EMPLOYMENT TRIBUNALS

Claimant:	Mrs J Grayson
First Respondent:	South Tees Hospitals NHS Foundation Trust
Second Respondent:	Paul Harrison
Heard at:	Newcastle (by CVP)
On:	25-29 September 2023
Before:	Employment Judge Loy
Members:	Mrs S Don
	Mr G Gallagher

Representation

Claimant:	Ms Millin, counsel
Respondent:	Miss Barry, counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The claimant's claim for failure to make reasonable adjustments is not well founded and fails;

2. The claimant's claim for discrimination arising from disability is not well founded and fails; and

3. The claimant's claim for disability related harassment is not well founded and fails.

REASONS

Introduction

1. Oral reasons were given at the hearing. A request for these written reasons was made at the hearing by the claimant.

2. This is the unanimous judgement of the employment tribunal.

3. The claimant was represented by Ms Millin of counsel.

4. The first and second respondents were represented by Miss Barry of counsel.

5. All references to the respondent below are to be taken to be references to the first and second respondent unless in context it is made clear that only one or other of the respondents is being referred to.

6. The cases on behalf of all parties were ably presented by their representatives.

7. The matter was listed for both liability and, if appropriate, remedy/

Background

8. The claimant is a band six nurse employed by the first respondent.

9. Band six reflects the claimant's significant experience in the role

10. The claimant is based in Speciality Medicine in the Chemotherapy Day Unit at the James Cook University Hospital in Middlesbrough.

11. The respondent is an NHS trust operating amongst other units the James Cook University Hospital which provides acute services.

12. The claimant commenced employment with the first respondent on 1 January 2003. The claimant remains employed by the first respondent at the time of these proceedings. The tribunal heard that the claimant is currently going through a process which may lead to her ill-health retirement from the Trust's employment.

13. The second respondent is employed by the first respondent as the Unit Manager of the Chemotherapy Day Unit. Initially, responsibility for managing the claimant's employment lay with Deborah Corrigan who was the Chemotherapy Unit Day Manager until she left the Trust's employment in December 2021 to take up a position in academia at the University of Teesside.

14. In January 2022, the responsibility for managing the claimant's employment passed to Mrs Harrison.

15. The claimant has a number of medical conditions which separately and combined are accepted by the respondents as amounting to a disability under the terms of section 6 Equality Act 2010. The respondent also says that its concession in relation to the claimant's disability was in respect of a defined period: April 2021 to December 2022. No concession applies outside of that period.

The claims

16. The claimant brings the following claims:

17. A failure to make reasonable adjustments contrary to sections 20 and 21 equality act 2010.

18. Discrimination arising from disability contrary to section 15 Equality Act 2010; and

19. Disability-related harassment contrary to section 26 Equality Act 2010.

20. The respondent denies all liability.

21. The respondent also relies on matters of time limitation. The respondent says that any matter arising before 30 June 2022 is out of time given the three months' time limitation applicable to Equality Act claims. The respondent denies that there has been conduct extending over a period the effect of which would be to commence time limitation from the last act of discrimination. The respondent says it would not be just and equitable to extend time under the discretion afforded to the tribunal under the Equality Act.

Witnesses

22. The tribunal heard evidence from the following witnesses:

23. The claimant who produced a written witness statement and was cross examined by Miss Barry.

24. The claimant was the only witness in support of her own case.

25. The respondent put forward the following witnesses

    25.1. Mrs Corrigan who produced a written statement and was cross examined by Ms Millin;

    25.2. Mrs Harrison who produced a written statement was cross examined by Ms Millin;

25.3. Mrs Hoggart who produced a written witness statement but was not cross-examined by Ms Millin because she was not called as a witness. This was due to a domestic issue which required her attendance. The tribunal applied appropriate weight to her written statement given the circumstances, in particular that it was not tested in cross-examination.

25.4. Mrs Clifford who produced a written statement was cross examined by Ms Millin;

25.5. Mrs Barbara Wilson who produced a written witness statement but was not cross-examined by Ms Millin because she did not give oral evidence; and

25.6. Mrs Suggett who produced a written statement and was cross examined by Ms Millin.

Factual findings and conclusions

26. The tribunal follows the list of issues that were agreed between the parties.

Jurisdiction

27. The tribunal has had regards to section 123 Equality Act ('EqA') and to the well-known authorities in British Coal Corporation v Keeble.

