



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Gwenllian Hughes

v

**The Royal National Orthopaedic
Hospital NHS Trust**

Heard at: Watford
2017

On: 20, 21, 22, 23 and 24 November

Before: Employment Judge Alliot
Members: Mr A Scott
Mrs A Brosnan

Appearances

For the Claimant: Mr Pine
For the Respondent: Ms Patterson, Counsel

JUDGMENT

1. The judgment of the tribunal is:
 - 1.1. The claimant was not subjected to discrimination arising from her disability;
 - 1.2. The claimant was not subjected to harassment relating to her disability;
 - 1.3. The respondent did not fail to comply with a duty to make reasonable adjustments;
 - 1.4. The claimant's case is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent on 2 November 2015 as a Band 5 Staff Nurse. It is common ground that the claimant has a disability,

namely severe congenital bilateral hip dysplasia which can trigger acute spasmodic torticollis affecting her neck. Her employment was terminated on 13 April 2016 on the grounds that she had failed her probationary period. She was paid a months salary in lieu of notice and outstanding holiday entitlement.

2. She brings claims under s.15 Equality Act 2010, discrimination arising from disability, s.20/21 Equality Act 2010, failure to comply with a duty to make reasonable adjustments, and s.26 Equality Act 2010, harassment related to the protected characteristic of disability.

Preliminary matters

3. At the outset of these proceedings the respondent applied to exclude three matters from the further particulars of harassment supplied by the Claimant.
4. At a preliminary hearing held on 28 September 2017, Employment Judge Henry ordered as follows:

“ 2. Further particulars

4.1 The claimant shall on or before 5 October 2017 furnish further particulars of her claim for harassment to identify by reference to date;

4.1.1 The acts alleged

4.1.2 Who was responsible for such acts

4.1.3 Who, if any one else, was present when it occurred; and

4.1.4 Whether the claimant made any complaint and if so whether oral or in writing.

4.2 It is here recorded that, where the claimant, in furnishing further particulars, raises issues beyond those in the claim form these are to be appropriately pleaded and an application to amend made.”

5. The claimant has duly provided a list of acts of unfavourable treatment and unwanted conduct. Ms Patterson, on behalf of the respondent, submitted that three of the acts on the list were issues that went beyond those in the claim form. These were issues in relation to Matron Jane Henry and a Band 7 Sister, believed to be called CJ, on 22 December 2015, issues relating to CJ on 4 January 2016 and issues concerning human excrement and cooking oil being left at the claimant’s nurse accommodation and a note on her car on 6 January 2016.
6. Mr Pine, on behalf of the claimant, contended that the issues relating to 22 December were referred to in the document attached to the claim form but accepted that the 4 and 6 January issues were not in the claim form.
7. The claim form states at paragraph 12 in the section relating to bullying and harassment :

“12. The claimant sent to the respondent a formal complaint dated 26 January 2016 in accordance with the respondent’s Bullying and Harassment Policy in respect of the treatment that she had/was receiving from Senior Sister Outpatients, Kalpana Patel (Copy attached)”

8. The complaint document does raise issues in relation to 22 December as regards Sister Patel. It is fair to say that it also names Matron Henry. A confrontation with an unidentified woman is also referred to. CJ is not identified.
9. In our judgment the claim form related to allegations of bullying and harassment against Sister Patel only and not others. As such, the matters set out in the accompanying complaint form could only be incorporated within the claim in so far as they related to Sister Patel.
10. Accordingly, we determine that the three issues identified by Ms Patterson were issues that went beyond those in the claim form.

Application by claimant to amend the claim

11. Following our determination, Mr Pine applied to amend the claim form to include the three further issues. This was resisted by Ms Patterson. We have a broad discretion to allow amendments at any stage of the proceedings. It is discretion to be exercised to seek to do justice as between the parties, balancing injustice and hardship. One factor to take in to account is the timing and manner of the application. This application has been made at the last possible moment and in the face of a clear direction that any issues that went beyond the claim form should be appropriately pleaded and an application to amend made. However, an application to amend should not be refused solely due to delay. The discretion should not be exercised punitively. The nature of the amendment is to add substantive allegations of bullying and harassment against two named individuals in two of the new issues and three unpleasant acts by an anonymous individual(s) in the third. This is not a labelling exercise or correction of clerical errors. These are not newly discovered facts. All were known to the claimant when the claim was issued on 14 September 2016, over a year ago.
12. As regards time limits, obviously all three issues are well out of time as of today’s date. We did not consider the time issue to be determinative as, if the amendment was allowed, both parties would still be able to argue that they were, or were not, part of a series of events leading up to dismissal.
13. It is inevitable that in any balancing exercise both parties will be able to point to a downside whether it is unexpectedly defending a new claim or the inability to rely on a new claim. We have looked at the issues in all the circumstances.
14. In our judgment there would be genuine prejudice to the respondent if we allowed the amendments and this outweighs the prejudice to the claimant in not being able to pursue these matters.

