincentive to return to work*: O'Hanlon v HMRC* [2007] ICR 1359 CA.

17. Harassment is governed by s 26 Equality Act 2010. There are three elements to the definition of harassment: (1) unwanted conduct; (2) that the conduct is related to a relevant protected characteristic; and (3) the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. As to (1), the conduct must be "unwanted", which means "unwelcome" or "uninvited". As to (2), the question whether conduct is related to a protected characteristic is not a question of "causation". Rather, it requires a connection or association with the protected characteristic. The Tribunal must consider all the circumstances. The intention of the alleged harasser may be one of them, but it is not determinative. Nor is it enough simply to point to the protected characteristic as part of the background: see e.g. *Hartley v Foreign and Commonwealth Office* UKEAT/0033/15; *UNITE the Union v Nailard* [2019] ICR 28; *Tess, Esk and Wear Valley NHS Foundation Trust v Aslam* [2020] IRLR 495, EAT.

18. As to (3), the conduct must have the purpose or effect of violating the person's dignity or creating the proscribed environment. If the conduct has the relevant purpose, that is the end of the matter. However, for it to have the relevant effect, the Tribunal must consider both, subjectively, whether the individual perceived it as having that effect and, objectively, whether that was reasonable: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336. The word "violating" is a strong word (as are the other elements of the definition) and connotes more than offending or causing hurt. It looks for effects that are serious and marked. A one-off act can violate dignity, if it is of sufficient seriousness: see *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT 0179_13_2802. Looking at the other limb of the definition, the word "environment" must not be overlooked. The conduct must create the specified environment, which means a state of affairs. A one-off act may do that, but only if it has effects of longer duration: see *Weeks v Newham College of Further Education* [2012] UKEAT 0630_11_0405. If the conduct has the relevant purpose, that is the end of the matter. However, for it to have the relevant effect, the Tribunal must consider both, subjectively, whether the individual perceived it as having that effect and, objectively, whether that was reasonable: see *Richmond*.

19. Victimisation is governed by s 27 Equality Act 2010, which says that A victimises B, if A subjects B to detriment because B does a protected act, or A believes B has done or may do a protected act. A protected act is defined in s 27(2). It includes making an allegation that someone has contravened the Equality Act. The approach to causation and the burden of proof mirrors that in respect of direct discrimination.

The start of the Claimant's employment and the admitted incidents

20. The Claimant is a transgender woman. She has a law degree, obtained as a mature student. She has dyslexia. Her ability to read written material is helped by use of a yellow overlay or by printing the material on yellow paper. She has her own yellow overlay. She has had the mental health conditions of anxiety and depression since childhood. The Respondents admit that the Claimant was disabled at all relevant times because of both of those matters and they admit that they knew she was at all relevant times.

21. We begin with a general finding about the Claimant's evidence. As we explain below, there is no dispute that the Claimant was subjected to transphobic abuse by unknown individuals early in her employment by the First Respondent. After that, she was involved in both an investigation of those events and absence management and grievances relating to that. In these claims, not only does she complain about the original incidents, but also about very many of the things that happened to her afterwards, including the management of her absences and the conduct of her grievances. She now identifies a whole range of things as gender reassignment discrimination or harassment, disability discrimination or harassment, harassment related to sex and/or victimisation. The Tribunal found that the Claimant had a tendency to misremember the detail of events, and in many respects the detail of her evidence or the questions she asked in cross-examination was not fully consistent with the contemporaneous documents. Furthermore, it appeared to the Tribunal that the Claimant's recollection of events now was affected by her belief, with hindsight, that many of these events were discriminatory.

22. The First Respondent is the Sheffield Teaching Hospitals NHS Foundation Trust ("the Trust"). The Trust comprises five hospitals. The Northern General Hospital is on one site and the other four, including the Royal Hallamshire Hospital, are on another site, known as the Central Campus. The Trust's catering operation produces meals for patients, staff and visitors of all five hospitals. Food production is carried out at the Central Production Unit ("CPU") on the Northern General site. Food is distributed from there to all the hospitals. Approximately 80 staff members work in the CPU, and there are a further 100 or so catering staff across the five hospitals. Mr Swallow is the Catering Manager at the Northern General site and Mrs Hawkshaw at the Central Campus. Mrs Wilson, as Head of Catering, has overall responsibility for the Trust's catering services.

23. The Trust works to and seeks to enforce a set of values – the PROUD values. They include "Respectful – be kind, respectful, fair and value diversity." Employees of the Trust receive general training about equality and diversity every three years. The training records to which the Tribunal's attention was drawn indicate that this happens in practice. The witnesses who were asked

about it appeared to have knowledge and understanding of the PROUD values. The impression they gave was that these values do indeed form part of the culture of the Trust, with which they were familiar. There is an Acceptable Behaviour at Work policy that is applied and enforced and an Equal Opportunities Employment Policy. The Trust has an Equality, Diversity and Inclusion strategy, with an EDI Board, coaching and mentoring and other measures designed to embed a zero-tolerance approach to any form of discrimination. The Trust also employs a Head of Equality, Diversity and Inclusion, Mrs Edwards. As soon as she joined the Trust in February 2020, she looked to build upon the three yearly equality training and broaden the scope of the Trust's training. She procured a suite of high quality e-learning courses, which require the participants to pass a test in order to pass the course. The witness evidence, including the answers given by the range of different witnesses in cross-examination, supported the contention that the Trust's approach to Equality, Diversity and Inclusion issues was not merely aspirational or about producing written policies and procedures, but was a part of the workplace culture.

24. The Claimant applied for a full-time role as a Catering Assistant at the CPU. She was interviewed by Mrs Cook (Head Chef) and Mr Clarke (Supervisor) in January 2020 and was successful. When Mrs Cook called her to offer her the role, the Claimant said that she needed to work 16 hours per week. They discussed all the roles and hours available. Eventually, the Claimant accepted the original full-time role for which she had applied.

25. As part of the Trust's pre-employment checks, the Claimant was referred for a pre-placement health screening with Occupational Health ("OH") in March 2020. The OH advisor reported that the Claimant was fit for work, but noted that she was currently transitioning. This had previously caused some anxieties, including people asking her about it. She had not worked for several years and was also experiencing some anxieties about returning to the workforce and her hours of work. The OH advisor recommended meeting the Claimant before she started work to discuss any support that was required.

26. Mr Swallow and Mr Bulman (HR Manager) therefore met the Claimant on 12 May 2020. They agreed with the Claimant that Mr Swallow would send a note to all CPU staff to say that the Claimant would be joining them, that she was transitioning and that she did not want people to ask her questions about it. This was done at the Claimant's suggestion. Mr Swallow told the Claimant that there were male and female changing rooms, each with toilet cubicles and showering facilities. They agreed that Mr Swallow's note would say that the Claimant would be using one of the cubicles in the female changing rooms and did not want to be asked questions about this. Mr Swallow sent a draft of the note to the Claimant. She made some suggested changes, mainly offering personal explanations e.g. referring to the fact that she had suffered ill treatment in the past, or saying that she did not want to be seen as offending anybody. Mr

Swallow did not incorporate most of the changes in his revised draft. He explained to the Claimant that, while he understood a wish to give some explanations, this was a management communication and he preferred to keep the message simple and clear. The Tribunal considered that Mr Swallow's draft was simpler and clearer. The Claimant agreed the final draft with Mr Swallow. On 10 July 2020, Mr Swallow sent the agreed draft to all staff in the CPU. It told them clearly that the Claimant would be joining the CPU, that she was transgender and had requested that people did not make comments or ask questions about this. It explained that the Claimant would be using a cubicle in the female changing rooms and that she did not want questions or comments about that either. Mr Swallow invited colleagues to join him in welcoming the Claimant and helping her to settle in.

27. At their meeting on 12 May 2020, the Claimant asked if she could start work 15 hours per week and gradually build up her hours to full-time, because she had not been in employment for so long. Mr Swallow agreed to look into it, and it was subsequently agreed that she could build up to full-time over four weeks.

28. There was a long discussion at the meeting on 12 May 2020 about the Trust's Managing Attendance Policy. The Claimant was familiar with it because she had previously supported a friend who had worked in the CPU and been managed under that policy. The Claimant expressed concerns that she might have sickness absences caused by her mental health and was concerned about whether she would receive attendance warnings under the policy. We return to the management of the Claimant's absence below, but we note at this stage that we agreed with Mr Williams's submission that the Claimant was, from the outset, overly and unduly concerned about the Managing Attendance Policy. She accepted in cross-examination that she regarded it as punitive, not as supportive. That seemed to the Tribunal to affect her approach to it from even before her employment started and she anticipated difficulties that had not in fact arisen. This was to become an issue. Mr Swallow told her at the meeting in May that the objective of the policy was to support colleagues to maintain their attendance and fulfil their contractual hours, and that where there was a need to consider adjustments as part of that support, they were considered. It seemed to the Tribunal that the Claimant was unwilling to accept that.

29. Mrs Wilson discussed the arrangements for the Claimant's start with Mr Swallow. She decided to issue a memo herself before the Claimant started, reminding the catering staff more generally of the PROUD values and the importance of valuing and celebrating diversity. She used a communication about support in the light of COVID-19 as the opportunity to do so. She reminded staff that the Trust would take decisive action where people were subjected to discrimination, and encouraged staff to report any disrespectful or discriminatory behaviour they experienced or witnessed. The memo did not refer to the Claimant or gender reassignment, because it was intended to supplement rather than duplicate Mr Swallow's specific note. It was sent to all

catering staff on 3 July 2020 and was then posted on a number of notice boards.

30. Mrs Wilson discussed with Mr Ashton, HR Business Partner, what other steps might be taken to ensure that the Claimant had a positive and supportive return to the workplace. She did not think that the CPU had previously welcomed a transgender member of staff. They agreed that Mrs Edwards, the Trust's Head of Equality, Diversity and Inclusion, should be asked to deliver some bespoke training to CPU staff. Mrs Edwards devised and delivered bespoke training to every member of staff in the CPU. There were a number of sessions (to ensure that everybody could attend in the light of shift patterns and the need for social distancing because of the pandemic). The staff were in the training room and Mrs Edwards delivered the training by Microsoft Teams. The Tribunal saw a copy of the slides and Mrs Edwards gave evidence about the training. It covered trans and gender diverse identities; what these terms mean; an explanation of transitioning; an explanation of gender dysphoria; the legal framework in the Equality Act; and examples of trans discrimination, harassment and victimisation. Mrs Edwards ensured that there was plenty of opportunity for discussion and questions. No question was off limits. She said that it was clear that there were different views and levels of knowledge among staff. Some expressed concerns, mainly female members of staff worried about sharing the ladies changing room with a transgender woman. Mrs Edwards tried to address those concerns by explaining that there was no evidence of transgender women being a threat or causing any issues in the workplace, and that there needed to be a balance of rights and respect for someone who wanted to live her life completely as a woman. The Tribunal had no doubt that the training was well devised and well delivered. Mrs Edwards clearly has empathy, experience and expertise and that was undoubtedly reflected in the quality of the training she delivered.

31. The Claimant suggested in cross-examination that the training should have included statistics about matters such as transgender hate crime, the number of transgender people in the UK and the number experiencing mental health issues. Mrs Edwards said that sometimes statistics can be helpful and sometimes an explanation is better. She said that she had touched on the impact on transgender people and the challenges being faced by transgender people in today's society. Mrs Edwards agreed that she had not referred to the fact that the Trust was a Stonewall champion.

32. Mrs Edwards was asked in cross-examination whether she thought the training was sufficient, particularly given that the Claimant was subjected to unacceptable and highly offensive transphobic conduct shortly after she started work, as we explain below. Mrs Edwards thought that the training was sufficient. She explained, "As an organisation we have a duty to do what we can to challenge and raise awareness and try to encourage better understanding. I've been doing this job for 17 years in a range of organisations. We can give people

the information, engage in conversation, and raise awareness and understanding, but we cannot stop people from saying or doing or behaving in a particular way. I intended to provide information about the subject matter, the challenges faced by transgender people, how we create a supportive environment, how we expect people to behave and treat each other. Ultimately, I can't be held accountable for those who don't take heed of the advice. I was clear no question was out of bounds. I think the training I delivered was clear and comprehensive."

33. The Claimant attended one of the training sessions herself and was provided with a copy of the training slides. We noted that after she was subjected to the unacceptable behaviour, she wrote in an email to Mrs Westwood, her line manager, that she was "shocked" that people thought the way they did after Mrs Edwards's training. In another email, she wrote that she thought that the efforts management had gone to to make her feel welcome would have worked, and that "management seem to have done all they can with the note to staff and the training by [Mrs Edwards] but you can't educate the narrow minded and I am not sure what else can be done to avoid a repeat."

34. The Claimant started work on 13 July 2020. She worked two days that week and three the next. On 23 July 2020 she contacted Mrs Edwards because she was anxious about moving on to work four days in the following week. Mrs Edwards contacted Mrs Westwood. She and Mr Swallow agreed to extend the Claimant's phased introduction by a further week and Mrs Westwood confirmed this when she met the Claimant on 24 July 2020 to discuss her hours.

35. On 28 July 2020 the Claimant arrived at work crying and shaking because of issues outside of the workplace. There is no dispute that at about 7am she found a note that had been posted into her locker in the ladies' changing room that said, "Get out you tranny freak." She destroyed the note and did not report it to anybody at that time. This is the first admitted incident of unacceptable behaviour. The author of the note has not been identified.

36. The second admitted incident of unacceptable behaviour took place the same day, between about 12pm and 2pm. We refer to this as the changing room incident. We repeat again that it was deeply offensive and unacceptable. The Claimant was in the ladies' changing rooms in a cubicle. She overheard two female voices as follows:

> Voice one: I am sick to death of this bloke with a dick pretending to be a woman, who doesn't even dress like a girl and has facial hair, that thing may rape me and we can drive it out of the department and maybe find a suitable leper colony for it.
>
> Voice two: I agree but we need to do something but what can we do when management are sucking up to that thing.

Voice one: We will find a way.

37. The Claimant remained in the cubicle throughout and did not see the perpetrators. We deal below with the investigation of this matter. However, we note at this stage that when she was interviewed the Claimant said that both voices were English. One was distinctive, middle aged, posh, not holding back and opinionated. The other was younger, softly spoken, quite posh, arrogant but young. She did not recognise them at the time, but she thought she might have recognised one of them since. She told Ms Barson during a break in the interview that the person she thought she had recognised was someone we will refer to as Ms F.[1]

38. However, after she had presented her first Tribunal claim, during the disclosure process, the Claimant was provided with a note Mrs Cook had made. Mrs Cook's evidence to the Tribunal was that when she found out on 29 July 2020 what had happened, she realised that she had been in the ladies' changing room at the same time as the Claimant on 28 July 2020. She had seen a number of people in there and she thought it would be helpful to the Claimant if she made a note of who had been in the vicinity at the time, so she did so. She provided the note to Mrs Westwood. The note indicated that Mrs Cook had seen four (named) people in or near the changing room. It also said that she had seen Mrs Marshall getting changed and had commented to her about the weather. As she was getting her own clothes out of her locker, she then saw the Claimant leave the changing room. When Mrs Cook's note was provided to her during the initial disclosure process, the Claimant noted that Mrs Cook and Mrs Marshall had had a conversation in the changing room while she was in the cubicle, so she decided that they must have been the perpetrators in respect of the changing room incident. At that stage she presented her third claim, naming them as the perpetrators and as named Respondents. The only basis for identifying them was Mrs Cook's note.