28. The tribunal concluded that there was not conduct extending over a period within the terms of section 123(3) EqA.

29. For the reasons we refer to below, the tribunal was not satisfied that there were any matters of discrimination extending over a period ending with the last pleaded incident of alleged discrimination.

30. The tribunal also noted that there were two principal managers responsible for the management of the claimant's health issues and absence: Mrs Corrigan and Mrs Harrison. It was common ground that when Mrs Harrison took over responsibility for the management of the claimant that a line was drawn the effect of which was that the claimant's management would be considered afresh by Mrs Harrison. The tribunal concluded that the substitution of Mrs Corrigan with Mrs Harrison was incompatible with conduct extending over a period. They were two different decision makers with their own perspectives.

31. The tribunal also concluded that it would not be just and equitable to have time extended on a just and equitable basis. The tribunal had regards to the prejudice and the balance of that prejudice between the parties. The effect of granting an

extension would be that the claimant's allegations before 30 June 2022 would be before the tribunal and considered as potential matters of unlawful treatment. If discretion is not extended there would remain a number of matters that the tribunal would only be entitled to treat as background.

32. This is not a case where all of the acts complained fell within the primary time limit of three months (as extended for the period of conciliation). The claimant would not be shut out of litigation altogether were time not to be extended in her favour.

33. The claimant has provided no evidence in her statement as to why she waited for the period that she did before presenting a claim. The claimant's has had access to union assistance and union representation since April 2021. The claimant had indicated in April 2021 to the respondent that litigation might follow. The claimant we also heard has been training as a union representative. The claimant is plainly someone of not inconsiderable intelligence. She was articulate during her evidence and she was aware of her rights at the time and she was a duty to enquire about time limits from at least April 2021.

34. In the circumstances the tribunal has considered all of the factual matters that were put in evidence but only treated those that took place on or after 30 June 2022 as incidents that might give rise to liability on the part of the first and/or second respondent.

Reasonable adjustments

35. The Tribunal has had regard to sections 20 and 21 EqA and to the authorities referred to by the counsel. including Griffiths v DWP; *Cave and Goodwin*; Newcastle upon Tyne hospitals and Bagley; Fareham College and Walters; and Archibald and Fife Council.

36. Failure to make reasonable adjustments

37. Under section 39(5) EqA a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: EqA section 21.

38. Section 20 EqA provides that the duty to make reasonable adjustments comprises three requirements, set out in sections 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

39. In considering whether the duty to make reasonable adjustments arises, a Tribunal must consider the following:

40. Whether there was a provision, criterion or practice ("PCP") applied by or on behalf of an employer;

41. The identity of the non-disabled comparators (where appropriate); and

42. The nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee: Environment Agency v Rowan [2008] IRLR 20.

43. The concept of a PCP is one which is not to be construed narrowly or technically. Nevertheless, as the Court of Appeal said in Ishola v Transport for London [2020] EWCA Civ 112 IRLR 368:

44. "[To] test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantaged caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief that the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP. In context, and having regard to the function and purpose of the PCP in the 2020 Act, all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises."

45. A duty to make reasonable adjustments does not arise unless the PCP in question places the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial (i.e. more than minor or trivial) and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

46. Simler P in Sheikholeslami v Edinburgh University [2018] IRLR 1090 held:

47. "The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP…

48. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see section 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see paragraph 8 of App 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

49. The substantial disadvantage must be "in relation to a relevant matter". Schedule 8 of the EqA makes it clear that, in this context, a "relevant matter" means employment by the respondent.

50. An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the employee is likely to (i.e. could well) be placed at the substantial disadvantage.