15. The respondent does not have any witness evidence from Matron Henry or CJ responding to the allegations. In fairness to those two individuals, in our judgment, they should have an opportunity to respond to serious allegations made against them. If we allowed the first two amendments they would be denied this. An adjournment would be wholly disproportionate.
16. We concluded it would be unfair to allow the amendments relating to Matron Henry and CJ.
17. As regards the alleged incidents on 6 January 2016, we observe that these were strikingly unpleasant and therefore unlikely to be overlooked or forgotten by the claimant when formulating her claim. However, the circumstances are that the claimant did not want the incident investigated at the time and did not want the police involved. The respondent did not investigate it at the time and it was not included in the original claim form.
18. We accept that the respondent has been prejudiced by the late application to amend as it does not have an opportunity to investigate. Although the incidents involved a person or persons unknown, they took place in and around the nurses' accommodation and the note suggests it may have been written by a fellow employee. We do not know what an investigation may or may not have turned up but we cannot exclude the possibility that the respondent might have advanced evidence relating to access to the accommodation or from other employees.
19. We concluded it would also be unfair to allow the amendment relating to 6 January 2016 incidents.

Application by the respondent to call Karen Parker-Ford

20. On day three of this hearing, Ms Patterson, for the respondent, applied to call Karen Parker-Ford, Senior HR Adviser to the respondent to give oral evidence. A witness statement was shown to Mr Pine, on behalf of the claimant, on day three. By agreement of the parties we have not read this witness statement. During the course of the cross examination of the respondent's two witnesses reference was made to three emails from Ms Sue Lister, RCN representative for the claimant, written on 8 January, 14 January and 20 January 2016. These emails contain comments by Sue Lister on Ms Patel's attitude in the meeting of 7 January 2016 and in relation to the outcome letter dated 7 January 2016. These comments are hearsay. The respondent wished to call Ms Parker-Ford, presumably to rebut Sue Lister's emails, as she had been at the same meeting. Mr Pine resisted the application.
21. In our judgment the application was too late and to allow it would prejudice the claimant.
22. The parties will have been aware of the emails from Sue Lister for some time. The respondent could have decided to call Ms Parker-Ford earlier. Had they done so, the claimant may well have been prompted to call Ms

Sue Lister. We note that we already have Ms Parker-Ford's hearsay email response to 20 January 2016 email of Sue Lister. An adjournment would be disproportionate. We refuse the application.

The evidence

23. We heard oral evidence from the claimant and Ms Kalpana Patel, Senior Sister in the Outpatients Department of the respondent. We heard evidence from Ms Deidre Cole, Matron for Adult Wards. We had a 400 page bundle and a witness statement bundle along with a chronology, the claimant's list of unwanted treatments, the claimant's equality legislation extracts from the NMC, a copy of the case management summary, dated 28 September 2017, and the respondent's opening note.
24. During submissions we received the respondent's written submissions on the law.

The issues

25. On 28 September 2017, Employment Judge Henry recorded the issues as follows:

Discrimination arising from disability

- 25.1 The allegation of unfavourable treatment as "Something arising in consequence of the claimant's disability" falling within s.39 of the Equality Act 2010 is the claimant's dismissal.
- 25.2 Can the claimant prove that the respondent treated her as alleged?
- 25.3 Did the respondent treat the claimant as aforesaid because of something arising in consequence of the disability?
- 25.4 Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent maintains that no further reasonable adjustments could be made for the claimant to continue in employment.

Harassment

- 25.5 Did the respondent engage in unwanted conduct?
- 25.6 Was the conduct related to the claimant's protected characteristic?
- 25.7 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?

- 25.8 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 25.9 In considering whether the conduct had that effect, the tribunal will take in to account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Failure to make reasonable adjustments

- 25.10 Did the respondent apply the following provision, criterion and/or practice?
- 25.10.1 Requiring the claimant to work for over five hour shifts.
 - 25.10.2 Requiring the claimant to stand for more than five minutes.
 - 25.10.3 Requiring the claimant to walk for over 10 minutes.
 - 25.10.4 Not allowing the claimant to work job share.
- 25.11 Did the application of any such provision, criterion or practice put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that the claimant could not then work her shifts.
- 25.12 Did the respondent take such steps as were reasonable to avoid the disadvantage?
- 25.13 The claimant submits that reasonable adjustments would include;
- 25.13.1 Five hours shifts working four days per week.
 - 25.13.2 Fifteen minute breaks after working for two hours, the ability to sit down regularly or to fill an alternative post within the Rehabilitation Unit.
 - 25.13.3 Altering the claimant's hours of work to enable her to overcome the fatigue arising from disability.

Jurisdiction/time

- 25.14 The claim form was presented on 14 September 2016. Accordingly and bearing in mind the effects of ACAS Early Conciliation, any act or omission which took place before 8 April 2016 is potentially out of time so that the tribunal may not have jurisdiction.

- 25.15 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period. Is such conduct accordingly in time?
- 25.16 Was any complaint presented within such other period as the employment tribunal considers just and equitable?

The Law

- 25.17 Ms Patterson has helpfully provided an 11 page document outlining her submissions on the law. Mr Pine takes no issue with the propositions advanced. We have carefully considered the document and do not intend to repeat its contents here but record that we have taken the propositions into account.

Section 26 Harassment.

- 25.18 We have the wording of s.26 and Ms Patterson's extracts from the case of Weeks v Newham College of Further Education UK EAT/0620/11 along with her propositions on the burden of proof. We note that the EHRC Employment Code provides that the unwanted conduct covers a wide range of behaviour including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour. Unwanted conduct is, essentially, the same as unwelcome/uninvited. It is largely to be assessed subjectively from the employee's point of view. Related to, has a broad meaning in that the conduct does not have to be because of the protected characteristic.