39. Mrs Cook and Mrs Marshall both provided witness statements in which they denied any involvement in the changing room incident. They both described a brief conversation about the weather and the fact that Mrs Marshall was wearing shorts. Mrs Marshall explained that she is originally from the Philippines and speaks with an accent that reflects her nationality. When she gave her oral evidence, Mrs Marshall had a strong accent and it was clear that her English is far from fluent. It was at that stage that the Claimant, fairly, indicated in response to a question from the Employment Judge that she did not believe that Mrs Marshall was one of the people she had overheard. After a break, she withdrew her complaint against Mrs Marshall.

[1] We have chosen to refer to that person with an anonymous initial because she has not given evidence to the Tribunal and the Tribunal is not in a position to make findings either way about whether she was the perpetrator.

40. In those circumstances, the Tribunal had no hesitation in finding that Mrs Cook was not involved in the changing room incident either. The only basis upon which she was alleged to be involved was her own admission of a conversation with Mrs Marshall. That conversation cannot have been the one in which the transphobic comments were made because one of the participants was clearly not English and the Claimant was clear that both voices were English. The Tribunal noted, of course, that Mrs Cook was one of the people who interviewed and appointed the Claimant. If she had had the transphobic views expressed in the changing room incident, it would have been unlikely that she would have appointed the Claimant in the first place. It also made it more likely that the Claimant would have recognised her voice. The Claimant had previously been 85% certain that Ms F was one of the two perpetrators. For all those reasons, the Tribunal found that Mrs Cook was not one of the perpetrators of the changing room incident. The perpetrators were not identified at the time and the Tribunal finds that the two people alleged by the Claimant in these proceedings to be the perpetrators were not responsible.

41. The third admitted incident took place on 11 August 2020. There is no dispute that on that day the Claimant found another note in her locker, written on a sanitary disposal bag in capital letters. It said, “Get out tranny.” The author of this second note has not been identified.

The investigation of the admitted incidents

42. The Claimant reported the changing room incident to Mrs Westwood and Mrs Edwards on 29 July 2020, the day after it happened. In her email she started by saying that she was struggling to do more than 3 days per week and asked to be referred to OH about that. Then she said that she had arrived at work the previous day shaking and crying because of hate crime and other issues. She mentioned the risk of self-harm. She concluded her email, “In other matters I was in the ladies toilet yesterday and I overheard a two way discussion which is as follows …” She set out the offensive conversation, as above. She explained that she had not seen the perpetrators, who did not know she was in there. She asked whether there was anywhere else for her to work.

43. Mrs Westwood discussed the Claimant’s email with Mr Swallow and Mrs Wilson. She emailed the Claimant saying that she would continue to support her in any way she could and suggesting that she take the following day off as authorised absence. She agreed to refer her to OH, and attached a consent form, and she confirmed that she would support the Claimant remaining on 3 days per week for the time being but said that she wanted to discuss it with her the following week. She said that she would be starting an investigation into the changing room incident, and asked the Claimant when it had happened. The Claimant replied later that day. While thanking Mrs Westwood for the offer of a day off, she said that she did not want it to be used to push her to a “stage 3” or

a “stage 4.” The Tribunal noted that there had been no suggestion of absence management from Mrs Westwood. In her email the Claimant implied that she no longer wanted to be referred to OH after speaking with her therapist. She said that she was not sure when the changing room incident had happened because she was already distressed. She thought it was the afternoon.

44. Mrs Westwood emailed the Claimant on 30 July 2020 to confirm that her day’s absence was a personal day to support her, and would not be counted as sickness absence. The Claimant sent further emails in which, for example, she expressed concerns about losing her job. Again, the Respondents had done nothing to prompt any such concern. The Claimant and Mrs Westwood arranged to meet on 4 August 2020. In an email dated 30 July 2020 Mrs Westwood confirmed that they would discuss the Claimant’s working arrangements and whether an OH referral would be beneficial, as the Claimant had said that she was struggling to do more than 2 or 3 days. They would also discuss the “very serious concerns” the Claimant had raised about the changing room incident.

45. The Claimant met Mrs Westwood on 4 August 2020. Ms Platts, HR advisor, attended and Ms Barson (supervisor) supported the Claimant. To begin with the Claimant was shaking and emotional. She revealed that she had self-harmed. However, she was able to take part in the meeting. Mrs Westwood began by discussing the Claimant’s working hours and then discussed the changing room incident. She had prepared questions about that in advance, and she went through them with the Claimant. Ms Platts made notes of the discussion and the questions and answers. The lengthy discussion was captured in a letter sent to the Claimant on 18 August 2020. The letter records that during their discussion Mrs Westwood did express concern that the Claimant was saying she was unable to work the agreed four shifts that week, given that she had accepted a full-time post. However, with encouragement from Ms Barson too, the Claimant agreed to try four shifts that week. Mrs Westwood was to meet the Claimant at the end of the week to find out how things had gone. They would then consider whether the Claimant wanted to move to a 20 hour per week post temporarily or whether she wanted to continue with the phased approach with a view to reaching full-time hours. Mrs Westwood would refer the Claimant to OH and a further meeting would then be arranged. The Claimant spoke about ending her employment, but Mrs Westwood encouraged her not to, and to take “small steps” to reach her goal of returning to and staying in work. The Claimant says that during the discussion of her working hours, Mrs Westwood pressured her to return to full-time hours and that that was her sole focus. Mrs Westwood accepted that she encouraged the Claimant to build up to full-time hours and explored how she could support her to do so, but she said that she did not bully or pressure her to do so. The Tribunal accepted Mrs Westwood’s account. Neither the HR advisor nor the Claimant’s colleague expressed concerns about Mrs Westwood’s approach, and the suggestion that she pressured the Claimant

to work full-time hours is inconsistent with the steps she took before and after the meeting to support the Claimant in working reduced hours. It is also inconsistent with the Claimant's subsequent emails (see below). Telling the Claimant that if she needed a further extension of her agreement to work part-time she would need to discuss it with Mr Swallow or Ms Wilson is not the same as pressurising her. It simply reflects the fact that Mrs Westwood did not have authority to agree the change.

46. The Claimant now says that Mrs Westwood treated the investigation of the changing room incident as an "afterthought" by dealing with it at the end of the meeting on 4 August 2020, and that this was discriminatory. The Tribunal found that Mrs Westwood did not treat the matter as an afterthought or give that impression. We accepted her evidence about that, which was consistent with the documents from the time. First, we noted that she dealt with matters in the same order that the Claimant raised them in her email of 29 July 2020. The Claimant's own wording was, "In other matters …". Secondly, Mrs Westwood made clear in her email of 30 July 2020 that the changing room incident would be discussed, and that she regarded it as "very serious." Thirdly, the pre-prepared questions about the changing room incident, the note of the questions and answers, and the detailed account in the letter of 18 August 2020 are inconsistent with this part of the meeting being an afterthought. Fourthly, the Claimant sent a number of emails to Mrs Westwood on 4 and 5 August 2020 and she did not suggest in any of them that Mrs Westwood had treated it as an afterthought. Nor did she give the impression Mrs Westwood had behaved inappropriately or pressured her to return to full-time hours or that this was the focus of the meeting. Indeed, in the evening on 4 August 2020 she asked for the rest of the week off as compassionate leave. Mrs Westwood did not immediately see the email, but Mr Swallow replied the following morning. In a response to him, the Claimant wrote that she appreciated his and Mrs Westwood's "support and kindness" but that the abuse she had suffered had left her upset and scared it would happen again.

47. Mrs Westwood gave evidence that the Claimant's transgender status had no bearing on the way she approached the meeting. The Tribunal accepted her evidence. There was absolutely nothing to suggest that she treated the Claimant any differently because she is a transgender woman. Mrs Westwood simply addressed the two issues calling for discussion as she would with any employee.

48. Following the meeting on 4 August 2020, Ms Barson told Mrs Westwood that the Claimant had told her during a break that voice one belonged to Ms F. Ms Barson had told her to report this, but the Claimant had changed the subject. Mrs Westwood asked Ms Barson to write a note of the conversation and she did so. Mrs Westwood gave it to Mr Swallow. In fact, Ms F had already provided a handwritten note after the operations meeting in which Mrs Westwood had

mentioned the incident, because she had seen the Claimant in the changing room on 29 July 2020. Ms F's note said that she saw the Claimant go into the toilets at 8am and 9am. The second time Ms F was on her way to the changing room and followed the Claimant in. The Claimant was in one of the toilet cubicles and was breathing heavily. Ms F was not sure if she was crying or struggling to breath. Ms F saw the Claimant later – about 10.30am – in the sandwich room, when she had cause to ask her to pull her face mask above her nose. At about midday Ms F went into the changing room, when the Claimant had just left. The Claimant's locker was next to hers. She saw 2 hair nets on the floor by her locker, so she went into the rest room and told the Claimant she thought she had dropped her hair nets. The Claimant went to pick them up. Ms F also noted that another colleague had told her that the Claimant had been crying at about 9.30am.

49. One of the Claimant's complaints is that Mrs Westwood did not take steps to investigate or support her when she received Ms F's note. Mrs Westwood explained in cross-examination that the Claimant was not at work on the day Ms F gave her the note (29 July 2020). The next day she was in work was 4 August 2020, and that was the day Mrs Westwood conducted the meeting with her. The Tribunal found that there was no failure to investigate or offer support in that respect by Mrs Westwood.

50. Mr Swallow took HR advice about the Claimant's request for compassionate leave. The Trust's Special Leave Policy allows for up to 5 days' paid compassionate leave to deal with a difficult or sensitive issue not covered elsewhere in the policy. Mr Swallow granted the Claimant's request for compassionate leave for 5, 6 and 7 August 2020. He emailed her on 6 August 2020 to confirm this. He added that it was important that they try to establish what measures could be put in place to help the Claimant feel safer at work. He noted that she had told Mrs Westwood she was struggling to do more than 3 days per week and that they needed to explore options for changing her working hours. They needed to discuss that with her. He had asked Mrs Westwood to contact her on Monday. They also planned to progress an OH referral, once they had received the Claimant's consent form. Mr Swallow confirmed that the changing room incident was to be formally investigated.

51. The Claimant replied to Mr Swallow the same day. Among other things, she said that she wanted to do 5 days in due course, but currently wanted to stay on 2 or 3 days per week. She also said that the changing room incident was not the only incident she suffered at work. There was another but she was not willing to disclose the details as it was too upsetting.

52. Mr Swallow spoke to Mrs Westwood about accommodating reduced hours for the Claimant, and Mrs Westwood spoke to Mrs Cook, who puts all the CPU rotas together. They identified a range of options for working 2 or 3 days, or 20 or 25 hours and Mrs Westwood emailed the information to Mr Swallow on 7

August 2020. They agreed that the Claimant could do three days per week for the next four weeks, and that they would review the situation again in the fourth week. Mrs Westwood drew up an amended contract. The Claimant called Mrs Westwood on 7 August 2020 to ask if she still wanted to meet her that day. Mrs Westwood said that she did not want her to come in as she was still on compassionate leave. She suggested they speak on Monday (10 August 2020) if the Claimant was back at work. The Claimant said that she wanted to try to come to work on Monday. Mrs Westwood said they would agree her remaining hours when they met. After calling Mrs Westwood, the Claimant called Mr Swallow. She told him that she had decided to return to work after speaking to her therapist. Mr Swallow told her that there had been discussions about supporting her return to work and that this would include a temporary adjustment to her hours, which would be agreed with her the following week. The Claimant confirmed that her aim was to try to get to full-time hours, but this might take some time. They discussed the changing room incident briefly, and Mr Swallow acknowledged what the Claimant had said about another incident. She did not elaborate on that. Mr Swallow told the Claimant that they would put as much support as possible in place for her return. They agreed that she would work in "pick and pack", with staff she was familiar with. The Claimant asked Mr Swallow if it would be him investigating the changing room incident and he said that was unlikely.

53. The Claimant did return to work on Monday 10 August 2020. A temporary adjustment to her hours to 3 days per week was agreed with her, and Mrs Westwood prepared revised contractual documents to reflect that. Mr Swallow spoke to her and sent an email confirming that Mrs Taylor had been appointed to investigate the changing room incident. Mr Ashton from HR would support her. The Claimant was required to attend an investigation meeting the following day. The investigation was to be carried out in accordance with the Trust's Acceptable Behaviour at Work policy ("the ABAW policy").

54. On 11 August 2020, the Claimant attended work and was interviewed by Mrs Taylor and Mr Ashton. She had a work colleague with her. Mrs Taylor asked her about the changing room incident. During the interview she said that Ms F had come into the staff room later in the day on 28 July 2020 with Ms Barson, and that she was 85% sure that Ms F was one of the two voices. Mrs Taylor asked her about the other incident she had mentioned to Mr Swallow. At that stage, for the first time the Claimant reported the first note that had been pushed through her locker (on 28 July 2020). Mrs Taylor asked the Claimant for information about that too. She told the Claimant that they would establish the facts and produce a report. The Claimant said that she was struggling to stay in post and Mr Ashton asked her to give them an opportunity to complete the investigation.

55. At around 3pm on 11 August 2020, the Claimant found the second note in her locker. She reported it to Mr Horton, a supervisor. The Claimant says Mr Horton asked her to sign a statement about what happened. The Respondents say that

she did not sign a statement at that stage – Mr Horton asked her what had happened and later set that out in an email, but she did not sign a statement. The Tribunal found that the Claimant did not sign a statement at that stage. There is no dispute that Mr Horton went straight with her to Mrs Westwood's office to report what had happened, nor that he sent an email to Mrs Westwood at about 4pm, setting out what the Claimant had told him. It would have been surprising if he had taken a signed statement but not referred to it. Further, in an email on 13 August 2020, the Claimant told Mr Swallow that Mr Horton, "took some written details" from her and that she was later called to Mrs Westwood's office and "asked to provide a written statement." The Claimant's explanation in cross-examination was that Mr Horton had written the information down and asked her to sign it, whereas she had written the whole statement for Mrs Westwood. The Tribunal did not find that evidence persuasive. We found that the Claimant was not asked by Mr Horton to provide a signed statement. That was the context for her discussion with Mrs Westwood.

56. When the Claimant and Mr Horton went to Mrs Westwood, they handed the note itself to her. Mrs Westwood scanned it and sent a copy to Mr Ashton, Mr Swallow and Mrs Wilson. About an hour later, Mrs Westwood asked the Claimant to write a statement detailing what had happened. She asked her to include details such as the last time she had been in the changing room, when she found the note and where, who she saw and anything else she could think of. The Claimant did so. Mrs Westwood also asked the Claimant to write the contents of the note on the statement. Her evidence was that she asked her to do so because she anticipated having to investigate what had happened, and thought that she would need to gather handwriting samples from every female member of staff on duty that day, including the Claimant. In the event, she was not asked to investigate it, so she did not ask anybody else for a sample. Mrs Westwood said that she did not ask the Claimant to provide a handwriting sample because she is transgender. She did so because she intended to ask all the female staff members on duty to do the same. She explained that her husband used to be a police officer, and she was particularly aware of the need to gather evidence promptly.

57. Before leaving work that day, the Claimant told Mr Swallow that she was resigning. He told her that he was aware there had been another incident, which would be investigated, and that he would not accept her resignation in the heat of the moment. When she got home that night, 11 August 2020, the Claimant emailed to say that she did not feel safe coming to work and was going off sick with stress. She sent a further email saying that she was shocked and surprised that she had been accused of writing the message herself by being asked to copy it in order to check her handwriting.