51. The predecessor to the EqA, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty. Although those provisions are not repeated in the EqA, the EAT has held that the same approach applies to the 2010 Act: Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. It is also apparent from Chapter 6 of the Code of Practice on Employment (2011), issued by the Equality and Human Rights Commission, which repeats, and expands upon, the provisions of the 1995 Act. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had in particular to:

52. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

53. The practicability of the step;

54. The financial and other costs of making the adjustment and the extent of any disruption caused;

55. The extent of the employer's financial and other resources;

56. The availability to the employer of financial or other assistance to help make an adjustment; and

57. The type and size of the employer

Issue 1: Did the respondent apply any or all of the following and if so were all any of them PCPs for the purposes of the duty to make reasonable adjustments?

58. The requirement to undertake all the duties of the claimant's substantive band six clinical sister role;

59. The requirement to work on the chemotherapy day unit;

60. The requirement to comply with the attendance indicators under the sickness absence policy;

61. The respondent's position is that these are PCPs it applied to the claimant. The respondent says that the claimant was never told that she had to undertake all the duties of a substantive post and the evidence suggests to the contrary.

62. The respondent says that the claimant was not required to work in the chemotherapy day unit and the evidence suggests that she was actually required to work on the oncology outpatients department as part of a graduated return to work.

63. The respondent says that there was no evidence that the claimant was required to comply with attendance management indicators and that the evidence suggests that she did not have any of those indicators applied to her in any meaningful way.

64. The tribunal prefers the position of the claimant in respect of the PCPs. It may weigh very well be the case that from time to time the claimant was not been directly subject to any of the PCPs matters by the respondent. However, in the background there were at all material times each of the practices or requirements referred to above which were so to speak at least latent and applicable to the claimant on that basis at least.

65. It remained the expectation that the claimant would discharge the substantive duties of a band six role at in the chemotherapy day unit and was subject to the respondent sickness absence management practices and procedures. The tribunal was therefore satisfied that each of the three points relied upon by the claimant by the claimant were PCPs held by the respomdent opposite the claimant.

Issue 2: Was the claimant placed at a substantial disadvantage in comparison with persons who were not disabled

Issue 3: Did the respondent know could they reasonably be expected to know that the claimant was likely to be placed at the disadvantage in comparison with persons who are not disabled?

Issue 4: If so, what steps could the respondents have taken to avoid the disadvantage. The claimant asserts that the respondent could have made the following adjustments

66. When going through these adjustments the tribunal will also address on a point by point basis whether it was reasonable for the respondent to take those steps and whether the respondent failed to take those steps (i.e. points 3.6 and 3.7 in the list of issues):

(a) ***allow the claimant to take regular breaks***

67. The fundamental difficulty the claimant has in maintaining a failure on the part of the respondent to allow her to take regular breaks is that the respondent not only allowed her to do so but also proactively encouraged her to do so as best it could.

68. There was no evidence that the claimant was not allowed to take regular breaks. The evidence was that the claimant did not take regular breaks ***despite*** the respondent's allowance and encouragement for her to do so.

69. The claimant is a band six nurse. She is able to regulate her own breaks. That she did not do so is really a matter for the claimant herself not the respondent. It is unclear what more the respondent could have done.

70. What is clear is the claimant was allowed to take such breaks as she considered she might need and that she was reminded of and encouraged to take them by Mrs Corrigan and then Mrs Harrison on a regular basis.

(b) adjust the claimant's duties to enable her to avoid bending/stooping, manual handling tasks and physically demanding work

71. This was again a complaint that is difficult to reconcile with the evidence. The respondent makes generally available stools so that the nurses can administer chemotherapy, and go about their duties generally, avoiding the need to bend or stoop.

72. At no stage in these proceedings before cross examination did the claimant seek to suggest that she was unable to use the stools provided by the respondent. It cannot now for the first time be suggested that it was a failing on the part of the respondent to provide any other form of equipment or auxiliary aid when it had no knowledge of any of the difficulties the claimant now says she had in terms of bending and stooping to do her work.

73. The same applies to manual handling and physically demanding work. There was a continuing dialogue and repeated meetings with occupational health the purpose of which was to establish what the claimant could or couldn't do. At no stage was there anything that was identified by occupational health with input from the claimant

herself that the respondent did not address as constructively as it could in the circumstances.

(c) allow the claimant to work as a coordinator for two days of the week

74. The tribunal was satisfied that the respondent approached this recommendation constructively and came to implement management decisions as best it reasonably could when seeking to balance the needs of other nurses within the unit and the need to deliver effective patient care.