Section 15 Disability discrimination

- 25.19 We have the wording of s.15 and Ms Patterson's summary of the points drawn from the case of Pnaiser v NHS England and Another UK EAT/0137/15/CA. In closing submissions it became clear that the real issue as regards this head of claim relates to whether dismissal was a proportionate means of achieving a legitimate aim.
- 25.20 We have Ms Patterson's propositions drawn from the cases of Barry v Midland Bank [1999] ICR 839HL, Hardy's and Hansons PLC v Lax [2005] ICR 1565 CA and British Airways v Stamer [2005] IRLR 862 EAT. We note that the EHRC Employment Code states:

“It is for the employer to justify the treatment. They must produce evidence to support the assertion that it is justified and not rely on mere generalisations”.

- 25.21 If the respondent failed to make reasonable adjustments it will be very difficult to show that the treatment was objectively justified.

Section 20/21 reasonable adjustments

25.22 We have the wording of the sections and Ms Paterson's propositions drawn from the cases of Environment Agency v Rowan [2008] IRLR 20, Noor v Foreign and Commonwealth Office UK EAT/0470/10 and Romec v Rudham [2007] AERD 2006 EAT. We have also taken in to account the EHRC Employment Code factors to be taken in to account when deciding what is a reasonable step for an employer to take (at paragraph 6.28).

Time

25.23 In so far as any acts are determined by us not to form a series of events leading up to and concluded by the dismissal, we will need to consider whether it would be just and equitable to extend time.

The facts

26. The claimant was born on 18 July 1962 and so was 53 years old at the time of the matters we are dealing with. She qualified as a Registered Nurse in 1985 and did not work as a paid nurse after that year. She undertook voluntary nursing work for the Red Cross from 1998 until 2001. At that time she came off the Nursing Register and ceased practising as a nurse.
27. In January 2015 the claimant began a Return to Nursing Course which she successfully completed in April 2015. We observe that, although the claimant qualified as a nurse quite some time ago, her experience of working as a Nurse in a clinical setting is very limited.
28. In evidence the claimant explained that her perception of being discriminated against by the respondent began pretty well before she started work in the Outpatients Department.
29. In her complaint, dated 26 January 2016, she states: "I felt destined to fail before I have even stepped into the Department".
30. In paragraph 4 of her witness statement she says that "My feeling of oppression and harassment started almost as soon as I met Senior Sister Patel on my second day of working at the Outpatients Department on 24 November 2015." (Sister Patel was not present on the claimant's first day of working). She goes on "I got the immediate and distinct impression that Sister Patel felt she had been "short changed" by being saddled with not only a part-time Nurse but, further more, a disabled part-time Nurse. I thereafter kept a diary of events". In fact, despite being in quotation marks, the words short-changed were not said by Mrs Patel and are the claimant's own words. This immediate perception of discrimination is a striking feature of this case and we have examined the circumstances carefully as it is conceded by the claimant that nothing was actually said by Ms Patel during the initial interaction between them to support her perception.

31. Shortly afterwards the claimant began to keep a contemporaneous diary of events. The claimant told us that she began her diary as she had had a previous experience of discrimination by a Health Trust employer and her perception on starting work in the Outpatients Department was to think 'here we go again'. She said that after the first time she had learnt her lesson. The claimant mentioned this prior episode at least three times during her evidence and, due to its apparent relevance to the claimant, we sought further brief details. It concerned the practice placement aspect of her Return to Nursing Course. She was placed with a District Nurse Practice. Due to her disability she was unable to get down to floor level to dress patients' leg ulcers. She felt the other District Nurses were dismissive of her disability. She was moved to an alternative District Nurse Practice where she had a far more empathetic reception. It would appear that the requirement for her to dress leg ulcers in the field was simply removed and she only did this procedure in the clinic where patients would be raised on a couch.
32. In spring 2015 the respondent undertook a recruitment exercise for nurses. We have an undated application form from the claimant which was probably sent in before June 2015. In this form the claimant makes quite clear that she has a disability. She refers to hip reconstructive surgery and slight limitations. She stated "I need to discuss reasonable adjustments if invited to interview". It would appear the block interviews were conducted on a number of wards.
33. The claimant originally applied for a post as a Band 5 Nurse on the Duke of Gloucester Ward. Work on that ward involved a lot of walking and Ms Cole's evidence was that at the interview the claimant stated she thought the ward role would not be suitable for her and so the respondent discussed alternatives.
34. Following discussions, a post in the Outpatient Department was considered. We have an Occupational Health letter, dated 3 September 2015, reporting on the result of pre-employment screening for the Outpatient Department. At that stage the claimant was deemed medically fit with adjustments for the proposed role of Staff Nurse, with the adjustment being 'restricted from heavy lifting'. This letter was discussed with the claimant who, presumably, agreed it. It was sent to HR but does not appear to have been communicated to Ms Cole or Ms Patel.
35. On 27 September 2015 the claimant sent an email to Ms Patel dealing with her joining the Outpatient Department. In that email she states:

"My preference is to work 3 days in a row making up the 22.5 hours. However it may become apparent that a full day is difficult and therefore I am wondering if the option of half days may be there".
36. Clearly the claimant was contemplating working three eight hour shifts on consecutive days. The claimant lives in Wales and so does not appear to

have visited the Outpatient Department prior to beginning her induction on 2 November 2015.