58. The Claimant complains that requesting her to provide a handwriting sample was direct disability and gender reassignment discrimination, and was victimisation because she had complained about the admitted incidents. She

says that Mrs Westwood told her it was "for elimination purposes", and that is what she said in her subsequent appeal of 25 November 2020 (see below). Mrs Westwood did not recall using that expression, but the Tribunal found it likely that she did. On her own account she thought that it would be necessary to obtain handwriting samples from everybody, so she clearly was asking the Claimant to provide one "for elimination purposes." However, the Tribunal accepted Mrs Westwood's evidence that she did not treat the Claimant any differently because she is a transgender woman, nor because she has a mental health disability. She would have asked anybody who complained of finding an equivalent note to provide a handwriting sample. That request may be open to criticism, but that does not mean that the reason why it was made was linked to the Claimant's gender reassignment or disability. The Tribunal was quite satisfied that it was not. Likewise, Mrs Westwood did not treat the Claimant differently or detrimentally because she had complained about the admitted incidents. The complaint about the second note was a cause of her request, in the sense that "but for" the complaint Mrs Westwood would not have asked the Claimant to provide a statement about what happened or to provide a handwriting sample, but that is not the same as "the reason why" Mrs Westwood asked the Claimant to provide a handwriting sample. The Tribunal accepted Mrs Westwood's evidence that the reason why she asked the Claimant to provide a handwriting sample was because she anticipated that handwriting samples would be taken from others and that this was an appropriate way to investigate the matter.

59. The Tribunal then considered whether requesting the Claimant to provide a handwriting sample by writing the discriminatory words used in the note was conduct that "related to" gender reassignment. We concluded taking into account all the circumstances that it was not. It was certainly no part of Mrs Westwood's "intention" or "motivation" – we accepted that she was simply concerned with identifying the culprits, and eliminating the Claimant for those purposes – but that is not the test. The question is whether the conduct was caused by or associated with gender reassignment. The Tribunal found that the fact that the three words the Claimant was asked to write were the discriminatory words did not mean that the request to do so "related to" gender reassignment. The focus was on investigating the complaint and the words were, in that sense, secondary. The offensive message was three words long and contained only 9 letters of the alphabet, written in capitals. That was the context in which the Claimant was asked to write those specific words. Fundamentally, the conduct "related to" the investigation of the Claimant's complaint.

60. The Claimant was off work sick from 12 August 2020. On 13 August 2020 Mr Swallow called her to find out how she was. He assured her that the Trust was taking the matter seriously and reminded her again about completing the OH consent form. The Claimant expressed concern about triggering stage 3 of the Managing Attendance policy. We return to this below. Mr Swallow asked the

Claimant if she would be able to meet Mr Ashton that day to discuss the second note and she said that she would. Later in the day, the Claimant confirmed that she had been signed off for a month, and she provided her sick note the following day. She was signed off with "work related stress – reports of bullying and harassment."

61. The Claimant complains that the Trust and Mrs Westwood discriminated against her by failing to take steps to support her following the admitted incidents. The Tribunal found that there was no failure to take steps to support the Claimant after the incidents. In particular:
    - 61.1 She did not report the first note until 11 August 2020.
    - 61.2 When she reported the changing room incident on 29 July 2020, Mrs Westwood instigated a day's paid personal leave and an OH referral.
    - 61.3 The meeting on 4 August 2020 was not as the Claimant now describes it, namely an attempt to bully or pressure her into working full-time hours with the changing room incident treated as an afterthought. It was a detailed and supportive discussion and consideration of the Claimant's working hours and what adjustments could be made to those and a proper discussion of the changing room incident.
    - 61.4 The Claimant subsequently referred to the "kindness and support" shown by Mrs Westwood and Mr Swallow.
    - 61.5 The Claimant's request for compassionate leave for the rest of that week was granted.
    - 61.6 The Claimant's consistent position was that she did want to work full-time in due course, but was not currently able to do so. The Claimant's request to continue working 3 days per week temporarily was agreed on her return to work on 10 August 2020.
    - 61.7 An investigation into the changing room incident was promptly initiated and Mrs Taylor interviewed the Claimant about it on 11 August 2020 (the Claimant's 2nd working day after the incident).
    - 61.8 It was not until 11 August 2020 that the Claimant reported the first note, and the second note was left. That was taken seriously. It was investigated by Mrs Taylor on 13 August 2020.
    - 61.9 The Claimant's heat of the moment resignation was not accepted.
    - 61.10 Mr Swallow called the Claimant when she was off sick after 11 August 2020 and provided support and reassurance.
    - 61.11 Mrs Westwood assisted the Claimant with requests for a salary advance in August, and dealt with a similar request in September during her own annual leave. She signposted the Claimant to sources of financial assistance on her own initiative because she knew her pay was to be reduced to half pay.
    - 61.12 Ultimately, the Claimant was transferred to the Royal Hallamshire and did not return to the CPU (see below).

62. Returning to the investigation of the admitted incidents, as noted Mrs Taylor and Mr Ashton spoke to the Claimant on 11 August 2020 about the changing

room incident and the first note. They spoke to her on 13 August 2020 about the second note.

63. Mrs Taylor and Mr Ashton identified and set out to interview all the female members of staff, including supervisors and others, who had been at work on 28 July and 11 August 2020. In total they interviewed 27 out of the 33 female members of staff on duty on one of those two days. Nobody they spoke to knew anything about the admitted incidents. Nobody they spoke to had heard any conversations about the Claimant or transgender people. Mrs Taylor did not get the impression that anybody was hiding something or that anybody was colluding. More than one of the people interviewed referred to the content of Mr Swallow's note before the Claimant started or to the training they had received.

64. Mrs Taylor and Mr Ashton spoke to Ms F twice. Mrs Westwood told them in her interview that 28 July 2020 was only Ms F's second day back at work after long term sickness absence. The investigators were provided with the Claimant's initial email reporting the changing room conversation; Mrs Westwood's questions and answers from 4 August 2020; the statements from Ms F, Ms Barson and Mrs Cook; the Claimant's email referring to a second incident; the Claimant's statement of 11 August 2020 about the second note; and a copy of that note. Ms F and Mrs Cook were asked about their written statements when they were interviewed.

65. The notes of many of the interviews recorded that Mrs Taylor began by introducing everybody, explaining that they were investigating a complaint under the ABAW policy, and saying words to the effect, "This is not about you but you have been identified as a potential witness." The Claimant suggested in cross-examination that this showed that people had been ruled out before they were interviewed. Mrs Taylor and Mr Ashton both disagreed. Mr Ashton said that this was not about ruling people out; rather most people would be more familiar with the Trust's disciplinary process than the ABAW process and Mrs Taylor was making clear that this was not a disciplinary interview and putting people at ease. The Tribunal accepted that evidence. It was wholly implausible that Mrs Taylor and Mr Ashton would have conducted 30 or so interviews to "go through the motions" despite having ruled the people out as suspects.

66. The Claimant also suggested that Mrs Taylor and Mr Ashton had not probed the witnesses sufficiently. The only questions she could suggest in cross-examination that had not been asked were to tell Ms F that she had been identified as a possible suspect and press her on that; and to question Mrs Cook about the motivation for writing her statement and whether she was covering her tracks. Mrs Taylor agreed that those questions were not asked but she said she thought the questions asked were sufficient. Mrs Taylor said that nobody they interviewed suggested that Ms F was involved.

67. One of the Claimant's complaints is that Mrs Taylor and Mr Ashton did not request handwriting samples from all of the relevant female members of staff as part of their investigation. She says this was discrimination because she was asked to provide a handwriting sample. Mrs Taylor said that they considered whether to gather handwriting samples but they did not believe it would help them identify the culprit(s). They did not have the first note, and the second was three words in block capitals. They did not think it would be possible to identify somebody on that basis and they did not think the cost and potential impact of instructing a professional handwriting expert was proportionate. They thought that gathering handwriting samples would have heightened anxiety and tensions in the CPU, which would have had a negative impact on everyone, including the Claimant. Mr Ashton agreed. He said that if they had thought gathering samples would have helped identify the perpetrator, they might have done so regardless of any aggravation it might have caused, but they did not think it would help. Mrs Taylor and Mr Ashton also explained that they did not know that the Claimant had been asked to provide a handwriting sample at that time, so this had no bearing on their decision. The Tribunal noted that although the words of the second note were written in block capitals across the bottom of the Claimant's handwritten statement of 11 August 2020, there was nothing on the face of the statement to indicate that this had been done by the Claimant at Mrs Westwood's request. Mr Ashton and Mrs Taylor both said that the Claimant's transgender status had no bearing on their decision. Their evidence was consistent with what Mrs Taylor said in response to the Claimant's appeal against the outcome of the ABAW investigation report at the time.

68. The Tribunal accepted Mrs Taylor and Mr Ashton's clear and straightforward evidence about this. We accepted that they did not know that the Claimant had been asked to provide a handwriting sample, and that their reasons for not gathering them from others were as they explained. Fundamentally, they did not think it would help to identify the perpetrator, given that they only had three words written in block capitals for comparison, and they were concerned that it would lead to a backlash against the Claimant. We accepted that this was not because the Claimant is a transgender woman.

69. Mrs Taylor and Mr Ashton accepted that each of the three admitted incidents had happened as the Claimant described. Although nobody provided any corroborating evidence, they had no reason to doubt what she told them. However, the Claimant was not able to identify the perpetrators of the changing room incident. She thought Ms F might be one of them but was not certain. Ms F denied any involvement and nobody else recalled hearing or participating in such a conversation. Mrs Taylor and Mr Ashton therefore concluded that they were unable to establish who the perpetrators were. Likewise, the Claimant did not know who had left the notes and none of the witnesses had seen or admitted anything, so the investigators were unable to identify the culprits. The Claimant's complaints were therefore upheld. If it had been possible to identify the culprits, Mrs Taylor and Mr Ashton would have recommended disciplinary

action. They were aware of the measures taken before the Claimant started work to support her and try to prevent such behaviour. They did not think these incidents could have been foreseen. However, they felt that in the circumstances further preventative measures should be taken. Therefore they recommended that CPU management and HR should deliver a further communication to CPU staff; CPU management should work with Mrs Edwards to review the incidents and identify any learning points or training needs; and discussions should then take place with the Claimant about her working arrangements and whether any further support, adjustments or assistance were required.

70. These findings were set out in a report dated 19 November 2020, which was sent to the Claimant, Mr Swallow and Ms Westwood the same day.

71. The Claimant was critical of the delay in providing the report, which took three months from the conclusion of the interviews. Mrs Taylor explained that this was a result of the pandemic. She explained in cross-examination that dealing with the investigation was on top of her day job. Part of her day job was to provide learning and development to around 1800 staff. All face to face training was cancelled, so they had to redevelop all of the training packages. She had a responsibility for patient safety. She was responsible for induction training for domestic services. Face to face training had to be delivered for that. They had an increase in vacancies because of the pandemic and had to recruit very quickly. The priority was for patients' needs to be met. Mr Ashton supported that evidence and said that there were similar issues in the HR department. He agreed that when the Claimant had chased him for a progress report he had not told her that the delays were caused by the pandemic. Nonetheless, the Tribunal accepted that the delays were caused by the pandemic. Mrs Taylor's evidence about the specific challenges the pandemic posed for her was compelling and unsurprising, given her role in a large hospital at the height of the pandemic. As we outline below, the Claimant had moved to the Royal Hallamshire by mid-September, so there was not the same immediacy about the need to conclude the investigation, so as to support the Claimant back into work in the environment where the incidents had taken place. Whilst the delay was regrettable, the Tribunal was satisfied that it was caused by pandemic workload pressures and was not because the Claimant is a transgender woman or any other discriminatory reason.

72. On 25 November 2020, the Claimant appealed against the outcome of the ABAW report on the single ground that Mrs Westwood had asked her to provide a handwriting sample "for elimination purposes" on 11 August 2020 but the investigators had not asked for handwriting samples from anybody else. The appeal was sent to Mrs Wilson. Mr Ashton told Mr Swallow to put the recommendations on hold until the appeal had been heard. Mr Swallow told the Claimant and she acknowledged the position.

73. The Claimant chased for an update about the appeal on 27 November 2020, 17 December 2020 and 5 January 2021. Mrs Over, Head of Domestic Services, was appointed to deal with the appeal. Ms Booker was her HR support. The appeal hearing was arranged for 10 March 2021. One of the Claimant's complaints is that the delay in arranging the appeal hearing was discrimination because she is a transgender woman. Mrs Over disagreed. She said that neither she nor Ms Booker had had any dealings with the Claimant before. They had no reason to deliberately delay the appeal hearing but during the pandemic it was inevitable that the usual timescales for dealing with employee related matters such as this became longer. Her own role involved responsibility for the management of all cleaning services across the Trust, including specialised services to guard against particularly harmful agents including Covid-19. She had responsibility for 1400 staff across 15 sites. At the time the Trust's services were under significant pressure. They had to carry out additional cleaning protocols and Covid-19 risk assessments. The Tribunal noted that there were significant absence levels in the Trust at the time. It was put to Mrs Over that if Mrs Wilson could arrange a grievance appeal hearing promptly (in March 2022), that showed that it could be done. Mrs Over said that her availability would have been better in 2022 as well. Again, the Tribunal had no hesitation in accepting Mrs Over's evidence that the appeal hearing was delayed because of the pandemic and not because the Claimant is a transgender woman.

74. Another of the Claimant's complaints relates to comments made by Mr Ashton at the appeal hearing about the reasons staff were not required to provide handwriting samples. The Claimant said that Mr Ashton said that (1) "there was enough tension in the department and so taking handwriting samples would have made matters worse and not necessarily got to the bottom of who had written the note." She also said that Mr Ashton said that (2) taking handwriting samples from everybody else would cause the Claimant distress, and (3) that it would cause further tension in the CPU. No notes of the appeal hearing were retained. Mr Ashton confirmed in his evidence to the Tribunal that he did make comments along the lines of the first and third allegations. He did not specifically say that taking handwriting samples from everybody else would cause the Claimant distress, but he did express the concern that he and Mrs Taylor had had, that if they tried to obtain handwriting samples it would have heightened tension and anxiety in the CPU and had a negative impact on everyone, including the Claimant. He explained that in his experience, when forensic forms of investigation are used, people tend to react negatively. He and Mrs Taylor were concerned that this would happen and that there would be resentment among the staff towards the Claimant as a result. That was the potential negative impact on her to which he was referring in the appeal hearing. The Tribunal accepted his evidence about what he said and why. In cross-examination Mr Ashton denied that he made the comments because the Claimant is a transgender woman. The Tribunal accepted his evidence. There was nothing to suggest that this had anything to do with his making the

comments. He was simply explaining, accurately, the reasons for not seeking handwriting samples from everybody. Those reasons themselves were not discriminatory either.

Complaints relating to the admitted incidents and their investigation

75. The Tribunal's conclusions on the issues and complaints relating to the above factual matters are summarised below. In most cases, those conclusions flow directly from the findings of fact and can be briefly stated. The Tribunal was in a position to make a clear finding on the evidence in each case.

76. We start with the admitted incidents and the statutory defence. The complaint against Mrs Marshall, the Third Respondent, was withdrawn and we have explained above why we found that Mrs Cook, the Second Respondent, had no involvement in the admitted incidents. The claim against her does not succeed.