75. It was accepted by the claimant she did work as a coordinator for at least one day per week. There were six band six nurses on the unit. There were also pregnant nurses on the unit who were unable to deliver chemotherapy due to their own health and safety requirements during pregnancy. The tribunal finds that the respondent struck a reasonable balance between the needs of the claimant as a disabled person, the positive duty on the respondent to make reasonable adjustments, the legal duties to protect the health and safety of pregnant employees and the interests of the patients who were in real need of the care provided by the unit.

76. Over a five day week, the claimant would be carrying out coordinating roles more frequently than she would on the general rotor where there are six nurses (setting aside pregnancy for these purposes) who are expected to carry out coordinating duties as part of their role. During the period of a graduated return, the claimant was allowed to carry out coordinating duties twice per week. After that, the respondent allowed the claimant to carry out a coordinator role as and when the respondent was able to reconcile those duties with the other demands on the unit. Put simply, the tribunal is satisfied that the respondent did everything it reasonably could to allocate the claimant coordinating duties during the period under consideration.

(d) allowing the claimant to largely undertake alternative duties as management, pre-assessment and QMS audit

77. Again, the claimant faces the difficulty that she accepted that she was allowed to undertake preassessment and QMS audit duties during the period under consideration. In addition, the claimant was allowed to carry out infection control training. The respondent's evidence was that there was a need for someone to take the lead on infection control and in the circumstances given the claimant's interest in that work and her restrictions, the respondent was prepared to support the claimant in that role. Again, the tribunal has concluded that the claimant did all it reasonably could in this regard

(e) redeploy the claimant to outpatients department or another suitable role of a sedentary and/or clinically limited nature on a temporary and/or permanent basis

78. The claimant was, as a matter of agreed fact, redeployed to the outpatients department in oncology for 12 weeks upon her return to work.

79. Furthermore, the thrust of the advice in occupational health was supportive of the claimant returning to her substantive role in the day unit subject to adjustments. The tribunal accepted that it was reasonable of the respondent not to make further enquiries into other roles in the light of that advice. those circumstances.

80. That said, the respondent remained alive to other roles. Again, it was not in dispute that the claimant was (understandably) reluctant to go on the redeployment register. That was because the period of time allowed on the redeployment register was time-limited and if that time expired before an alternative role had been found the claimant would be liable to be dismissed.

81. The respondent nevertheless remained open to the claimant moving elsewhere in the Trust by providing to the claimant's details of lateral opportunities elsewhere within the hospital. The claimant's reacted negatively to those suggestions and the tribunal will referred to that matter again below.

(f) disregard the requirements of the sickness absence policy

82. Again, the claimant appears to be identifying as an adjustment that was not made one that actually was made.

83. Mrs Harrison specifically agreed at a review meeting with the claimant that the claimant's anticipated sickness leave to undergo a spinal procedure would <u>not</u> be counted for the purposes of the management of the claimant's sickness absence.

84. The tribunal does not accept the claimant's evidence that in discussing the leave arrangements for the claimant's spinal procedure that Mrs Harrison reneged on that agreement. It would have been very surprising that Mrs Harrison would in contemplation of the specific event in question commit herself in writing to providing the claimant with an amnesty in relation to sickness absence connected with that event and then when that event came to pass as had been anticipated to then entirely change a position to the opposite effect

85. The tribunal did not conclude that that is what happened. The tribunal prefers the evidence of the respondent, in particular Mrs Harrison, that this conversation was really about pay and not about the status of leave. There was plainly a discussion between the claimant and Mrs Harrison about how to arrange the shifts to ensure that the claimant remained in receipt of pay while at the same time having the necessary time off for the spinal procedure. The amnesty provided by Mrs Harrison did not extend to reinstating pay for future sick leave, it was confined to not counting the days of sick leave towards a management trigger under the absence procedure. However, the claimant wanted (again for understandable reasons) to receive pay for the time that she was off work and she could only do that by taking annual leave. The claimant would have been in the position of receiving half pay had she taken

that leave as sick leave. There is no criticism to be attached to anybody about coming to that conclusion. It seems to the tribunal to be an entirely pragmatic course of action.