37. The claimant was appointed to the role of Band 5 Staff Nurse in the Outpatient Department on 7 October 2015 with a start date of 2 November 2015. The job was subject to a six month probationary period to achieve competencies and demonstrate that she met the required standards in carrying out the duties and responsibilities of the job description. The claimant stated that she accepted the post in Outpatients as her understanding was that the workload in Outpatients tended to be lighter. However, this was not the case at the respondent as the nurses did a lot of walking for administration purposes. In cross examination the claimant accepted that she had not realised that walking to and from the reception desk to retrieve Clinic Outcome Forms was an essential element of the job.
38. The Outpatient Department consists of 19 Consultation Rooms along with some Ancillary Rooms for blood testing etc. A number of clinics would be held each day, Monday to Friday. The Department was open 8am to 8pm. Some clinics were 8:30 to 12:30, others started at 13:00 and finished at 17:00 and some lasted all day. A clinic could be 2 rooms with an average of 10 to 15 patients in each, or 4 to 5 rooms with an average of 120 patients. The Staff Nurse role was to ensure that patients on a clinic were met on arrival, a Clinical Outcome Form ("COF") generated, the patient sent for blood testing, x-rays etc as appropriate, the patient placed in the relevant waiting area and presented to the Consultant/Registrar in the relevant room when required. After examination of the patient, the role was to deal with the patient regarding any queries or follow up, complete the COF and enter the data onto a computer. The places where a nurse would complete the COF and enter data on the computer required the nurse to stand. It is clear that the Outpatient Department was extremely busy with patients coming and going all the time and that the workload was demanding. There were 4.6 FTE Band 5 Nurses allocated to the Department with twelve Healthcare Workers. Sister Patel was responsible for running the Department. Ancillary tasks could be to administer emergency CPR which would involve pushing a CPR trolley and attending a patient who would most likely be on the ground having collapsed.
39. We find that the Outpatient Department was a pressured working environment due to the number of patients and involved a great deal of walking and standing as a core part of the role.
40. Although we do not have the email, in October 2015, before she had begun working, the claimant requested time off in the week commencing 7 December to attend an employment tribunal in Wales as a witness. The claimant began her induction week on 2 November. Week 2 was revalidation. During this week, on 11 November, the claimant met Ms Patel for the first time to reiterate her request for time off in the week commencing 7 December. She was told she was allocated to work Monday, Tuesday and Friday. Week 3 was time off in lieu. The first three weeks therefore appear to have been uneventful. The claimant began work in the

Outpatients Department on 23 November. Ms Patel was away that day. Nevertheless, when asked about her comment that she was destined to fail before she stepped into the department, the claimant replied that she had already had problems collecting her uniform, having to go up two flights of stairs and that Sister Webb, Clinic Co-Ordinator that day, had been particularly unwelcoming. She stated:

“I had seen this before, I thought uh-oh, a trust that cares so little - discrimination tends to be endemic. Let’s just say I was fully prepared for it already.”

41. On 24 November the claimant attended work. It is alleged that when the claimant met Ms Patel she was given the immediate and distinct impression by Sister Patel herself that she felt that she had been “short changed” by being saddled with not only a part-time nurse but furthermore a disabled part-time nurse. Her explanation was that despite nothing being said she gained this perception from Ms Patel being brusque and her looks and engagement.
42. In the circumstances, we examined what Ms Patel knew of the claimant at that stage. She had not had the September OH letter but knew that the claimant had not filled the role on the Duke of Gloucester Ward as she was unable to walk the length of the ward. However, Ms Patel was advised that the claimant was cleared to work; she was not advised that any adjustments were required. We find that Ms Patel would not have had any problem with the claimant being a part-time nurse as that was the very role that was being fulfilled against her budget of 4.6 FTE Band 5 Nurses. Further, Ms Patel, whilst aware of a general issue of the claimant’s inability to walk on the Duke of Gloucester Ward, had no specific information as to the claimant’s disability or her restrictions. At that time the only restriction known to anyone at the respondent was on heavy lifting.
43. At the informal meeting on 24 November the claimant told Ms Patel that the work was very tiring and she was not sure how she would cope with it three days a week. Ms Patel offered to split the working days but the claimant declined as she wanted them together. The claimant asked about working half days but Ms Patel told her that due to the limited number of Band 5s that would not meet service needs. In evidence the claimant recalled her saying it would adversely impact patient care because of leaving prior to handover. She said she recalled Ms Patel saying it would be very difficult to get someone to cover the remaining hours of the shift. Ms Patel said she would consider dropping the claimant’s hours from 22.5 to 15 (i.e. 2 days per week).
44. On the next day the claimant went off sick with an acute episode of torticollis. She returned to work on the next Monday, 30 November 2015. The claimant acknowledged that the file note of the Return to Work meeting with Ms Patel was accurate. It records that they talked about the workload and Ms Patel reiterated that if the claimant had concerns to let her know. However, the claimant again complained of Ms Patel’s body language

towards her. The claimant again asked about time off work the next week and was informed that it was not possible.