77. We approached the complaints against the Trust on the basis that an employee or employees of the Trust in the CPU, acting in the course of their employment, carried out the admitted incidents. However, we were entirely satisfied that the Trust proved that it had taken all reasonable steps to prevent employees from doing those acts or anything of that kind. We considered their approach to be exemplary. As set out above, the steps that were taken were:

    77.1 Establishing a culture in which employees are aware of and understand the PROUD values and in which there is an Acceptable Behaviour at Work policy that is applied and enforced, and an Equal Opportunities Employment Policy.
    77.2 Operating an Equality, Diversity and Inclusion strategy, with an EDI Board, coaching and mentoring and other measures designed to embed a zero-tolerance approach to any form of discrimination.
    77.3 Providing training on equality and diversity issues to all staff every three years.
    77.4 Employing a Head of Equality, Diversity and Inclusion to build upon and broaden the scope of the existing training.
    77.5 Designing specific, bespoke training about trans and gender diversity and delivering it to every member of staff in the CPU at the outset of the Claimant's employment. The training was comprehensive and considered and was delivered personally by Mrs Edwards. The use of toilets and changing rooms was specifically addressed and discussion about that and other issues of concern was encouraged so that concerns could be and were addressed.
    77.6 Agreeing with the Claimant the terms of a note sent to all staff in the CPU before she started work, making clear that they should welcome her, and that discussion of her gender reassignment and use of the ladies changing rooms was not to take place.

77.7 Mrs Wilson's more general memo, reinforcing the PROUD values, encouraging staff to report any unacceptable behaviour and reminding staff that action would be taken in respect of any such behaviour.

78. The Claimant had difficulty identifying other steps that she said should reasonably have been taken in addition to those set out above. She suggested that Mrs Edwards's training should have included statistics about transgender people and should have made reference to the fact that the Trust is a Stonewall champion. The Tribunal did not consider that this was a further step the Trust ought reasonably to have taken. The training could not include every, conceivable point and angle. The Tribunal did not consider that it was in any way deficient for not including those elements. As Mrs Edwards said, sometimes statistics can be helpful, sometimes an explanation is better, and she did touch on the underlying point, namely the issues faced by transgender people in society. The Claimant also suggested that the training was "stale" because at least two people went on to perpetrate the admitted incidents. That is misconceived. The training had been delivered only days before the first two incidents, and two or three weeks before the third. The fact that people who had attended the training carried out the admitted incidents does not mean that the training was stale or that it was ineffective. As Mrs Edwards made very clear in her evidence, even highly effective and appropriately delivered training may not persuade people with offensive views to behave appropriately. We noted that appeared to have been the Claimant's view at the time.

79. We considered whether further steps ought to have been taken between the second and third admitted incidents. We concluded that this would not have been reasonable. The Claimant reported the second incident on 29 July 2020. She only attended work on 4, 10 and 11 August 2020 before the third Incident took place. An investigation into the second was instigated very promptly but the Claimant had only just given her account of it when the third incident happened. The Tribunal considered that it would not have been reasonable to take further steps between 29 July 2020 and 11 August 2020 in those circumstances. The training was very recent and the investigation into the second incident had barely begun. It would have been premature to take further action and difficult to identify any further steps that would potentially have been effective or proportionate.

80. The Tribunal were therefore satisfied that the Trust had indeed taken all reasonable steps to prevent the admitted incidents or anything of that kind from happening. It is not liable for the admitted incidents and complaints 6.2.1; 6.2.15 and 7.1.1 (each in respect of the changing room incident); and 15.1.1 therefore do not succeed.

81. Our conclusions on the other complaints in respect of these events are summarised as follows, based on the above findings.

Complaint number(s) in agreed list of issues	**Factual finding as explained above**
6.2.2, 15,1,2 (Treating the admitted incidents as an afterthought)	Did not happen
6.2.3, 6.2.14 6.2.15 (for 5.1.3) 7.1.1 (for 5.1.3) 15.1.3 17.2.3 17.5 (Asking C to provide handwriting sample)	Happened but was not because of gender reassignment or disability or a protected act. Was not related to disability.
6.2.4 (Failure to take handwriting samples from other staff)	Happened at the investigation stage but was not because of gender reassignment.
6.2.5 (Delay offering appeal hearing)	Happened but was not because of gender reassignment.
6.2.13 (Comments by Mr Ashton at appeal hearing)	Happened in part but was not because of gender reassignment.
6.2.15 and 7.1.1 (for 5.1.2) (Not taking action against Mrs Cook and Mrs Marshall)	No action was taken against Mrs Cook and Mrs Marshall but that is because they were not suggested to be the perpetrators at the time. They were interviewed in the investigation. There was no basis for suggesting that they were involved. Mrs Cook's note certainly did not provide such a basis. There was nothing to suggest that action would have been taken against them if the Claimant had not been a transgender woman or had not been disabled.
6.2.16, 6.2.17, 7.1.2, 7.1.3, 9.2 (Failure to investigate the voluntary statements and failure to support C after the admitted incidents)	Did not happen.

82. In complaints 6.2.18 and 7.1.6 the Claimant complains that the Trust placed her in an unsafe working environment. The Tribunal did not agree that the Trust

placed the Claimant in an unsafe working environment. There is no absolute or objective standard of safety. As explained above, we found that the Trust had taken all reasonable steps to prevent the admitted incidents or anything of that kind and we approached this complaint on that basis. The fact that the admitted incidents happened does not itself mean that the working environment was unsafe. Even if the working environment had been unsafe, there was absolutely no basis for saying that the reason why the Claimant was placed there was because of gender reassignment or disability.

Attendance management in 2020

83. We deal now with the events related to attendance management in 2020. The Trust's Managing Attendance Policy ("the MA Policy") provides that if an employee's absence exceeds certain levels, it triggers the formal absence management procedure. The triggers are 4 instances of absence or a total of 11 working days' absence in a rolling 12-month period. The policy states that it may be reasonable to adjust the trigger points for an employee whose disability impacts on their attendance at work. OH and HR advice should be sought first and this should be considered on an individual basis. Once triggered, the formal attendance management process has four stages. For employees with less than 2 years' service, they will start at stage 3 of the process. The MA Policy says that at stage 3 there is an Attendance Review Meeting. "The outcome is the issuing of the Third Formal Improvement Letter. The only exception will be procedural errors and where there is a disability issue not previously identified after consultation with HR." At stage 4, consideration is given to whether the person's employment can continue. Employees are removed from formal monitoring 12 months after receiving an improvement letter if their absence is below the trigger level. However, during the 12 months, any further absence that results in the employee being at or above trigger points will move them to the next stage of the process. The MA Policy says that at a stage 3 Attendance Review Meeting all the employee's absences will be reviewed, which will include reasons for absence. Among other matters, the employee should raise any issues they consider relevant to their absences, and if the absence is disability related there will be discussion of additional support and adjustments. HR and OH advice may be sought. The line manager will write to the employee to confirm the outcome of the meeting and the issuing of a stage 3 improvement letter.

84. The MA Policy also provides for medical exclusion. When an employee is well enough to attend work but required not to do so for infection control purposes, their absence is recorded as medical exclusion. It does not count for sick pay or absence management purposes. In practice, if an employee attends work and is sent home e.g. with vomiting, they will be paid for the day they attended work. For as long as the sickness itself lasts, they will then be classed as on sick leave. However, if they recover and are well enough to attend work, but required not to because it is less than 48 hours since an episode of vomiting,

that counts as medical exclusion. The same applies if they call in sick with e.g. vomiting. While they are unwell, their absence counts as sick leave. It is only if they become well but cannot attend work because of infection control that it will count as medical exclusion.

85. As noted above, Mr Swallow spoke to the Claimant by phone on 13 August 2020. She repeated her concern about triggering stage 3 of the attendance management process. Mr Swallow told her that she would have the opportunity to explain her situation at all stages of the procedure, but the stages had to be applied in accordance with the MA Policy. They spoke later in the day, after the Claimant had seen her GP and been signed off for a month. The Claimant was again concerned about triggering stage 3. She said that it would be unfair, if she was off work through no fault of her own because of workplace bullying. The Claimant asked if she would definitely be given a stage 3 warning on her return to work and Mr Swallow told her that a stage 3 would be issued in accordance with the MA Policy. The Claimant then told him that she had spoken to Mr Ashton, who had told her that Mr Swallow had discretion whether to issue a stage 3 warning or not. Mr Swallow said that this was not something he had done in the past but would always seek HR advice. The Claimant sent an email on 14 August 2020 with her sick note signing her off work until 13 September 2020. The fit note cited "work related stress – reports of bullying and harassment." The Claimant said that she was deeply concerned and distressed about the inflexibility of the stage 3 process on her return. She said that she had taken advice and that issuing a stage 3 letter or sanction would be discriminatory.

86. On 19 August 2020 the Claimant's 3 day working pattern was again extended to support her.

87. The Claimant was referred to OH on 21 August 2020. Mrs Westwood asked for advice about her working pattern and hours, support in relation to her disclosure of self-harming; and reasons for her current absence and support and adjustments that could be offered in relation to that.

88. On Friday 28 August 2020 the Claimant emailed Mr Swallow and Ms Westwood. She said that she felt she had no choice but to return to work on Monday to avoid a stage 3 improvement letter. She asked what could be done to keep her safe in work. She spoke to Ms Westwood by phone. Ms Westwood told her that Monday's shifts were covered but that she could work Tuesday/Wednesday/Thursday. The Claimant asked if she could do two days. Ms Westwood told her she would need to use annual leave to cover the third day. They agreed she would start at 8am and would work in Pick and Pack on Tuesday 1 September 2020. In the event, the Claimant did not return to work. She emailed late on Monday evening to say that she did not feel safe to return to work and had no choice but to remain off sick.

89. The Claimant called Mr Swallow on 2 September 2020 and then emailed him. She said that the support management had provided had been helpful. She noted that she had told Mr Swallow she felt she needed to return to work to avoid triggering the MA Policy and that he had rightly pointed out that it was well-documented why she was off and that the investigation was ongoing. She said, "Therefore it may be wise to return at the current time until the process has been completed …." She noted that she had raised the possibility of compassionate leave and that Mr Swallow was going to seek advice. Mr Swallow replied later that day. He reiterated the steps the Trust had taken to try to ensure the Claimant was safe and supported. He said that he had taken advice from Mr Ashton about whether the Claimant's current absence could be covered by compassionate leave and that it could not. He said that he thought she must have meant to say that it was "not wise" to return at the current time. He asked her to confirm that. He also said that this was a matter for her to seek advice from her GP and that he would expect updated medical certification if she was fit to return to work. He added that if the Claimant felt that returning to an alternative location might assist her in returning to work, he would see if that could be facilitated. The Claimant replied later that day by annotating Mr Swallow's email. She did not provide an update from her GP or confirm that she had meant to say "not wise", but she did say that if it assisted until the investigation was completed she could return elsewhere. Mr Swallow's evidence was that it was not clear to him that the Claimant wanted to return to a different location. In any event, she was still covered by a fit note and, as he had explained, if she wanted to return he expected to receive an updated sick note.

90. On 8 September 2020 the Claimant contacted Mrs Edwards. She told her [incorrectly] that she had been invited to attend a stage 3 meeting and been threatened with losing her job. Mrs Edwards spoke to Mr Ashton about it because it did not feel right to her that the Claimant was being taken down an attendance management route. Mrs Edwards also spoke to Ms Barraclough and Ms Robson, senior HR personnel. Mrs Edwards's evidence was that Mr Ashton explained to her that there was a process to go through because of the Claimant's absence, but that it would not result in her losing her job. It was about ensuring she was ok and identifying support for her. Mrs Edwards took from what Mr Ashton said to her that the meeting the Claimant had been asked to attend would not be a stage 3 meeting, because Mr Ashton emphasised its supportive nature. Mrs Edwards told the Claimant that she was not being asked to attend a formal stage 3 meeting. There did need to be a meeting, but its focus would be on ensuring her health and wellbeing.

91. Mr Ashton's evidence was that he did not tell Mrs Edwards the Claimant would be subject to a welfare meeting instead of a stage 3 meeting. He told her that the MA Policy was quite clear that someone with less than two years' service who had enough absence would be invited to a stage 3 meeting. However, it did not follow that they would be issued with an improvement letter and that was

only one of the reasons for holding the meeting. The most important part of the meeting was to understand why the employee was struggling to attend work and identify whether further support was required.

92. The Tribunal had no hesitation in accepting Mr Ashton's evidence. He was a careful and measured witness with obvious expertise in the Trust's policies and how they should be applied. We had no doubt that this was simply a case of crossed wires. Mr Ashton told Mrs Edwards that the Claimant would have to attend a meeting, but the emphasis was on its supportive nature and he said that she would not necessarily be issued with a stage 3 improvement letter. Mrs Edwards took that to mean that it would not be a stage 3 meeting and said as much to the Claimant.

93. The Claimant then emailed Mr Swallow on 10 September 2020. She told him that she wanted to formally complain about the admitted incidents. She acknowledged that they were already being investigated and that this would continue, she was just formalising her complaint. She also wanted to complain about the fact that she had been on sick leave solely because of the admitted incidents and was concerned that the MA Policy would be applied to her and she would be issued with a stage 3 improvement notice on her return to work. She said that she had sought advice from Mrs Edwards about this. She did not say that Mrs Edwards had told her that she was not being invited to a stage 3 meeting. Mr Swallow took advice from Mr Ashton before replying. He confirmed that the first part of the grievance was being addressed as the Claimant had noted. He said that no decision had yet been taken about what would happen when the Claimant returned to work from her current sickness absence. When she returned he would review the situation and a decision would be taken about how the MA Policy would be applied. Mr Swallow told the Claimant that he would now be on leave until 28 September 2020.

94. On 14 September 2020 the Claimant emailed Ms Westwood a further sick note signing her off work for another month, until 14 October 2020. The sick note again cited "work related stress – reports of harassment and bullying."

95. The Claimant's pay reduced to half pay from 12 September 2020. The Tribunal did not see the letter to the Claimant informing her about that, and she could not remember when she found out. On 16 September 2020, in correspondence about the Claimant's request for a salary advance, Ms Westwood mentioned to the Claimant that her pay was being reduced to half pay and provided her with some links and information about financial support. It appears the Claimant tried to contact a number of people the same day. In their absence, she spoke to Mrs Wilson about the possibility of returning to work in a different location. Mrs Wilson told her that if she wanted to return before the expiry of the sick note, she would need to submit another one confirming that she was fit for work. She agreed to look into transferring the Claimant to another work area. The Claimant called Mrs Wilson again on 17 September 2020 and subsequently

provided an amended fit note signing her potentially fit for work in a different department. Mrs Wilson spoke to Mr Ashton and Mr Jones and they agreed that the Claimant could be transferred to the catering department at the Royal Hallamshire. They thought, because of the different catering function and layout, that it might be a better, more nurturing environment for the Claimant. Mrs Wilson spoke to Mrs Hawkshaw, the Catering Manager at the Royal Hallamshire and explained that the Claimant was transitioning and had experienced issues because of it. Mrs Hawkshaw was happy for the Claimant to join her team. Mrs Wilson called the Claimant and suggested she return to the Royal Hallamshire. She agreed and she started there the following Monday, 21 September 2020.

96. The Claimant complains about the delay in transferring her to the Royal Hallamshire after her email to Mr Swallow on 2 September 2020, and about her reduction to half pay. However, it seemed to the Tribunal that she was seeking to re-cast the correspondence with the benefit of hindsight. The Claimant does not appear to have pursued a return to work after that email to Mr Swallow. On the contrary, she appears to have been reassured by what Mrs Edwards told her on 8 September 2020, after which she obtained a further fit note for a month. She did put in her grievance about potentially being put on stage 3, but that was perhaps putting a marker down. It appears that it was only after she found out that she would go onto half pay that she contacted Mrs Wilson and obtained an amended fit note. She spoke to Mrs Wilson on the Thursday, obtained the fit note on the Friday and started at the Royal Hallamshire on the Monday.