(g) fully implement the recommendations of occupational health and the claimant's GP

86. The only aspect of the OH advice that the respondent did not fully implement related to the coordinating duties where it was suggested (again subject to operational requirements) that the claimant do two days per week coordinating.

87. The tribunal has already set out why it considers that the respondent did all it reasonably could in terms of complying with this recommendation.

88. The tribunal also considers it to be somewhat artificial to separate this particular recommendation out from the collection of measures which were recommended and implemented. The tribunal considers that the respondent discharged its duty to make reasonable adjustments in all circumstances.

89. Looking at the matter in the round, the tribunal was satisfied that the respondent discharged its duty to make all reasonable adjustments so that the claimant could safely carry out her duties as a band six nurse.

Discrimination arising from disability – section 15 Equality Act 2010

90. The tribunal has had regard to section 15 Equality Act and the authorities referred to by the parties including the leading authority Pnaiser v NHS England & another.

Section 15(1) EqA concerns discrimination arising out of disability and provides:

"A person (A) discriminates against a disabled person (B) if –

A treats B unfavourably because of something arising in consequence of B's disability, and

A cannot show that it did not know, and could not reasonably have been expected to know, that the employee had the disability; or

A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

91. "Unfavourably" must be interpreted and applied in its normal meaning; it is not the same as "detriment" which is used elsewhere in the EqA, but a claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable: Williams v Trustees of Swansea University Pension and Assurance Society [2018] UKSC 65. The effect of that decision of the Supreme Court says that

there is probably little difference between "unfavourable" treatment and other phrases such as "disadvantage" or "detriment" found in other provisions.

92. Guidance on the correct approach to a claim under section 15 EqA was provided by Simler P in Pnaiser v NHS England [2016] IRLR 170. The EAT gave the following guidance:

93. A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.

94. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

95. The Tribunal must determine whether the reason/cause (or, if more than one, a reason or cause) is "something arising in consequence of B's disability". The causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of a disability may require consideration, and it would be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

96. Where a disability case is concerned with attendance management, it is the treatment that requires justification, not the underlying policy, save in rare instances: Buchanan v Commissioner of Police of the Metropolis [2017] ICR 184.

97. A respondent may objectively justify unfavourable treatment if it can establish that the treatment was a proportionate means of achieving a legitimate aim. To be proportionate, the treatment must be an appropriate means of achieving the legitimate aim and also reasonably necessary in order to do so: Homer v Chief Constable of West Yorkshire [2012] UKSC 15 at [20-25].

98. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. It is for the Tribunal to conduct that balancing exercise and make its own assessment of whether the latter outweighs the former; there is no range of reasonable responses test. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys and Hansons plc v Lax [2005] EWCA Civ 846 Pill LJ at [19-34], and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

99. There are two matters identified as arising in this matter as a consequence of the claimant's disability:

    99.1. Her inability to carry out all the duties of her substantive role within the chemotherapy day unit; and

    99.2. The requirement for reasonable adjustments to her role

100. Dealing with the second point first. It is unclear to the tribunal how this differs from the case advanced directly under sections 20/21 Equality Act 2010. It seems to the tribunal that either the respondent has discharged its duties under that section or it hasn't. It cannot be re-pleaded under section 15 and a different conclusion arrived at

101. The tribunal can see circumstances in which a section 15 claim could arise out of reasonable adjustments that may be required under section 20. For example, if an employee was dismissed in circumstances where they were disabled but the employer rather than carry out potentially onerous adjustments instead dismisses the disabled employee. That might well amount to unfavourable treatment arising in consequence of adjustments which themselves arose out of the claimant's disability. That is not however this case.

102. There are two matters which are said to amount to unfavourable treatment in relation to point this head of claim. They are connected to one another. The first is Mrs Harrison's alleged comments on 30 June 2022 in which remarks were made about the claimant seeking alternative employment. There is a note of that meeting in the bundle. The second is an email which followed up on the that conversation in which two alternative roles within the respondent's hospital were brought to the attention of the claimant.