45. The claimant worked on Monday 7 December, had annual leave on Tuesday and time off on Wednesday and Thursday to go to the Employment Tribunal in Wales. She was rostered to work on Friday 11th but phoned in sick.
46. There is a dispute of facts as to whether Ms Patel took the call. Ms Patel did not recall it and thought she would as the claimant said she had spent the night in a service station on the M6. Be that as it may, in our view, nothing turns on this issue.
47. The claimant was then off sick for the next week.
48. On 21 December the claimant was seen by Occupational Health to assess her needs. This was following a referral by Ms Patel. The claimant said it was at her prompting and Ms Patel thought she initiated it due to the sickness absence. We consider it more likely than not that Ms Patel initiated it in order to manage the claimant's sickness.
49. The Occupational Health Report is dated 21 December 2015 and states:

“Description of relevant medical issues

Ms Hughes reports she suffered bilateral hip dysplasia. This condition was diagnosed late. She had an operation in 2004. The surgery went wrong and that made the condition worse. She now has significant limitations with her mobility. One limb is significantly shorter than the other. She suffers with acute spasmodic torticollis affecting her neck; this has been brought on by misalignment of her lower limb. She is under the care of her doctor for management of her condition on medication. I have also advised her to seek physiotherapy treatment through her doctor.

Ms Hughes suffers limitations with her functional capability. She is unable to stand for more than 5 minutes and unable to walk for more than 10 minutes. This has implications in her ability to carry out her current job role and adjustments will be necessary to accommodate her in work.”

“Current capacity for employment

Ms Hughes is fit for work with adjustments. She currently works a 7 ½ hour shift over 3 days. She struggles working 7 ½ hours. She feels pain and discomfort 5 hours in to her shift. She finds she has to walk a considerable distance to get to the disabled toilet from where she works. This takes a toll on her health as she already struggles with her mobility; Her job involves a lot of standing. She can only manage to stand for up to 5 minutes and walk for up to 10 minute. She will need the following adjustments to accommodate her in work. Please consider allowing her to work 4 days a week on a 5 hour day, allowing a 15 minute break after working for 2 hours. Please consider transferring her to work within close proximity of a disabled toilet. The Foot and Ankle Clinic would be an ideal location for her to work from as it has a disabled toilet and also sitting facility. In my opinion a DSE Workstation Assessment needs to be done. An initial local risk assessment will need to be carried out in accordance to the Trusts

procedures; you can then refer her for a specialist DSE Workstation Assessment carried out by an Occupational Health Practitioner. Due to her current acute neck symptoms I would advise that she returns to a 4 hour day over 4 days for the first week, then to 5 hour days over 4 days. The outlined adjustments may need to be long term as she has long term health conditions. I will leave it to you as her managers to decide whether or not the establishment can support the advised adjustments.”

50. The claimant did not work on 21 December and was asked to attend a meeting with Ms Patel on 22 December. By this time the claimant was aware of the Occupational Health recommendations and Ms Patel would have seen the report. The claimant complains of harassment in going to the meeting. She alleges she was “frogmarched” down the corridor at an unsafe speed and says the behaviour was unfair and uncaring. The evidence was that the distance to be covered was only a two to three minute walk. Ms Patel did not manhandle or touch the claimant in any way and the term ‘frogmarched’ is entirely the claimant’s. Ms Patel recalled walking with the claimant alongside her with no apparent problems experienced or articulated.
51. We find it odd that if the claimant found it difficult she did not slow down or say something. We find that nothing outwardly wrong took place and that this was another incident of the claimant perceiving some unwanted treatment.
52. At that meeting the claimant was told to remain on sick leave whilst assessments and/or adjustments were put in place prior to her return to work. Once again the claimant’s evidence of harassment relied upon her perception of body language and looks. The claimant acknowledged the reference to adjustments but characterised it as Ms Patel trying to protect her professional back. The claimant departed for Wales.
53. On 22 December 2015 Ms Patel raised questions of Occupational Health concerning the OH recommended adjustments. OH reported back on 22 December 2015. The report states:

“ 2 [Q] Limitation functional capability and unable to stand for 5 minutes or walk more than 10 minutes, her current role in OPD is mostly standing and walking. Is this permanent?

[A] Her condition is long term and unlikely to resolve in the foreseeable future.

3. [Q] Is this job suitable for her given that we are on our feet all day? How does this impact and is she fit for this role? [A] As advised in my report she is fit for work with adjustments.

She will be required to be able to carry out sitting down duties as and when required. Ideally she would cope better in a desk based role. If there are no jobs that fit the description on my recommendation then you will need to re-refer her for consideration of redeployment.

4. [Q] You have suggested workplace adjustment equals to work 4 days per week, 5 hours a day equates to 20 hours per week. Is this permanent?
[A] It may need to be long term as this affects the terms of her contract I will leave it to you as her managers to decide whether or not this change can be supported .

5. [Q] You have asked for her to work in close proximity of a disabled toilet and the Foot and Ankle Clinic as ideal location. Can you please clarify it as the request by Staff Nurse Hughes the Foot and Ankle Clinic only runs on certain days and the particular location is not always in use. Are you suggesting this is the only area she can work?