97. The Claimant now says that the reason for her absence from 13 August 2020 to 21 September 2020 was her mental health disability of anxiety and depression. She was very clear in all her correspondence at the time that the only reason she was absent was because she did not feel safe at the CPU in the light of the incidents that had taken place. That was consistent with the sick notes provided by her GP. The OH report of 9 November 2020 (see below) referred to the Claimant having a significant underlying emotional health problem and unstable personality, being emotionally fragile when she started work at the Trust, and the situation becoming more difficult after the admitted incidents, which "triggered sickness absences." It seemed to the Tribunal that the Claimant's underlying poor mental health broadly approached made her more susceptible to the effects of the admitted incidents and was a feature of her unwillingness to attend work at this time. It was not clear to what extent "anxiety and depression" specifically were a part of that, but we found that anxiety was certainly a feature.

98. As noted, the Claimant started at the Royal Hallamshire on 21 September 2020. The Claimant regularly contacted Mrs Hawkshaw, by email and by dropping into her office, with a range of concerns and issues, or sometimes just to chat. She said in her first week that she could only do two days. That was agreed.

99. Following the OH referral made by Mr Swallow, an interim OH report was provided on 29 September 2020. Dr Giri needed to see the Claimant in person. He advised that the current adjustments should remain in place in the meantime.

100. One of the matters the Claimant raised with Mrs Hawkshaw was her concerns about the MA Policy and triggering stage 3. Another was the delay in the investigation of the admitted incidents. Mrs Hawkshaw emailed Ms Platts and Mr Ashton for an update about both matters on 1 October 2020.

101. Mrs Hawkshaw took advice from HR about the MA Policy and on 5 October 2020 she wrote to the Claimant inviting her to a stage 3 Attendance Review Meeting to take place on 20 October 2020. Her letter said that all the Claimant's absences would be reviewed, including reasons for absence, and that she "may" be issued a stage 3 improvement notice as an outcome.

102. That evening the Claimant raised a grievance about being invited to the stage 3 meeting. She said that she was being punished and victimised because she had been subject to transgender bullying and had complained about that. She said that Mrs Edwards had told her that she would not be attendance managed but a welfare meeting would take place. She asked that the grievance be heard before the stage 3 meeting took place. She threatened Employment Tribunal proceedings (and started early conciliation two days later). She also complained about being on half pay during her sickness absence.

103. On 7 October 2020, in accordance with the Trust's Grievance and Dispute Policy, Mrs Hawkshaw invited the Claimant to an informal meeting on 20 October 2020 to discuss her grievance. She told her that the stage 3 meeting would be postponed. The informal meeting took place as planned. An HR advisor was present and the Claimant had a colleague for support. The Claimant explained what Mrs Edwards had told her, and that she understood she would have a welfare meeting not a stage 3 meeting. She said she was being victimised for being bullied. Mrs Hawkshaw went away and spoke to Mrs Edwards. Mrs Edwards confirmed what she had told the Claimant. Mrs Hawkshaw then spoke to Mr Ashton. He told her that he had not told Mrs Edwards that the Claimant would not have a stage 3 meeting. What he said appeared to have been misconstrued. Mr Ashton advised Mrs Hawkshaw that the stage 3 meeting needed to go ahead. Mrs Hawkshaw reconvened the informal grievance meeting on 3 November 2020 and explained all this to the Claimant. Mrs Hawkshaw made clear that she was not disputing what the Claimant was saying, but she thought there had been a misunderstanding on Mrs Edwards's part. She said that Ms Barraclough, Interim Head of Operational HR had advised her that the stage 3 meeting should go ahead. Ms Platts and Mrs Hawkshaw both tried to assure the Claimant that the fact a stage 3 meeting took place did not mean that an improvement letter would be issued. Ms Platts

agreed to seek further advice from Ms Barraclough. She did so. She confirmed that the stage 3 meeting should go ahead, regardless of any prior confusion. The MA Policy applied to all employees. The purpose of the stage 3 meeting was to discuss the reasons for absence and make a decision whether to issue a stage 3 improvement letter based on all the information. It was compassionate and supportive. The Claimant was urged to attend a stage 3 meeting to bring about a resolution. The Claimant was not happy to do so and wanted to go to the next stage of the grievance procedure. We return to that below.

104. The Claimant says that Mrs Hawkshaw treated her less favourably because of disability and victimised her by inviting her to a stage 3 meeting. She relies on the complaints she made about the admitted incidents as a protected act. The Tribunal had no hesitation in finding that Mrs Hawkshaw did not invite the Claimant to a stage 3 meeting because she had anxiety and depression nor because she had complained about transgender discrimination, namely the admitted incidents. She invited her to a stage 3 meeting because she had hit the relevant trigger points and the consistent HR advice was that a stage 3 meeting should be held. The fact that Mrs Edwards had led her to believe that no stage 3 meeting would take place does not alter that. Mrs Edwards's advice was inconsistent with the HR advice.

105. The Claimant suggested to Mrs Hawkshaw in evidence that she should not have had to attend a stage 3 meeting because it would be distressing for her to have to re-live the admitted incidents. That was not the concern she raised at the time, but in any event Mrs Hawkshaw did not agree that the Claimant would have to re-live the admitted incidents at any stage 3 meeting. It would be for her to share as much as she wanted. Mrs Hawkshaw's purpose in inviting the Claimant to the stage 3 meeting was simply to manage her absence in accordance with the policy. She and Ms Platts gave repeated assurances that it was intended to be supportive and that a Stage 3 Improvement Letter was not a foregone conclusion. The Claimant was evidently unwilling to accept those assurances.

106. Mrs Hawkshaw gave the Claimant the outcome to her informal grievance in writing on 9 November 2020.

107. The Tribunal noted that the OH report was provided on 9 November 2020. Dr Giri referred to the Claimant having a significant emotional health problem and unstable personality attributable to recurrent traumatic incidents and unpleasant gender related comments. Two arson attacks and one episode of car vandalism had hampered her recent fragile recovery. Re-joining full-time employment after being out of work for 10 years in an emotionally fragile condition was far from ideal. It became more difficult after the admitted incidents, which triggered sickness absences. Dr Giri made a number of recommendations, including that the Claimant should remain at the Royal Hallamshire and working part-time;

and that she should have a work buddy. Accepting a higher than average sickness absence should also help.

108. The Claimant met Mrs Hawkshaw to discuss the OH report on 18 November 2020. They agreed a revised shift pattern and that the Claimant would remain at the Royal Hallamshire for 4 to 6 months, before the position was reviewed. Ms Hulbert was appointed as the Claimant's buddy and subsequently the Claimant had a good relationship with her and found her supportive. Mrs Hawkshaw agreed that the Claimant's trigger points would be adjusted and explained how that worked.

Handling of Formal Grievance

109. The Claimant appealed against Mrs Hawkshaw's informal grievance outcome, in a letter to Mrs Wilson dated 13 November 2020. She confirmed that her concerns were that Mrs Edwards had told her that she would not be subject to a stage 3 meeting, and then Mrs Hawkshaw had invited her to one; that requiring her to attend a stage 3 meeting was discrimination and victimisation and that she was being punished for being bullied; and that her pay had been reduced to half pay while she was off sick. Ms Fawdrey, HR Manager, was appointed to assist Mrs Wilson with the formal grievance. A management statement of case was provided by Ms Platts on 9 December 2020 and copied to the Claimant by Ms Fawdrey on 11 December 2020 (and subsequently sent in hard copy). The Claimant's statement of case was provided on 14 December 2020. The formal grievance meeting took place on 18 December 2020. The Claimant attended with Ms Hulbert. Mrs Hawkshaw attended with Ms Platts. After the meeting, Mrs Wilson spoke to Mr Swallow and Mrs Edwards. Mrs Wilson did not uphold the grievance. She wrote to the Claimant on 29 January 2021 setting out the outcome. In outline:
    109.1 Mrs Wilson explained that she was satisfied that the Trust had done all it could to provide the Claimant with a safe working environment. Unfortunately, the Trust had not been able to identify the perpetrators of the admitted incidents. If it had, they would have been subject to disciplinary proceedings.
    109.2 The MA Policy was clear that an employee with less than two years' service who hit the trigger would be invited to a stage 3 meeting. Mrs Edwards had told Mrs Wilson that she had advised the Claimant to attend the stage 3 meeting and try to see it as supportive (this relates to a subsequent conversation with the Claimant, not the conversation on 8 September 2020). Mr Swallow had confirmed to Mrs Wilson that he had told the Claimant that he had no choice but to issue a stage 3 improvement letter after a stage 3 meeting. Mrs Wilson explained in her letter that that was incorrect. There was no question of the Claimant being dismissed, as had been made clear to her. No decision had yet been made whether the Claimant would receive an improvement notice because she had not attended the meeting. Taking all these matters into

account, Mrs Wilson believed that inviting the Claimant to a stage 3 meeting was in line with the MA Policy and was not discriminatory.

109.3 However, Mrs Wilson noted that the nature of and reasons for the Claimant's absence in August 2020 had been discussed at length in the grievance process. That discussion would be repeated at any stage 3 meeting. In addition, the Trust had OH advice confirming that the Claimant's absence was triggered by the admitted incidents. As a one-off, Mrs Wilson therefore considered that she had sufficient information to determine the outcome of the stage 3 process without requiring the Claimant to attend a further, stage 3 meeting. She decided, taking into account the nature of and reason for the absence, that the Claimant would not be issued with an improvement letter. This was an exceptional decision and any future absences would continue to be managed using the MA Policy. If the Claimant hit the trigger in future she would be required to attend an Attendance Review meeting.

109.4 Mrs Wilson said that the Claimant's sick pay was governed by the [nationally agreed] Agenda for Change Terms and Conditions. The Claimant had been paid correctly and there was no discretion about that.

110. The Claimant complains that the application of the MA Policy to her was harassment and victimisation. Mrs Wilson's evidence was that her decisions that the Claimant should have been invited to a stage 3 meeting, and as to the outcome of the stage 3 process, had nothing to do with the fact the Claimant is a transgender woman or has a mental health disability. She was required to attend a stage 3 meeting because the MA Policy required it. It was certainly not because she had complained about the admitted acts. On the contrary, Mrs Wilson was not surprised she had done so, given the nature of the incidents. The Tribunal had no hesitation in accepting Mrs Wilson's evidence. The MA Policy did require a stage 3 meeting to be held, and Mrs Wilson was quite clear that the reasons for absence (including in this case any disability related reasons or any reasons associated with the admitted incidents) would be considered at the meeting, so as to inform the outcome. Indeed, Mrs Wilson weighed those very matters in determining the outcome of the stage 3 meeting herself.

111. The Claimant also complains that her absence in August-September 2020 should have been discounted from her absence record altogether and that the failure to do so was discrimination because she is a transgender woman, harassment and victimisation. Mrs Wilson's evidence was that she was not prepared to erase the absence from the record altogether, but that was because the Claimant had incurred sickness absence, and all sickness absence was included on an individual's attendance record, regardless of the reason. That did not mean it would necessarily count towards the MA Policy triggers nor that it would lead to particular action such as an improvement letter. No member of staff had absences expunged and Mrs Wilson did not consider it

appropriate to treat the Claimant differently. The important point was that there was discretion about the outcome; but the meeting needed to take place to determine what was appropriate. The Tribunal accepted that evidence, which made obvious sense. The decision not to discount the Claimant's absence from her record was not because she is a transgender woman or had complained of discrimination.

112. Dealing with the two harassment complaints, clearly the application of the MA Policy to her in October and November 2020 and the refusal to remove the August-September 2020 absence from her record altogether was unwanted by the Claimant. However, the Tribunal found that neither the application of the MA Policy nor the refusal to remove the absence from the Claimant's record altogether was conduct that "related to" gender reassignment or disability. Dealing with the refusal to delete the absence from the record first, the fact that underlying cause of the Claimant's absence related to the transphobic behaviour she had been subjected to, and that her underlying poor mental health was a factor in her unwillingness to attend work at that time, did not mean that Mrs Wilson's management of that absence, and her decision that those days should remain in the Claimant's attendance record as days on which she was off sick, was caused by or associated with gender reassignment or disability. The conduct was associated with absence management. The Claimant had as a matter of fact been off sick on those days and that would continue to be recorded in her attendance records. How the Trust treated those absences when deciding whether to issue an improvement letter was an entirely separate matter, but the mere fact of accurately counting the Claimant's number of days' sickness absence was not conduct that related to gender reassignment or disability. If we had found that the conduct related to gender reassignment or disability, the Tribunal would have found that it did not have the purpose of violating the Claimant's dignity or creating the proscribed environment. Mrs Wilson's purpose was simply to manage the Claimant's absence appropriately. Nor did the Tribunal consider that it was reasonable for it to have the effect of violating the Claimant's dignity or creating the proscribed environment. Simply having her number of days' sickness absence accurately recorded could not, objectively, have such an effect.

113. Turning to the application of the MA Policy to the Claimant, that entailed inviting her to a stage 3 meeting and, subsequently, determining the outcome of that meeting in the grievance process by deciding not to issue an improvement letter. That was not conduct that related to gender reassignment. Again, the fact that the underlying absence related to the transphobic behaviour did not mean that inviting her to a stage 3 meeting and determining the outcome in this way related to gender reassignment. Nor did the Tribunal consider that it related to disability. In the context that the Claimant said that she had been off sick because she did not feel safe returning to work, and her fit-notes referred to work-related stress, inviting her to a meeting to discuss that absence and any

support she needed, before deciding on any further steps, was not caused by or associated with disability. Nor was deciding that all the relevant matters had in fact been considered in the grievance process and that no improvement notice should be issued. If the conduct had related to disability, the Tribunal would again have found that it did not have the purpose of violating the Claimant's dignity or creating the proscribed environment. Mrs Hawkshaw's and Mrs Wilson's purpose was simply to manage the Claimant's absence in accordance with the policy, provide any necessary support and decide on any other steps. As to the effect, again the Tribunal did not consider it objectively reasonable for the conduct to have the necessary effect. The Claimant was invited to a meeting to discuss her absence and the reasons for it, and to identify any support that was required and any steps that should be taken. She did not express any concern at the time about having to "re-live" the admitted incidents and she would not have been required to do so. She was, from even before her employment started, unduly concerned about the MA Policy. She was also unwilling to accept repeated reassurances about how it would operate. That was not objectively reasonable. Nor was it objectively reasonable to perceive that being invited to attend a straightforward absence management meeting met the high threshold of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Had the Claimant attended the meeting and, for example, been subjected to inappropriate questioning or conduct, or required to "re-live" the admitted incidents, the situation might have been different, but that did not happen. It was unreasonable to assume or perceive that it would, in the face of repeated assurances to the contrary. Ultimately, Mrs Wilson dealt with the stage 3 in as light a touch way as she could, by considering all the information and the OH report, deciding that no further discussion was required and deciding that no improvement letter would be issued. It was not objectively reasonable to perceive that as a violation of dignity, nor as creating the proscribed environment either.

114. The Claimant also complains that the delay in providing her with an outcome to her formal grievance – between the conclusion of the hearing on 18 December 2020 and the letter on 29 January 2021 – was direct gender reassignment discrimination. Mrs Wilson's evidence was that after the grievance meeting she needed to speak to Mrs Edwards and Mr Swallow. She needed time to consider the evidence, and this was a very busy period, not least because it was the middle of the pandemic. Christmas intervened as well. The Tribunal had no hesitation in accepting that evidence. There was absolutely nothing to suggest that the fact that the Claimant is a transgender woman had anything to do with the five or six week timescale.

115. The Claimant appealed against Mrs Wilson's decision on 8 February 2021. She disputed Mrs Wilson's findings that everything that could be done to provide her with a safe environment had been done; that it was not discriminatory to invite her to a stage 3 meeting; that her absence caused by the admitted incidents

was not being expunged from her record; and that there was no discretion to pay her full pay for the relevant period.