103. The tribunal accepts that the claimant's difficulties in performing her full role on the day unit arose out of her disability. The tribunal was mindful that there can be a chain of causes which result from the disability and the tribunal is satisfied here that there is a sufficient connection.

104. However, the claimant again has factual difficulties in getting this part of the claim off the ground. It was the claimant's own case that she was not able to carry out the full range of her band six duties on the day unit due to amongst other things fatigue.

105. The reason that the conversation took place between Mrs Harrison and the claimant and that Mrs Harrison sent an email suggesting two alternative roles in the Trust, was because the claimant was finding it difficult to cope in the day unit. A sensible conversation then took place about what could be done. The respondent was aware that the claimant did not want to go on the redeployment register due to the potential for it to put her employment in general in jeopardy. The tribunal finds that the claimant did say to Mrs Harrison that she was looking for a desk job. Mrs Harrison then made a suggestion which would not involve the perils of the

redeployment register and which might be acceptable to the claimant which involved drawing to the claimant's attention lateral moves within the hospital.

106. Much was said about the similarity between the claimant's role in the day unit and the role that was available in haematology. Less was said about the role in AOS which we heard was predominantly a desk job. Mrs Harrison left the decision to the claimant as to whether or not she wished to apply. This was a simple matter of Mrs Harrison making a commonsense suggestion in a desire to be helpful and which was badly received by the claimant for reasons which the tribunal did not fully understand. In the circumstances this was not unfavourable treatment.

107. Had the tribunal found it to be unfavourable treatment the tribunal would have gone on to find that the respondent had a legitimate aim and that having the conversation and sending an email were a proportionate means of achieving it, namely the desire to ensure that the risk that the claimant was employed in a role that met her needs and which provided meaningful service to the hospital.

Disability-related Harassment – section 26 Equality Act 2010

108. The tribunal has had regard to section 26 Equality Act 2010.

109. Section 26 EqA provides as follows:

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

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

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

(i) violating B's dignity, or

9ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

2) …

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

The perception of B;

The other circumstances of the case;

Whether it is reasonable for the conduct to have that effect.

111. The Tribunal has had regard to the guidance given by the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 as reviewed by the Court of Appeal in Pemberton v Inwood [2018] EWCA Civ 564 per Underhill LJ at [85-88].

112. Dealing first of all with the question of purpose. The tribunal finds that neither Mrs Corrigan nor Mrs Harrison were to any extent engaging in conduct the purpose of which was to violate the claimant's dignity or to create for her an intimidating, hostile, degrading, humiliating or offensive environment for her. The tribunal finds that at all times both Mrs Corrigan and Mrs Harrison were making genuine attempts to reconcile the claimant's health conditions with the respondent's legitimate expectation that the self evidently important function of the chemotherapy day unit was maintained.

113. The tribunal's focus is therefore being on whether the prescribed effect met the conditions of harassment in the perception of the claimant; the other circumstances of the case and whether it was reasonable for the conduct to have that effect on the claimant.

114. The matters pleaded.

Conduct and comments of the claimant's colleagues upon her return to work in the chemotherapy day unit and redeployment of the outpatients department

115. There is no evidence in the claimant's witness statement about any specific comments in relation to her return to work in May 2018. In the circumstances, the tribunal cannot make any finding that there was unwanted conduct with the effect of violating the claimant's dignity et cetera.

116. In relation to the circumstances in April 2021, the evidence is to the contrary effect. The claimant was insisting on fit testing and donning and doffing training. Mrs Corrigan's position was that this was not a priority for the claimant and she was not being required to have a patient interface. At the same time, there was a need for nurses to be redeployed from less busy units such as the chemotherapy day unit to the covid unit. The testing of masks and PPE was a priority concern. Nevertheless, Mrs Corrigan acquiesced in the claimant's demands for fit testing and donning and doffing training and arranged it for her. It is difficult to see in the circumstances what more the respondent could have done.

117. The claimant again returned to work on 30th February 2022 having been absent since 21 June 2021. Again, it is difficult to see what precisely the claimant is complaining about here. Notwithstanding her current criticisms of Mrs Corrigan, the claimant appears to have delayed a return to work because Mrs Corrigan was leaving the Trust and would therefore no longer be responsible for managing the claimant's employment. In any event, there is no conduct which the tribunal is able to identify which could be even begin to be considered as unwarranted let alone having the proscribed effect.