[A] In making this recommendation I was keen in securing two objectives. To make it possible for her to be able to use a disabled toilet without having to walk long distance to get to it.; For her to be able to work in a location that has a chair already in place that she can use in between standing and waking duties.

6. [Q] You have requested a specialist DSE Workstation Assessment this would need to be done prior to her return to work.

[A] This would need to be done upon her return to work.

7. [Q] Can you confirm Staff Nurse Hughes is able to perform in an emergency situation ie moving/transporting cardiac arrest trolley?

8. [A] During my assessment she advised she was successfully involved in CPR.

I am of the opinion she would encounter difficulties moving/transporting cardiac arrest trolley in an emergency situation.

9. [Q] Is Staff Nurse Hughes able to complete her role as per JD, ie dressings, screening late duties independent working?

[A] She will need help of colleagues performing some of the tasks of her job role and may have difficulties working independently.

10. [Q] Are there any other adjustments required to support I her role.

[A] I have detailed the required adjustments in the body of my report”.

54. On 23 December the claimant was invited to a meeting on 5 January 2016 to discuss sickness and the OH report. This meeting was moved at the claimant’s request to 7 January 2016 so she could have RCN representation present. The claimant’s recorded reaction at the time, in her diary, we find illuminating. She states:

“They want me to meet with them on 5 January 16 at 14:00 to discuss sickness absence and probation. I am incredulous. What a bunch of reprobates.”

55. On 31 December 2015 Ms Patel emailed the claimant to ask her to return to work on 4 January, saying; “The OH recommendations have been

considered and a 4 hour shift pattern would be worked on the week commencing 4 January 2016”.

56. The claimant’s diary entry states: “Have an email from Sister Patel saying she would “love” to have me back to work. Who got to her?”. This again illustrates the claimant’s attitude towards Ms Patel (who had actually said she would like to have her back).
57. The claimant returned to work on 4 January 2016 on phased return hours, namely 4 hours a day for Monday, Tuesday, Thursday and Friday. The claimant stated she had been provided with a stool. She was permitted breaks. Apparently all the toilets in the department had facilities for the disabled but she was placed in the Foot and Ankle Clinic. The claimant stated she was coping physically. However, she gave evidence that she relied on the many and experienced Healthcare workers to fetch and carry the COF Forms for her. She stated that she was not expected to do so much. This is not surprising as she was, in reality, a supernumerary as an extra Staff Nurse had been engaged to cover and was working the full shift.
58. The OH adjustments recommended were not discussed on 5 January as they were due to be discussed at 7 January meeting.
59. On 7 January a meeting was held. Ms Patel was supported by Karen Parker-Ford, Senior HR Adviser and the claimant was supported by Sue Lister, RCN Representative. A note taker was present.
60. The outcome letter records as following:

“It was noted that since you started work within the Outpatient Department you have only been at work 1 full week of 3 days and a total of 6 days in the 8 week period due to a combination of induction, TIOL, A/L and sick leave. Therefore we discussed that we would need to extend your probation period as your mid-probation review would be due on 11 January 2016 and I am unable to sign this off as completed. By extending your probation means that you will be given more time to complete the competencies and achieve what is required as Band 5 Nurse in Outpatients and to allow me time to review and action what I can of the OH recommendations. It was agreed that we would extend the probation for 4 weeks so that we could cover the elements of the role and give you support and training where needed.”

And

“I explained that I would be happy to reduce your contracted hours from 22.5 hours per week to 15 hours per week but you would need to work 7.5 hour shifts 2 days a week which I would be happy to split so that they do not fall on consecutive days which you have declined.

You stated you are only able to do 5 hours maximum and you find it difficult to do a 7.5 hour shift without having a sit down and the pace of the department was too much. I explained that nursing staff within Outpatients are employed on a 7.5 hour or 10 hour working day. The Outpatient Department is very busy and has a number of increasing large clinics that run all day. The Department is open from

8am to 8pm, Monday to Friday. As I stated during the meeting you have not yet worked a full day in a busy clinic. Pre –screening, dressing room or completed a late shift and that all Band 5 Staff Nurses rotate daily within the Department. I explained that I would therefore not be able to accommodate this on a permanent basis as I need the staff to cover/rotate to late clinics and it would be impossible to find cover for the 2.5 hours per day. Therefore we can accommodate this for the maximum length of a Return to Work Programme (up to 4 weeks) in order to support you back in to work but at the end of that my expectation would be that you return to full 7.5 hour shifts.

Currently I am unable to cover 2.5 hours with temporary staff as it is and I find it hard to hand over halfway in a shift. Therefore I have had to book a full 7.5 hours to cover your phased return which has financial impact on the department. As you are aware I only have limited number of Band 5s within OPD and I explained that there are only 4.6 WTE Band 5 Staff Nurses and out of that 3 WTE are new in post within the last 6 months and with the department's annual leave and sickness, it is already difficult to cover the staffing required in the department.

We discussed that you had been successfully appointed to Outpatients following a generic recruitment process and you had stated that you was not able to carry out the roles and duties expected of you in a ward setting. You stated that you were not informed of the shift pattern in the Outpatient Department prior to your commencing your post and I explained that if we did get to meet before you started we would have been able to discuss the job role and shift pattern within the department.