116. The hearing of the Claimant's grievance appeal was originally arranged for 4 May 2021, but in fact took place on 18 May 2021 because the Claimant's companion was unable to attend on 4 May 2021. The Claimant says that the delay in arranging a hearing was discrimination because she is a transgender woman. Mr Jones's evidence was that the delay was caused by the pandemic. He explained that a number of disciplinary and grievance cases were postponed because of the pandemic, and this led to a backlog that delayed further cases that arose. The Claimant's was one of those. The hearing was arranged on the first available date given those issues and given the availability of Mr Jones and Ms Fawdrey. The Tribunal accepted that evidence. There was no evidence to suggest that other hearings were being arranged sooner or that the Claimant's transgender status had anything to do with the delay.

117. We noted that the Claimant chased Mr Jones on 7, 17 and 28 March 2021, and he told her each time that he was still waiting for HR to set up the hearing. He chased Mr Ashton on 29 and 30 March 2021. The Claimant chased again on 6 April 2021 and Mr Jones told her the same day that he had asked HR to expedite it. The Claimant chased again on 8 April 2021 and Mr Jones again told her that he was awaiting confirmation of the date. On 14 April 2021, Ms Fawdrey identified 4 May 2021 as a potential date, and arrangements were then made for that. The fact that Mr Jones did not explicitly state on each occasion that the delay was because of the pandemic, but simply sent the Claimant a brief response, does not undermine his evidence. Indeed, a short response letting the Claimant know that the matter was still in hand was perhaps to be expected in those circumstances, particularly given the frequency with which she emailed about it.

118. Mr Jones gave evidence to the Tribunal about the MA Policy, which he said was developed in consultation with and agreed by staff side representatives. It was an important tool in ensuring regular attendance, effective working and support for those off sick. The Trust had to manage absences to ensure it had enough staff to deliver services to staff, patients and visitors, to a high standard. That was essential. An NHS Trust could not simply suspend or cut services when absence levels were high. The catering department had to be able to feed patients and staff. Providing the right food at the right time for in-patients was an integral part of their care and recovery. The Trust could use bank or agency staff, but that was not sustainable in the long term because of the cost, and because such staff were also less familiar with the work. The MA Policy was designed to be supportive. It was not a blunt instrument. All absences were assumed to be genuine and almost all were taken into account for the purposes of triggers (disability related absences and treatment for critical illnesses were excluded).

119. At the appeal hearing, the Claimant said that her return to work had been delayed by Mr Swallow. She explained that he had raised the possibility of her working in a different location on 2 September 2020 and she said that she had responded straight away to say that she would like to return, but Mr Swallow had failed to make the arrangements. That meant her sickness absence was extended and she ended up receiving half pay for three days. That point had not been raised at an earlier stage of the grievance. Mr Jones asked the Claimant to forward the email correspondence to him after the appeal hearing. In his witness statement, Mr Jones said that the Claimant had forwarded him her initial email to Mr Swallow on 2 September 2020 and Mr Swallow's response, but nothing from the Claimant confirming that she did want to return to a different location. He asked her to send any further emails across, but she did not do so. In cross-examination, Mr Jones confirmed that evidence. During the break in the Tribunal hearing, the Claimant identified an email that she had subsequently sent to Mr Jones, but had not previously disclosed in the proceedings. The Tribunal admitted it in evidence by agreement. Mr Jones was recalled. He explained that he had now been provided with the further email and had checked his emails, including his sent items. He would normally acknowledge such emails. He could find no record of receiving or acknowledging the email. He did not dispute that it had been sent, but he said he had not received it. The Tribunal accepted his evidence. There were a number of instances in the evidence of emails going into people's junk folders, including the Claimant's. Mr Jones had taken care to ask for the additional evidence, and then to follow-up when the evidence provided did not deal with the issue. We were satisfied that if he had received the email at the time, he would have taken it into account.

120. Mr Jones's view on the information before him at the time of the appeal hearing was that it was not until 16 September 2021 that the Claimant was clear that she wanted to return to work imminently in a different area, and that was arranged within two days of her providing an amended fit note. There was no undue delay. When he was recalled, he said that the further email would not have changed his decision in any event, because although the Claimant indicated to Mr Swallow that she was willing to work in a different location, she did not provide confirmation from her GP that she was now fit to work, as Mr Swallow had requested.

121. Mr Jones wrote to the Claimant with the outcome to her appeal on 1 June 2020. We deal first with a discrete issue relating to the Claimant's dyslexia. As we have noted, it is easier for her to read written materials printed on yellow paper or using a yellow overlay. Mr Jones told the Claimant by email on 2 June 2021 that a copy of the outcome letter had been put in the post that day. She replied to ask for a copy by email as well, and then sent a further email the next day asking if the copy in the post was on yellow paper. Mr Jones replied shortly afterwards attaching a copy of the outcome letter by email and the Claimant

replied the same day to say that she had read Mr Jones's decision with care. She confirmed in cross-examination that she had read it before the hard copy arrived in the post. She could highlight an emailed copy in yellow on her computer. The hard copy had been printed on white paper. Mr Jones's evidence was that as soon as the Claimant asked about yellow paper, he contacted Mrs Hawkshaw and asked her to give a yellow copy to the Claimant. He understood she did so the same day. Mrs Hawkshaw's evidence was that Mr Jones came to see her on 3 June 2021 to ask if he would give the Claimant a copy of the letter on yellow paper. Mr Jones was working in her building that day. She printed it, put it in an envelope and gave it to the Claimant. She appeared to be expecting it because she asked if it was from Mr Jones. The Claimant said that she was never given a yellow copy of the letter by Mrs Hawkshaw. Mr Jones's evidence in cross-examination was inconsistent. He initially said that he had telephoned Mrs Hawkshaw, but then agreed that he had asked her in person because he was working in her building that day and did not have the printer code. The Tribunal preferred the evidence of Mrs Hawkshaw and Mr Jones. Although his evidence changed in cross-examination, the Tribunal found that this was just a mistake because of the passage of time, rather than a deliberate attempt to mislead. When Mr Jones's memory was prompted, he volunteered the detail that he did not have the printer code when he was working on D floor. It seemed to the Tribunal most likely that the Claimant did not pay particular attention to the yellow copy, because she had by then seen and read the outcome letter by email, and that she has now forgotten being given it.

122. Turning to the substance of Mr Jones's decision, he found:
    122.1 The decision to invite the Claimant to a stage 3 meeting was not discriminatory. She was invited because she had triggered stage 3, so that her absence and the reasons for it could be discussed and consideration could be given to how the Trust could support her.
    122.2 Mrs Wilson was right not to expunge the Claimant's absence from her record entirely. She did have a period of absence. All absence, whatever the reason, was included in people's records. Should a further meeting be triggered, all absences would be considered, including the reasons for them and whether they should be discounted.
    122.3 Mrs Wilson was correct that there was no discretion in the Agenda for Change terms and conditions, a national pay system, to pay the Claimant full pay for her sickness absence.
    122.4 The email correspondence the Claimant had provided did not confirm that she was ready to return to work in a different location and from the correspondence he would not have expected Mr Swallow to be arranging her return to work at that time.

123. During the appeal hearing, Ms Marvin had mentioned the possibility of NHS temporary injury allowance to cover the three days' half pay. The Claimant

emailed Mr Jones to ask about that when she received the outcome letter. In fact, temporary injury allowance had been replaced by an injury allowance in section 22 of Agenda for Change. The employee has to apply for the allowance. Mr Jones emailed the Claimant on 7 June 2021 providing information about the allowance and explaining that she should work through the application process in discussion with her line manager.

124. The Claimant says that in finding that it was not discriminatory to invite her to a stage 3 hearing; finding there was no discretion to reimburse the three half days' pay; failing to consider that there was a grant available for the Claimant to recover those wages; refusing to disapply the MA Policy; failing to take account of the reasons for the Claimant's absences; and rejecting her grievance appeal generally; the Trust and Mr Jones treated her less favourably because she is a transgender woman and, in some cases, victimised her because she had complained about the admitted incidents.

125. The Tribunal found that Mr Jones did not fail to consider whether there was a grant available to the Claimant. Ms Marvin raised it at the appeal hearing, and Mr Jones provided information about it when the Claimant asked. But that was something she needed to apply for, it did not give Mr Jones the discretion to authorise additional sick pay. The Tribunal also found that Mr Jones did not fail to take account of the reasons for the Claimant's absence. He found that the reasons for the absence would form part of the discussion at a stage 3 meeting, rather than preventing the Claimant from being invited to the meeting in the first place. Mr Jones's evidence was that no part of his decision in respect of the Claimant's grievance appeal was made because of, or influenced by, her transgender status or her disability. He considered her appeal as objectively as possible on the basis of the evidence, and rejected it for the reasons he gave. He noted that the Claimant was asking him to disapply the MA Policy not because of disability-related absence, but because she was off sick because of bullying and harassment at work. His evidence was that he did not victimise the Claimant because she had complained about the admitted incidents. The Tribunal accepted his evidence. There was nothing to suggest that his decision or approach would have been different if the Claimant had not been a transgender woman, or if she had not had the disability, or if she had not complained about the admitted incidents. The reasons for his decisions and approach were the reasons he gave.

Complaints relating to attendance management in 2020 and the grievance about that

126. The Tribunal's conclusions on the issues and complaints relating to the management of the Claimant's attendance in 2020 and her grievance about that are set out below. In most cases, those conclusions flow directly from the

findings above and are briefly summarised in the table. The reasonable adjustments and unfavourable treatment complaints are dealt with separately.

Complaint number(s) in agreed list of issues	**Factual finding as explained above**
7.2 (Telling C she would have a welfare meeting and then revoking that)	Mrs Edwards did tell C she was not being asked to attend a stage 3 meeting. Mr Ashton did not give that advice. Mrs Hawkshaw did invite C to a stage 3 meeting in a letter dated 5 October 2020. Was not because of disability or a protected act.
17.2.1 (Inviting C to stage 3 meeting)	Mrs Hawkshaw did invite C to a stage 3 meeting in a letter dated 5 October 2020. Was not because of a protected act.
15.1.4, 16.1.1, 17.2.2 (Applying MA Policy to C)	The MA Policy was applied to C in October and November 2020. She was invited to a stage 3 meeting by Mrs Hawkshaw. Mrs Wilson exceptionally determined the outcome during the grievance. No improvement letter was issued. Was not related to disability or gender reassignment. Did not have the proscribed purpose or effect. Was not because of a protected act.
6.2.6 (Delay to grievance outcome)	Five or six week timescale was not because of gender reassignment.
6.2.7, 15.1.5, 16.1.2, 17.2.4 (Not discounting absence from record)	Happened but was not because of gender reassignment or doing a protected act. Was not related to gender reassignment or disability. Did not have the proscribed purpose or effect.
6.2.8 (Delay arranging grievance appeal hearing)	Happened but was not because of gender reassignment.
6.2.9 (Grievance appeal finding that inviting to stage 3 was not discrimination)	Happened but was not because of gender reassignment.
6.2.10 (Grievance appeal finding no discretion to reimburse wages)	Happened but was not because of gender reassignment.
6.2.11 (Grievance appeal failure to consider grant for lost wages)	Did not happen. Was referred to at appeal hearing and information provided to Claimant when she requested. Fact not referred to in outcome letter was not because of gender reassignment.
6.4, 10.1, 10.2, 17.8	Refusal to apply MA Policy happened but was not because of gender reassignment, disability or a

(Grievance appeal refusal to disapply MA Policy, failure to take account of reasons for absence, time taken to deal with appeal)	protected act. Failure to take account of reasons for absence did not happen. In any event no part of Mr Jones's approach was because of gender reassignment, disability or a protected act. Delay arranging grievance appeal hearing dealt with under 6.2.8 above. No undue delay between 18 May 2021 appeal hearing and 1 June 2020 outcome letter.
17.2.6 (Rejecting grievance appeal)	Happened but was not because of a protected act.

127. We turn to the complaints of unfavourable treatment and failure to make reasonable adjustments. The Respondents conceded for these purposes that they knew that the Claimant had the disabilities of anxiety/depression and dyslexia. As set out above, the Claimant's pay was reduced to half pay at the end of her sickness absence in September 2020. She was on half pay for three days before she returned to work at the Royal Hallamshire. The Tribunal found that that was unfavourable treatment and it was because of her sickness absence. The Tribunal did not agree that the Claimant was "threatened" with absence management sanctions. In August, she pressed Mr Swallow to tell her what would happen about her absence and he, incorrectly, told her that an improvement letter would be issued. However, she spoke to Mr Ashton straight away and he correctly advised her that this was a matter of discretion. She later spoke to Mrs Edwards and she gave her an (incorrect) assurance that she was not being invited to a stage 3 meeting. These discussions were in response to the Claimant's questions, they were not warnings issued by the Trust. The Claimant was then invited to a stage 3 meeting on 5 October 2020. While she was not "threatened" with absence management sanctions, she was told that she might be issued with a stage 3 improvement letter. The Tribunal accepted that this might be regarded as unfavourable treatment, measured against an objective sense of that which is adverse compared with that which is beneficial. The test of unfavourable treatment is a much lower threshold then in a harassment complaint (violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment).

128. As explained above, the Tribunal found, in the light of the OH report of November 2020, that the Claimant's poor mental health generally, including her anxiety was a factor in her unwillingness to return to work following the admitted incidents. The Tribunal found that the disability was a significant influence or effective cause of the sickness absence and, as such, an effective cause of the unfavourable treatment.

129. However, the Tribunal found that reducing the Claimant's pay to half pay and inviting her to a stage 3 meeting at which a stage 3 improvement letter was a

possible outcome were both proportionate means of achieving a legitimate aim. In the case of the Claimant's pay, that was governed by the nationally agreed Agenda for Change conditions, which provide for one month's full pay and two months' half pay for employees in their first year of service. The underlying aim of such a reduction in pay is, of course, to encourage good attendance and safeguard public money, which are legitimate aims. The Tribunal found that reducing the Claimant's pay to half pay was a proportionate means of achieving those aims. It was appropriate and reasonably necessary. Indeed, the Tribunal noted that the reduction to half pay did indeed appear to prompt the Claimant's return to work. No less discriminatory alternative was identified. Continuing to pay the Claimant full pay would not have achieved the aims. The context was that there was the option for the Claimant to apply for injury allowance to cover the three half days, and that was explained to her. She had also been given four days' compassionate leave following the admitted incidents. In those circumstances, balancing the needs of the Claimant and the Trust, it was proportionate to reduce the Claimant's pay to half pay after a month's sickness absence.

130. As for inviting her to a stage 3 meeting and telling her that a stage 3 improvement letter was a possible outcome, the aim of the MA Policy is, as Mr Jones explained, to ensure regular attendance, effective working and support for those off sick. The Trust must manage absences to ensure it can deliver essential services and must, at the same time, do so in a cost-effective and sustainable way. These are again legitimate aims. The Tribunal found that inviting the Claimant to a stage 3 meeting and telling her that a stage 3 improvement letter was a possible outcome was a proportionate means of achieving those aims. It was appropriate and reasonably necessary, because it enabled a proper understanding of the reasons for absence and what could be done to support the Claimant in future to help her maintain good attendance. It was appropriate to warn her that an improvement letter was a possible outcome, because under the MA Policy it was. But it had been repeatedly made clear to the Claimant that the underlying reasons would be discussed and that an improvement letter was not inevitable. Again, the theme running through these complaints is that the Claimant had a fixed and inaccurate view of the attendance management process and this led her to refuse to engage with it. Had she attended the stage 3 meeting, no doubt there would have been a straightforward conversation about the reasons for her absence and what more could be done to support her. Balancing the needs of the Claimant and the needs of the Respondent, that was proportionate.