Mrs Corrigan and Mrs Harrison's conduct and comments in relation to the claimant shielding, fit testing and PPE procedure

118. There was a dispute about whether or not Mrs Corrigan had used the word 'ridiculous' to describe the requirement for the claimant to be shielded once more after she had come back to work. The tribunal accepted that what happened on the part of the respondent was that a comment was made out of frustration as a result of changing guidelines received from the government in terms of who could or couldn't or should or shouldn't be in the workplace. This must be magnified in the context of an acute hospital and a chemotherapy unit.

119. What is clear is that Mrs Corrigan is not even alleged to have called the claimant ridiculous. This was not a personalised remark on the claimant's own case. It was an expression by Mrs Corrigan of her frustration at the situation of having to manage a busy chemotherapy unit when she could not safely count on what resources she might or might not have available from one moment to the next. Similar frustrations with changing government guidelines were no doubt being simultaneously expressed across industry and across the country.

120. To the extent that the remark was made at all, it was not made in a way in which was either intended or which could reasonably have the effect of violating the claimant's dignity et cetera.

121. As a matter of fact, the tribunal prefers the evidence Mrs Corrigan to that of the claimant and it is satisfied that Mrs Corrigan did not in fact make this remark at all certainly no in a way directed towards the claimant personally or professionally.

The lack of contact and support during the claimant's sick leave from 21 June to December 2021

122. The tribunal finds a fact that there was no such lack of contact or support.

123. The tribunal accepts the evidence Mrs Corrigan that the claimant and Mrs Corrigan were on friendly terms for the most part during this period. This included times and they would socialise together. The impression that the claimant seeks to leave that she was isolated and left to her own devices is not accurate. On the contrary, there was contact from Mrs Corrigan, from occupational health and when the claimant was initially meant to return to work on 3 November 2021 the reason that she did not do so and instead put in a further sicknote was because the claimant became aware that Mrs Corrigan was leaving the Trust. It is impossible to reconcile the allegation that Mrs Corrigan was isolating the claimant with the claimant's own evidence that she was reluctant to return to work if she was not going to be managed by her.

Mrs Corrigan's refusal to accommodate the claimant's physiotherapy appointments – October 2021

124. The tribunal finds a fact that Mrs Corrigan did not refuse to accommodate the claimant's physiotherapy appointments. The evidence was to the contrary effect.

125. There was no evidence before the tribunal that the claimant did in fact miss a physiotherapist appointment. Certainly there were no documents produced to show that the claimant's physiotherapy was only available on Friday afternoon or that as a result of anything Mrs Corrigan said or did that the claimant actually missed an appointment.

126. During the first four weeks of the claimant's return to work, the claimant was accommodated on a Friday afternoon to have her physio appointment then. However, as was agreed by the claimant, Friday afternoons with the busiest time for the chemotherapy day unit. There was no evidence that the claimant had any difficulty in rearranging her appointments or that she suffered any medical detriment as a result of so doing or not so doing.

Mrs Harrison's failure to hold regular fortnightly meetings with the claimant as well as declining to hold a 12 week review meeting – February 22 onwards

127. Clearly it would have been better had the proposed fortnightly meetings all taken place. However, that cannot detract from the fact that the approach to the claimant by Mrs Harrison was supportive and constructive. It does not follow through on an intended plan is necessarily disability-related harassment. There is no suggestion that there was not regular contact with the claimant and any failure to meet fortnightly meetings does not appear to the tribunal to have reasonably have had the effect of violating the claimant's dignity et cetera.

Mrs Harrison's refusal to allow the claimant have a sufficient period of recovery following her elective spinal procedure and injections – March 2022

128. The tribunal finds as a fact that the claimant was not refused sufficient time off for recovery following her spinal procedure.

129. There was plainly a conversation between Mrs Harrison and the claimant in which they discussed how to arrange shifts to best suit the claimant's need for some time off and a desire to be paid. There is no evidence from the claimant or otherwise that a longer period of time off jeopardised her recovery. It does not follow from the fact that the procedure was a spinal procedure that the recovery period should have been more extended.