You informed me today that if you knew what the role involved you would have turned down the offer as this is not the role you had been used to in other Outpatient Departments. You mentioned there is a lot of walking within the role during a shift, at a fast pace, which you found difficult. I did provide you with a stool so that you could sit down when required but you felt that it was causing a problem with the notes trolley and a problem to the patients and therefore you removed the stool but stated that, as you was working reduced hours, you did not need to sit down as often and was managing.

You stated that you would prefer doing clinics around rooms 13 to 16 as it is close to the disabled toilet. I informed you that this would not be possible as this area is not always used and also staff need to rotate between pre-screening, dressing room and clinics as per the job role. You mentioned that you found it hard to work in the clinics around rooms 6, 7 and the paediatric area due to distance to the disabled toilets. I did inform you that there are also two toilets opposite admissions that are fully fitted with the disabled equipment. You stated that bending/crouching was a problem for you, you said you were able to pick things up if you drop them but you would take your time to do this. You mentioned it was not a problem doing dressings as the patients sit on the couches and all dressings are done at the height of the couch. We discussed if you would be able to perform CPR and you said you could do this with no problem as you would fall to your knees and then roll out of the way when needed. You stated that this would be possible even though the OPD corridors are small and you felt you would be able to carry this out safely without putting yourself or anyone else in harm. OH stated that you may struggle to push the crash trolley but you disagreed and stated that you could push it as good as anyone. I explained that we have to cover a large site area, including the car park, Physiotherapy and

Occupational Therapies in the case of a crash call. You stated you would have no problem with this.

It was explained to you about the option of redeployment and if we cannot accommodate the recommendation and restriction and after adjourning the meeting to discuss with our representative, you stated that you did not feel Outpatients was for you and that you would like to be redeployed to a more suitable role.

It was explained to you that we will meet to discuss your skills and experience and also look at your restrictions. This information will be shared with the Matrons and if there are any suitable vacancies across the Trust that can accommodate your requirements, then we will need you to be assessed by our Occupational Health Department against the job description to ensure you are suitable for the post and the post to you. You were also encouraged to view the Trust's vacancies and notify your manager if you were interested in an advertised role that you felt was suitable. You mentioned that you would be interested in Arthroplasty or Pain. I explained that the Arthroplasty nurses at this Trust run their own clinics, see pre and post op patients and go on ward rounds and have responsibilities and therefore we do not employ Band 5 nurses."

"Should you have any queries at this stage or of you consider that this is not an accurate summary of our discussion please do not hesitate to contact me."

61. In her diary and in her evidence the claimant complained about meetings held in Ms Patel's office which she called "The goldfish bowl" and characterised as demeaning. Apparently, the office had internal windows and so could be looked into from outside. However, how the department was built was nothing to do with Ms Patel. We find that it was entirely appropriate to conduct meetings with the claimant behind closed doors in the office. To do otherwise would risk complaint of not respecting her privacy in discussing management issues and adjustments in the open and in front of other staff.
62. In an email dated 20 January to Karen Parker-Ford, Sue Lister suggested that this letter does not accurately reflect the discussion and has been embellished. In her reply Ms Karen Parker-Ford states that it is a reflection of the discussion and invites any corrections. None were made. We accept that the outcome letter is a reasonable reflection of what occurred. Indeed, it is noticeable that Sue Lister refers to Ms Patel as being pleasant.
63. As for the two other emails from Sue Lister referring to Ms Patel being adamant that she could not accommodate the reduced hours, this merely reiterates her admitted position in the meeting and letter of 7 January 2016. It is noticeable that at the meetings on 5 January and 7 January and thereafter the claimant stated that the Outpatient Department "was not for me" and that if she knew what the role involved she would have turned down the offer as this was not the role she had been used to in other Outpatient Departments. In cross examination concerning these comments the claimant said that a significant reason for her stating this was that there was no hands-on nursing in the role and she found it a boring and repetitive

administrative task. It is fair to say she also added as a reason how she perceived she was being treated.

64. In the letter dated 7 January 2016 a further meeting was arranged for 21 January. However the claimant went off sick on 19 January for a further month with stress.
65. The claimant's diary entries cease after 8 January.
66. Ms Cole had a telephone conversation with the claimant on 22 January. By this time the emphasis had switched to finding the claimant an alternative position in the respondent's organisation as there was an acceptance that without five hour shifts the claimant would be unable to fulfil her role in Outpatients.
67. The claimant pursued a bullying and harassment complaint, put in writing on 26 January 2016.
68. Thereafter we find that genuine attempts were made to find the claimant an alternative position, albeit that repeated OH assessments advised five hour shifts and the reality was that these were unlikely to be accommodated.
69. The claimant herself did not follow up a potential position in the Rehabilitation Unit as she knew it required full time hours.
70. At some time, probably in early April 2016, Ms Cole wrote a final probation report on the claimant. This reports that it was not possible to incorporate the OH recommendations. It states:

“However it was noted that in order to run an Outpatient Department there could not be a permanent confirmation of this provision. The Department could not accommodate the five hour daily shifts on a long term basis. The Department had two shift types, a seven and a half hour day and a 10 hour day. Staff also needed to rotate/cover the late clinics. It was not possible to secure staff that could work the short fall of two and a half hours per day on a regular basis. Therefore this would result in periods where the staffing of the department would be unsafe and potentially place patients and the service in a vulnerable position and render the service unsafe. Alternative options were offered and discussed but still involved a seven and a half hour day.”