131. For these reasons, claims 12.1.1 and 12.1.2 are not well-founded.

132. The Claimant also bases her complaints of failure to make reasonable adjustments for disability on the above events. It is not necessary to decide the question of Mr Jones's personal liability for these complaints, because they do not succeed in any event. The Tribunal found:

132.1 The Trust did have PCPs of applying the MA Policy and applying the sick pay policy.

132.2 It did not have a PCP of not taking into account the reasons for absences in the application of the MA Policy. As the account set out above makes clear, the reasons for absences are taken into account and were taken into account in the Claimant's case. For most absences the employee will still be invited to a meeting, but the reasons are taken into account in the discussion at the meeting and in deciding what, if any, further steps to take.

132.3 It did not have a PCP of requiring that the Claimant work 37.5 hours per week. On the contrary, despite applying for and accepting a 37.5 hours per week role, the Claimant never worked those hours and was never required to do so. A phased start was agreed with her initially, not for any disability-related reason, but because she had been out of the workplace for so long. After that, adjustments were made to her hours as set out in detail above. Eventually, her contract was formally changed.

132.4 Applying the MA Policy in principle put the Claimant at a disadvantage in relation to her mental health disability because she was more likely to have absence and to face an improvement notice and, ultimately, dismissal.

132.5 Disapplying (or adjusting) triggers for absence management could have helped to avoid that disadvantage. It was not reasonable for the Trust to adjust triggers before inviting the Claimant to a stage 3 meeting. It needed to meet her in order to discuss and understand the reasons for her absence, so that appropriate adjustments could be made if necessary. At that stage, the Claimant was not saying that her absence was disability-related. She was saying she was unable to attend work because she did not feel safe. Her sick notes referred to work-related stress because of the admitted incidents. It might have been reasonable for the Trust to consider adjusting triggers at the stage 3 meeting had it gone ahead. It did not. Mrs Wilson was in receipt of the OH report by the time she made a decision and she decided not to issue a stage 3 improvement notice.

132.6 It was not reasonable for the Trust to discount the Claimant's absence from her record altogether. The record was a factual account of the Claimant's attendance at work. Not keeping an accurate record would not avoid the disadvantage. What was reasonable was to take into account the reasons for absence and adjust the process or outcomes accordingly. That was done.

132.7 Applying the sick pay policy (i.e. a reduction to half pay after a month's full pay) in principle put the Claimant at a disadvantage in relation to her mental health disability because she was more likely to have absence and to face a reduction in pay.

132.8 It was not reasonable for the Trust to have to continue to pay the Claimant full pay in September 2020. She was not saying at that stage

that her absence was caused by anxiety and depression. In any event, continuing to pay her full pay would act as a disincentive to returning to work and there was no exceptional disability related feature that made it reasonable to pay her full pay. She had had four days' compassionate leave on full pay. It was not reasonable for the Trust to have to reimburse her the three days' half pay in the grievance appeal process. The Claimant was told about how to apply for injury allowance to seek reimbursement of those sums. There is no complaint in these proceedings relating to the handling of any application she may have made for injury allowance. It was reasonable for those handling the grievance appeal to proceed on the basis that the Claimant had been told how to seek reimbursement of those sums.

132.9 The whole of complaint 13 is therefore not well-founded.

133. The other complaint of failure to make reasonable adjustments relates to the Claimant's dyslexia and the sending of the grievance appeal outcome on white paper on 1 June 2020. The Tribunal found that the Trust did not have a PCP of communicating grievance and grievance appeal decisions on white paper. As the account above makes clear, its practice was to send all hard copy written communications to the Claimant on yellow paper. There was a single oversight in the case of the grievance appeal outcome. That does not give rise to a PCP. Even if there was a PCP generally of providing written materials on white paper, the Tribunal had doubts about whether that put the Claimant at a substantial disadvantage because she had a yellow overlay that she could and did use when reading documents on white paper. Further, even if there had been a disadvantage, one step to avoid the disadvantage would be to send the document by email, so that the Claimant could highlight it in yellow. That was done and that overcame any disadvantage. The Claimant highlighted the grievance appeal outcome in yellow and read and digested the letter before the white copy ever arrived. There was no failure to make reasonable adjustments in this regard and complaint 14 is not well-founded.

Incidents in June 2021

134. We turn now to the Claimant's complaints about events in June 2021. We start with a disputed conversation between the Claimant and Mrs Townsend, an Acting Supervisor in the Catering Department. The Claimant invited the Tribunal to find that Mrs Townsend's evidence overall was not to be believed, but the Tribunal disagreed. In particular:

134.1 The Claimant and Mrs Townsend both agreed that they got on well. The Claimant could identify no reason why Mrs Townsend would have invented the disputed conversation.

134.2 Mrs Townsend said that the Claimant would often confide in her about work and personal issues. That seemed highly likely to the Tribunal. Evidence from the time and witness evidence supported the view that the

Claimant did discuss issues at work and in her personal life with her colleagues and managers. She had clearly discussed a particularly difficult personal issue with Mrs Townsend, which led the police to call Mrs Townsend at work because the Claimant gave them her details as somebody she had confided in.

134.3 The Claimant has misconstrued a comment Mrs Townsend made in her witness statement about Ms Hulbert. Mrs Townsend said that sometimes the Claimant told her that she wanted to speak to her rather than Ms Hulbert, because Ms Hulbert was a bit too immature and Mrs Townsend was older. That does not mean that Mrs Townsend said that the Claimant was criticising Ms Hulbert; she understood that she was simply explaining why there were some matters she preferred to discuss with Mrs Townsend. The fact that nobody had heard the Claimant criticising Ms Hulbert, or being anything other than positive about her, was irrelevant.

134.4 The Tribunal believed Mrs Townsend's evidence about helping the Claimant when she said she was not very confident about wearing make-up. In cross-examination, Mrs Townsend had a clear and specific recollection of it.

134.5 There was evidence to support Mrs Townsend's account of the Claimant saying that she was going to take the Trust "to the cleaners" or take them "for every penny." Mrs Wilson was asked about that for the first time in cross-examination. She said that Mrs Hawkshaw had reported such a concern to her. Mrs Townsend had told Mrs Hawkshaw that Ms Booth, who worked for the company that serviced the vending machines, had told her about the Claimant making these comments. Mrs Wilson therefore contacted Ms Booth and asked to meet her. Ms Booth confirmed to Mrs Wilson that she used to see the Claimant at the supermarket and the Claimant had made the comments then. Mrs Wilson did not do anything about it because it was outside the workplace. Mrs Wilson's recollection, when asked about this in cross-examination, was clear and precise.

134.6 There was only one matter on which Mrs Townsend's evidence was open to question. She said in her witness statement that the Claimant would "often message me outside of working hours and she asked on numerous occasions if she could come to my house to chat." In cross-examination, the Claimant said that she had never asked to come to Mrs Townsend's house. Mrs Townsend said that she had messages on her phone to prove it. The Tribunal asked her to provide those messages. They showed that on one occasion the Claimant had messaged Mrs Townsend at 19:08hrs, asking, "Can I come and see you tonight as struggling. X" Mrs Townsend replied to say that she was going to bed soon with a headache and would talk to the Claimant when she was at work. The Claimant replied, "OK. X" The Claimant suggested that she was not asking to go to Mrs Townsend's home, she was asking to speak

to her at work. The Tribunal had no hesitation in rejecting that. The department closed at 19:00hrs. The Claimant messaged after it closed. She cannot have been asking to go and see Mrs Townsend at work. When Mrs Townsend said that she was going to bed shortly, the Claimant did not reply to say that she thought she was at work or words to that effect. It was obvious that the Claimant was, as Mrs Townsend said, asking to go and see her at home. To that extent, Mrs Townsend's account was preferred to the Claimant's. The only question was Mrs Townsend's reference to "numerous" such requests. Mrs Townsend could not explain the reference when asked about it in cross-examination. There was only one social media request. However, the reference to "numerous" occasions in Mrs Townsend's witness statement could have referred to requests in person as well. The Tribunal noted that exchanges between the Claimant and Ms Hulbert showed the Claimant pressing her more than once to meet up outside work, and an exchange between the Claimant and Mrs Edwards showed her asking to meet Mrs Edwards on a Saturday. The Tribunal found it was more likely than not that the Claimant had made repeated requests of Mrs Townsend too, but not all on Facebook Messenger.

135. That is the context for the Tribunal's consideration of the disputed conversation. Mrs Townsend said that the Claimant approached her on 10 June 2021 in the servery and asked for a word in private. Mrs Townsend took her to the disposable room, which was the nearest empty room. The Claimant told her that she did not feel well. She was hot and sweaty and it was making her feel ill. Mrs Townsend was not authorised to send the Claimant home, because there was a manager (Mrs Hawkshaw) on site. Mrs Townsend knew the Claimant only had an hour of her shift left, so she suggested she take five minutes, have a drink of water and then finish her shift. At that point the Claimant told her she was so hot she had taken her underwear off, and made a wringing motion with her hands. Mrs Townsend again suggested that she have a cold drink. Mrs Townsend went to see Mrs Hawkshaw, because she had authority to send the Claimant home. Mrs Townsend recounted the whole conversation to Mrs Hawkshaw, including the suggestion that the Claimant had taken her underwear off and made a wringing gesture. Mrs Hawkshaw expressed surprise, but they did not discuss it further. After their discussion, Mrs Townsend made a note of the conversation with the Claimant in her notepad. She often made notes, as her memory was not very good.

136. The Claimant denied having such a conversation with Mrs Townsend. She said that she did not mention underwear, or wringing it out and she did not make any gesture. At a subsequent grievance meeting, she said that she could not remember talking to Mrs Townsend about being too hot at all, she could not remember going to a separate room and she could not remember Mrs Townsend suggesting that she get a cold drink. She did not know what the

disposable room was and had never heard about it. She had never been to a private room with Mrs Townsend. In cross-examination she accepted that she had spoken to Mrs Townsend on 10 June 2021 and told her how hot she was and that she was feeling unwell, but she said that she had not mentioned underwear or wringing it out. When cross-examining Mrs Townsend, the Claimant put to her that they had gone to a separate room. She put to her at one stage that she had not suggested the Claimant get a cold drink and at another that she had suggested that. Her evidence at the Tribunal was clearly inconsistent with what she said during the grievance process.

137. The Tribunal preferred Mrs Townsend's evidence. She had no issue with the Claimant and no reason to make this account up. She made a note of the conversation on the day. We found that it was accurate. It seemed to the Tribunal that the Claimant did have a tendency to blur appropriate boundaries, and perhaps to "overshare" with her colleagues. We noted that she denied making the comments and gesture as soon as she was asked about it a few days later, but we still found that it was more likely than not that the Claimant had made the comment and gesture. We have no doubt that it was meant in a light-hearted way, and was certainly not sexual in nature, but we found on a balance of probabilities that it happened as Mrs Townsend reported.

138. Mrs Townsend's evidence to the Tribunal was that she told Mrs Hawkshaw about the conversation because the Claimant had told her she was feeling unwell. She notified a member of management in case it was necessary for the Claimant to go home. She would have done the same with any colleague, regardless of gender reassignment or disability. She also said that it never entered her mind that this conversation or her reporting of it was "of a sexual nature". She just told Mrs Hawkshaw what the Claimant told her. The Tribunal accepted Mrs Townsend's evidence. It was clear to the Tribunal that she was somebody who had gone above and beyond to support the Claimant, allowing her to confide in her in the workplace and to be in touch outside of work via social media. She said that she was surprised and upset that the Claimant had complained about her and it was clear to the Tribunal that she was. The Tribunal had no hesitation in finding that Mrs Townsend's conduct in reporting the conversation did not "relate to sex" nor was it "of a sexual nature." The Claimant's view seemed to be that because it was about underwear, it was sexual. The Tribunal disagreed. Mrs Townsend's conduct did not relate to sex and was not of a sexual nature. It simply recounted a conversation that had taken place about being too hot, in the course of which a comment and gesture about removing underwear because of the heat had been made.

139. As we have explained, Mrs Townsend reported the conversation to Mrs Hawkshaw because Mrs Hawkshaw had the authority to send the Claimant home. Mrs Hawkshaw expressed surprise about the underwear comment and gesture. Mrs Townsend made a note of it after their discussion. She added

exclamation marks to the parts dealing with the underwear comment and the gesture.

140. We note at this stage that the Claimant had had some COVID-related absences from work during 2021. Those did not count towards the MA Policy triggers. On 20 May 2021, she told Mrs Hawkshaw that she had diarrhoea. Mrs Hawkshaw sent her home. She was paid for the whole day. There were other meetings and emergencies, for which Mrs Hawkshaw agreed time off or annual leave. On 4 June 2021, at the Claimant's request, Mrs Hawkshaw and the Claimant agreed that the Claimant would move to the Northern General on a permanent basis.

141. Mrs Hawkshaw's evidence, which the Tribunal accepted, was that supervisors had mentioned to her that the Claimant sometimes clocked on for work before she had got changed. She decided to speak to her about it. A supervisor also told Mrs Hawkshaw that the police had called the Claimant on a work number, and she also wanted to ask her about that.

142. On 10 June 2021, Mrs Townsend told her about their conversation and the underwear comment and gesture. Mrs Hawkshaw's evidence was that she was concerned that there might be an underlying health issue. It added to the things she wanted to speak to the Claimant about, but it was not urgent.

143. The next day, 11 June 2021, the Claimant was off work again with diarrhoea. She emailed Mrs Hawkshaw to say that she assumed she was unable to attend because of infection control and asked for confirmation. She asked if this would be used against her with attendance management and whether she would lose pay. Mrs Hawkshaw replied to say that the Claimant could not attend work, as she knew, and that they would discuss her absence when she returned. She also suggested an OH referral because she was concerned that the Claimant might have an underlying health issue. The Claimant said that she did not need an OH referral (although a few days later she suggested a referral in relation to her mental health).

144. The Claimant's next day at work was 16 June 2021. She had a return to work interview. The Assistant Supervisor told her that her absences triggered stage 3 of the MA Policy and she was concerned about that. The Claimant approached Mrs Hawkshaw and asked if she was going to have to attend a stage 3 meeting. Mrs Hawkshaw said that she was, although the outcome would not necessarily be a warning. Mrs Hawkshaw's evidence was that the Claimant became quite cross and walked out of Mrs Hawkshaw's office. Almost immediately a supervisor came to tell Mrs Hawkshaw that the Claimant was shouting about her return to work meeting in front of staff and customers in the servery. She was shouting that she would take the Trust to court. Mrs Hawkshaw went into the servery, where the Claimant was standing by the vending machine, shouting. Mrs Hawkshaw asked her to come into her office, which she did. Mrs Hawkshaw told her that she should not say these things in front of customers,

and that her behaviour was going to make her ill. Then she said words to the effect that the Claimant could not "spit her dummy out". When the Claimant had calmed down, Mrs Hawkshaw repeated that this was a place of work and the Claimant could not shout in front of colleagues and customers. She told the Claimant that managers had to act in accordance with the MA Policy. She apologised for her "dummy" comment and said that she did not mean to offend her.

145. The Claimant's evidence was that she did not get upset in the canteen or go running to other staff. In cross-examination she said that she was upset but not angry. She said that Mrs Hawkshaw did not apologise there and then. We return to the question of an apology below, but we note that the broad circumstances in which Mrs Hawkshaw made her comment were not in dispute. It seems to the Tribunal likely that the Claimant was angry and speaking with a raised voice in the servery – she had already come to see Mrs Hawkshaw and told her that she would not be attending a stage 3 meeting, her behaviour in the canteen is what prompted somebody to come and get Mrs Hawkshaw, and it is consistent with her view that she simply should not have to attend a stage 3 meeting that she would have been angry about it. She may well have been upset too.