130. The tribunal is satisfied that what lay behind this was the claimant's desire to be paid for her leave. If the claimant had taken sick leave she would have received half pay due to the period of her absences in overall terms. If the claimant took annual

leave she would be in receipt of full pay. In any event, there is no issue of disability related harassment which arises out of a situation which was discussed at the relevant time, reflected the wishes of the claimant and which was to the financial benefit of the claimant.

Mrs Hoggart subjected the claimant to immense pressure to return to the chemotherapy day unit – 9 March 2022

131. The tribunal is cognisant of the fact that Mrs Hoggart did not give evidence. The tribunal was therefore prepared to take the claimant's position at its evidential highest on this point. However, even on that basis the tribunal cannot conclude that there was any disability related harassment involved in the claimant's return to the chemotherapy day unit.

132. The issue is in reality a simple one. The chemotherapy day unit was short-staffed and the claimant had the skills required to help out. It may very well be the case that Mrs Hoggart appealed to the claimant's finer feelings. But that does not amount to conduct which can reasonably have had the effect of violating the claimant's dignity. In reality, Mrs Hoggart was simply putting the patient first and the tribunal do not find it possible to criticise her for so doing upon pains of violating the claimant's dignity et cetera. This was after all a chemotherapy unit where lives were at stake.

Mrs Harrison's refusal to allow the claimant to work as a coordinator for two days of the week – April 2022 onwards

133. The tribunal has dealt with this matter above. However, even separately analysing this matter in the context of disability related harassment, the tribunal has not concluded that the claimant has met the threshold for a complaint under section 26.

134. As the tribunal has ready found, the respondent did what it could in terms of providing the claimant coordinating work in circumstances where there were also pregnant nurses on the unit who could not safely handle chemotherapy medicines. It does not in the tribunal's opinion have the effect of violating the claimant's dignity if she was asked to help out on the ward so that the patients were provided with the treatments that they needed. This was not conduct related to the claimant's disability and it was not conduct which could reasonably have the effect of violating her dignity.

Mrs Harrison's complete disregard of the claimant's concerns in relation to health and request for implementation for reasonable adjustments and support – March 2022 onwards

135. The tribunal has ready found and repeats that Mrs Harrison did not have disregard for the claimant's concerns or for her need for reasonable adjustments. This allegation simply does not get off the ground factually for the reasons we have given. Everything that could reasonably have been done to support the claimant was done.

Mrs Harrison's conduct and comments on 30 June 2022

136. Again, while recognising that it is a different statutory test under section 26, our findings in relation to this matter that we have already made are instructive. The tribunal has found that Mrs Harrison was simply looking to respond to the claimant's own request for a job less physically demanding when she had the conversation with the claimant on 29 June 2022 and sent her email on 30 June 2022 with lateral opportunities for redeployment. Looking again at the effect on the claimant, it is unrealistic for the tribunal to conclude it was reasonable of the claimant to perceive her dignity being violated when all Mrs Harrison was doing was making suggestions in response to concerns raised by the claimant herself.

Mrs Harrison's email of 30 June 2022 to the claimant suggesting she seek alternative employment

137. This is been addressed immediately above.

Treating the claimant as being on sick leave, contrary to the GPs advice on 6 July 2022

138. The tribunal is satisfied that this was nothing more than human error. The tribunal is also satisfied that it was not reasonable for the claimant to perceive it in any other light.

Failing to fully implement occupational health and GP recommendations and advice May 2018/July 2022

139. The nearest the claimant gets to having any meaningful grounds for complaint about any failure to follow occupational health and GP recommendations, is the fact that she was not given coordinating duties twice a week rather than once a week. The tribunal rejects the suggestion that it might be reasonable for the claimant to perceive the differences between two and one working day's coordinating per week as a matter of harassment. To the effect that it did so, it was not reasonable for the conduct to have had that effect.

Conclusions

a) The claimant's claim for failure to make reasonable adjustments is not well founded and fails.

b) The claimant's claim for discrimination arising from disability is not well founded and fails.

c) The claimant's claim for disability related harassment is not well founded and fails.

Employment Judge Loy

12 March 2024

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