146. The Tribunal noted that the Claimant emailed Mrs Hawkshaw that evening. She again explained her disagreement with having to attend a stage 3 meeting. She told Mrs Hawkshaw that the matter of her absences was already with the Employment Tribunal. She asked why she should have to attend a stage 3 meeting when it came out of discrimination. She said that she had been crying and upset and that Mrs Hawkshaw's comment about picking up her dummy and putting it in her mouth was not helpful and had offended her. She sent further emails on 21 June 2021 (and later), raising similar concerns about the attendance management process, in similar terms. She made repeated references to being managed out of her job and to the fact that this was making her ill. She indicated that she would not attend a stage 3 meeting. Mrs Hawkshaw replied suggesting she contact her GP and providing details of the workplace counselling process. She did not refer to the dummy comment, or to having made an apology.

147. We deal with the dummy comment at this stage. There is no dispute that Mrs Hawkshaw made a comment along the lines alleged. She has never denied it. She says she apologised on the day, the Claimant disagrees. There is no dispute that she apologised at a meeting on 25 June 2021, at which Ms Hulbert was present (see below). Ms Hulbert said that the Claimant would not let it go afterwards. The Claimant secretly recorded a meeting with Mrs Hawkshaw on 17 September 2021. She provided part of the recording to Mrs Mahon, who dealt with her subsequent grievance. In that part of the recording, the Claimant brings up the dummy comment again and Mrs Hawkshaw says, "I apologised all those weeks ago. I can only apologise. You took it not the way I thought you

would … so I can only apologise for that. Just … I can't take it back …, it wasn't meant in an offensive way." Mrs Hawkshaw's evidence to the Tribunal was that she regretted making the dummy comment. The Claimant had been acting unprofessionally in front of customers and colleagues and she made the comment to try and calm her down. She had seen no evidence that the Claimant's disability caused her to behave in an unprofessional manner and the comment was not related to her disability. She said that she had not discriminated against the Claimant in making the comment. The Tribunal accepted that Mrs Hawkshaw would have made the comment to any employee who was behaving in the way the Claimant was, and that she was trying to calm her down. It was not because of gender reassignment or disability. She had enjoyed a good relationship with the Claimant up to this point. In her cross-examination, the Claimant said that she understood that when she made the comment Mrs Hawkshaw was saying that she was behaving in a child-like way. The Tribunal noted that the Claimant's mental health disability was anxiety and depression. There was nothing at the time (nor was there any evidence before the Tribunal) that her anxiety and depression made her behave in the way she was behaving in the servery. The comment related to behaving in a child-like way – shouting in front of staff and customers because she was unhappy about being asked to attend a stage 3 meeting – it did not relate to disability.

148. On 18 June 2021, a supervisor had reported to Mrs Hawkshaw that the Claimant had left her shift early and this was another thing Mrs Hawkshaw needed to discuss with her.

149. Mrs Hawkshaw therefore arranged to meet the Claimant on 25 June 2021 to address the various issues that had arisen. She arranged for Ms Hulbert to attend to support the Claimant. Mrs Hawkshaw went through a number of matters with the Claimant, including the clocking on procedure, the report that she had left work early, and the fact that the police had called her on a work number. She went on to discuss what Mrs Townsend had said about the underwear comment and gesture.

150. There is a dispute about precisely what was said. At a much later stage the Claimant listed six questions she said Mrs Hawkshaw had asked her, but closer to the event she was more vague about the number and precise nature of the questions. In a grievance dated 5 July 2021, she said that Mrs Hawkshaw had referred to Mrs Townsend's account of a conversation (which she said was false), and then asked "a number of questions relating to this topic" which were "highly embarrassing and unfair." In a draft letter dated 9 July 2021 (but never sent) Mrs Hawkshaw said that she began by asking her if she had told Mrs Townsend that she was so hot she had removed her underwear. The Claimant said that she had not had any such conversation, so Mrs Hawkshaw told her in detail what Mrs Townsend had said. The Claimant said that she had not said this and had never removed her underwear at work. Mrs Hawkshaw asked her if she were sure and the Claimant reiterated that she had never done such a

thing. The Claimant raised a grievance about this, and she, Mrs Hawkshaw and Ms Hulbert were all interviewed about what was said. The Tribunal noted:

150.1 Ms Hulbert said that the meeting went as it should have gone. Mrs Hawkshaw asked the Claimant, she said, "No" and Mrs Hawkshaw did not press it. She handled the meeting well. She had a few set questions and asked them. Ms Hulbert did not think that Mrs Hawkshaw had made any inappropriate comments. Ms Hulbert recalled that Mrs Hawkshaw had mentioned Mrs Townsend's account and then asked the Claimant, was she inappropriately dressed in the changing room and seen by a member of staff, did she tell a member of staff about taking her underwear off, maybe she asked if she had felt unwell. She might have asked her if she wore underwear at work, or if she wore it in general, because if she had been seen without any on in the changing rooms then she probably asked her if she did wear it at work. She did not recall Mrs Hawkshaw asking the Claimant if she changed her underwear at work. She did ask her if she had changed her underwear if it was hot and sweaty and had she done it before. After the meeting, the Claimant felt embarrassed by the questions.

150.2 When Mrs Hawkshaw was interviewed, she described the discussion consistently with what she had said in the draft letter dated 9 July 2021. She added that another colleague had said the day before that the Claimant had been in the changing room "naked from the waist down". Mrs Hawkshaw said that she had got a statement but had not asked the Claimant about this.

150.3 In her witness statement, Mrs Hawkshaw said that she did not believe Mrs Townsend had fabricated the conversation about underwear. She asked the Claimant about it because she was "concerned about her health." This was not related to sex or of a sexual nature. In cross-examination, Mrs Hawkshaw accepted that she had asked the Claimant whether she took her underwear off at work as a general question, not specific to 10 June 2021. She was asked why it was necessary to ask that and she said that the Claimant had had some issues with her stomach and medication and it was about her health and wellbeing. She was asked why it was necessary to ask her if she took her underwear off at work if that was her concern. She said it was what she had been told. She thought there might be other reasons due to the Claimant's health. She could not explain why she had not asked the Claimant about her health or medication during the conversation.

151. The Tribunal found that Mrs Hawkshaw had referred to the conversation as reported by Mrs Townsend. She went on to ask a number of questions that were more generally about whether the Claimant wore or changed her underwear at work, and about whether she had been inappropriately dressed in the changing room. The Tribunal considered Ms Hulbert's account likely to be the most accurate because she was only involved in this matter at the one

meeting, and was there as more of an observer than a participant. The Tribunal accepted that the questions asked were not related to sex, or of a sexual nature. The Claimant simply seems to have taken the view that because the questions were about underwear, that meant they were of a sexual nature. The Tribunal found that they were not. Nor did they have anything to do with the Claimant's mental health disability. There was nothing to suggest that an employee without a mental health disability in the same situation would have been treated any differently.

152. However, the Tribunal found that the Claimant had proved facts from which it could conclude, in the absence of an adequate explanation, that the reason Mrs Hawkshaw had asked her those questions about her underwear was because she is a transgender woman. Those facts were:

    152.1 The questions asked were not simply about what had happened on 10 June 2021 but were more general questions about whether the Claimant wore or changed her underwear at work and whether she was ever inappropriately dressed at work.
    152.2 After speaking to Mrs Hawkshaw, Mrs Townsend made a note of the conversation in her notebook. She described Mrs Hawkshaw as "surprised" by the comments, not concerned about the Claimant's health. Mrs Townsend wrote exclamation marks in that part of her note.
    152.3 Mrs Hawkshaw did not ask any questions about the Claimant's health, or whether there was a health issue relating to these events, and she did not mention any concerns about health or hygiene. She could not explain why that was, despite the fact that she said this was why she asked the Claimant about it.
    152.4 Mrs Hawkshaw had received a report about the Claimant being naked from the waist down in the changing room before asking the questions. She did not mention that specifically, but the questions she asked seemed to be connected with that as much as with the conversation with Mrs Townsend.
    152.5 A concern about the Claimant's state of undress in the changing rooms was likely to be connected with the fact that she is a transgender woman. This was a communal changing room with a shower cubicle. It did not seem to the Tribunal likely that there would have been a concern about a cisgender woman in a state of undress while changing in such a changing room.

153. The Tribunal therefore found that the burden shifted to the Trust to prove that the reason for Mrs Hawkshaw's line of questioning was not the Claimant's transgender status. The Trust did not do so. The Tribunal was not persuaded by Mrs Hawkshaw's evidence that the reason for asking the questions was concern about the Claimant's health. She did not ask her about that, and the questions she did ask did not seem to relate to a health concern. No other

explanation was put forward. The Tribunal therefore concluded that Mrs Hawkshaw asked the questions because of a concern that the Claimant as a transgender woman might be in a state of undress in the female changing room. That was because of gender reassignment. Mrs Hawkshaw would not have asked the questions of a cisgender woman.

Complaints about the events of June 2021

154. The Tribunal's conclusions on the issues and complaints relating to these events in June 2021 are summarised in the table below.

Complaint number(s) in agreed list of issues	**Factual finding as explained above**
6.2.15 and 7.1.1 (for 5.1.4); 18.1.1 (Mrs Townsend reporting the underwear conversation)	Mrs Townsend did report accurately comments and a gesture made by the Claimant. She did not do so because of gender reassignment or disability and her conduct did not relate to sex, nor was it of a sexual nature.
6.2.15 and 7.1.1 (for 5.1.5); 11.1.1 (Mrs Hawkshaw's dummy comment)	Happened but was not because of gender reassignment or disability.
6.2.15 (for 5.1.6); 18.1.2 (Mrs Hawkshaw's questions about underwear)	Happened as described above. Was not because of disability, did not relate to sex and was not of a sexual nature. Was because of gender reassignment. The Tribunal concluded that this was less favourable treatment and was detrimental. The Claimant was asked personal and embarrassing questions in a relatively formal work meeting in front of a colleague. That is detrimental. This complaint of less favourable treatment because of gender reassignment therefore succeeds.

Absence management 2021

155. We have referred above to the fact that the Claimant's absence for diarrhoea in June 2021 triggered stage 3 of the MA Policy again. The Claimant saw something sinister in the fact that this absence counted as a day's sickness absence, when the day she was sent home in May with diarrhoea did not count. That seemed to the Tribunal simply to reflect her misunderstanding of the medical exclusion policy and the treatment of absences for sickness or diarrhoea. The two absences were different. On the first occasion she attended work and was sent home. The Trust does not count such an incident as a day's

absence. On the second, she did not attend work because she was unwell with diarrhoea. That was a day's sickness absence. It was not part of the medical exclusion policy, because it was not part of the 48 hour period during which she could not attend work after her symptoms had stopped.

156. The Claimant was told by the relevant supervisor when she returned to work that she had triggered stage 3. As we have described, she was angry and upset about that. She sent numerous emails about it, and said that she would not attend a stage 3 meeting. At the meeting with Mrs Hawkshaw on 25 June 2021 she said that if she was contractually required to attend she would do so but would not say anything. The Claimant was absent from work on 29 June 2021 because she had to isolate as her flatmate was having an operation. She was signed off sick on 8 July 2021, because of "workplace bullying and harassment causing stress." She remained absent until 17 September 2021. An investigation was started into her grievance about the underwear and dummy issues. Mrs Mahon wrote to her on 4 August 2021 to invite her to an investigation meeting. We do not need to deal in detail with the grievance process, which concluded after the Claimant had resigned.

157. In the meantime, Mrs Hawkshaw wrote to her 9 August 2021 inviting her to an Attendance Review meeting on 20 August 2021. The Claimant replied to say that she did not intend to attend. She was unwell and it would cause her further distress. On 20 August 2021 she sent a further email to say that in addition she felt there was a conflict of interest if Mrs Hawkshaw held the meeting, because she had raised a grievance about her. No further steps were taken about the meeting at that stage. Mrs Hawkshaw held a return to work meeting with the Claimant on 17 September 2021. That was the meeting the Claimant secretly recorded.

158. The Claimant gave notice of resignation on 28 September 2021. She emailed a resignation letter to Mrs Hawkshaw and Mrs Wilson. Her notice was due to expire on 25 October 2021.

159. The following day, Mrs Hawkshaw wrote to her to say that she wanted her to attend a stage 3 meeting, but wished to refer her to OH first. She explained why. She wanted to know if the Claimant's absences were caused by her mental health disability and should be discounted or whether new trigger points should be set. Although the Claimant was given the letter, neither the OH referral nor the stage 3 meeting was progressed, given that she had resigned.

160. Mrs Hawkshaw's evidence was that she managed the Claimant's absence exactly as she would have done anybody else's. She explained repeatedly that the purpose of a stage 3 meeting was to understand the absences and what could be done to help the Claimant, and to decide whether or not a warning would be issued. The Claimant simply refused to accept that, despite repeated explanations. The Tribunal accepted Mrs Hawkshaw's evidence that neither the

Claimant's transgender status, nor her disability, nor the fact that she had complained about discrimination, had any influence on Mrs Hawkshaw's conduct in telling the Claimant on 16 June 2021 and subsequently that she would be invited to a stage 3 meeting, inviting her to an attendance review meeting on 9 August 2021 and inviting her to a stage 3 meeting on 28 September 2021. She was simply managing the Claimant in accordance with the MA Policy, just as she would any employee. The attendance review meeting was simply to keep in touch with the Claimant during her long-term absence, in accordance with the MA Policy. The stage 3 meeting was to be arranged after her return to work because she had hit the triggers again and the MA Policy called for a meeting. Adjustments to trigger points, discounting absences, and potential improvement notices would have been considered at a stage 3 meeting, if it had taken place. As explained above there was a simple explanation for treating the two absences for diarrhoea differently; this did not point to discrimination or victimisation by Mrs Hawkshaw.

Complaints about absence management in June 2021

161. Finally, therefore, the Tribunal's conclusions on the issues and complaints relating to the Claimant's absence management in June 2021 are summarised in the table below.

Complaint number(s) in agreed list of issues	**Factual finding as explained above**
6.2.12, 6.2.15 and 7.1.1 (for 5.1.7), 11.1.2, 17.2.5, 17.10.1 (Mrs Hawkshaw telling C she would be invited to a stage 3 meeting)	Happened but was not because of gender reassignment, disability or a protected act.
6.2.15 and 7.1.1 (for 5.1.8), 11.1.3, 17.10.2 (Mrs Hawkshaw inviting C to an attendance review meeting)	Happened but was not because of gender reassignment, disability or a protected act.
6.2.15 and 7.1.1 (for 5.1.9), 11.1.4, 17.10.3 (Mrs Hawkshaw inviting C to a stage 3 meeting)	Happened but was not because of gender reassignment, disability or a protected act.

Time limits

162. Some parts of some of the claims were not presented within the time limits in the Equality Act 2010. The Respondents did not forcefully argue against a just and equitable extension of time in those claims in their closing submissions. It

seemed to the Tribunal that it was just and equitable to extend time. The Claimant clearly has legal knowledge and knows about how to bring a Tribunal claim and the time limits for doing so. But she has four, complex claims. She has dyslexia and poor mental health. The Tribunal could understand how parts of some claims might have been presented late in those circumstances. The Respondents were able to deal with every complaint that was made, so the delays in some of them did not affect the cogency of the evidence. There is obviously prejudice to the Respondents in facing out of time complaints, but less than otherwise where the evidence was not affected and the Respondents had to deal with lengthy and complex claims in any event. The prejudice to the Claimant in not being able to proceed with those claims was greater. The Tribunal therefore concluded that it was just and equitable to extend time for bringing any claim that was not presented within the time limit in the Equality Act 2010.

Employment Judge Davies

1 July 2022