71. The Probationary Review Report states:

“Lady Hughes has been unable to fulfil her job role within the OPD. This is as a result of the department being unable to accommodate all the recommendations and adjustments requested by OH following a period of sickness. All alternative redeployment options have been exhausted.”

72. At the meeting on 13 April Ms Cole terminated the claimant's contract of employment under the probation policy as she had not met the required standards in carrying out the duties and responsibilities of the job description

for the Outpatients Department. This was confirmed in the dismissal letter dated 18 April 2016.

Conclusions

73. The claimant has lived with a significant physical disability from birth. It has been exacerbated by unsuccessful surgery. In giving her evidence she came across as confident and articulate. She was assertive and, in some instances, combative. Nevertheless, on occasions, she became a bit emotional which suggested to us that her perception of grievance was genuine to her. Her evidence was factually straightforward and credible. As to her perception and its reliability, we will address this further. Ms Patel came across as a straightforward and credible witness. She denied harassing or bullying the claimant or being motivated by any ill-will towards her due to her disability. Her evidence was to the effect that she, at all times, was endeavouring to manage the claimant's disability and trying to accommodate the adjustments recommended by OH. Her evidence on the difficulties posed by a short shift in relation to handovers was a bit muddled and not entirely convincing. From her demeanour and comments from Sue Lister as to her being adamant and a reference to "that is Kal", we concluded that she could indeed be periodically brusque on occasions. However, she was managing 19 consulting rooms, hundreds of patients and 18 or so staff over a very busy 12 hour shift, so that may not be entirely surprising. The claimant had not nursed in a clinical setting for many years and the pressured nature of work in the NHS probably came as a surprise to her. We did conclude though that any brusqueness was probably not confined to the claimant and was a general trait of her management style, manifested to everyone.
74. Ms Cole gave straightforward and credible evidence. We concluded that she made her own decisions and was not simply supporting Ms Patel's position.
75. As is clear from our recital of the facts, a great deal of this case revolves around the claimant's perception and her interpretation of body language. We accept in principle that conduct may consist of body language and tone. Further, we accept that a disabled person will be sensitive and alert to inadvertent or, indeed, deliberate conduct that could cause them disadvantage. However, allegations of perceived harassment and discrimination are easy to make and hard to refute. We have to assess the characters involved and the evidence before us. In assessing the reliability of the claimant's perception we have looked at, in particular, instances where the claimant has made complaints concerning events that have not involved face-to-face interaction with Ms Patel.
76. We have already noted that the claimant's perception of harassment and discrimination started virtually before she began on the Outpatients Department. It involved Ms Webb on Day 1 and Ms Patel on Day 2. We find it unlikely that a reasonable perception of harassment or discrimination could arise in such a short time and instantly. A perception of ill treatment

arising out of body language is more likely to arise over a period of time, piecing together gestures, expressions or tone that could be innocuous or malevolent on their own but in combination lead to a reasonable perception.

77. When on sick leave, in December 2015, the claimant's reaction to being requested to attend the meeting on 7 January is very illuminating. The claimant was on sick leave at the respondent's behest so that adjustments and assessments could be put in place to support her in relation to her disability. The request by Ms Patel, by email, inviting the claimant to a meeting to discuss her sickness absence, the OH report and mid probation was entirely reasonable and proper management. No body language was involved, yet the claimant's reaction in her diary is wholly unreasonable, referring to being incredulous and calling management a bunch of reprobates. Similarly, her resentment to having a meeting in Ms Patel's office, the so-called goldfish bowl, does not involve body language. It was entirely appropriate to hold meetings in the office and Ms Patel is hardly responsible for its construction.
78. Whenever it was put to the claimant that Ms Patel's actions were entirely appropriate and reasonable, she rejected this as only window dressing and not genuine.
79. The claimant's use of emotive words and phrases also suggested to us an unreasonable perception. She characterised Ms Patel's attitude on first meeting as being 'short changed'; the two to three minute walk down a corridor on being 'frogmarched' and in her complaint she refers to Ms Patel waging 'a vendetta' against her. We find that these descriptions are inapt as regards the facts as we find them. We find that these characterisations of how she was treated are gross exaggerations and unreliable.
80. We find that however genuinely held, the claimant's perceptions of harassment, bullying and disability discrimination are unreliable and unreasonable in all the circumstances.

Harassment

81. We now deal with the specific allegations.

24 November

82. We find that Ms Patel did not engage in the alleged unwanted conduct of manifesting she felt short changed at being saddled with a part time, disabled nurse.

22 December 2016

83. We find that Ms Patel did not engage in unwanted conduct in walking down the corridor with the claimant whether alongside or ahead of her. We find that as Ms Patel had had a knee replacement herself, her rate of walking was unlikely to be excessive. In addition, given that the claimant is a

confident and assertive individual, we find it is probable that had she had difficulties, she would have slowed down and said something. She did not.

5 January 2016

84. It is correct that Ms Patel did not discuss how she was going to proceed with adjustments recommended by OH at this meeting. That is because consideration of the OH adjustments had been put off, at the claimant's behest, to the 7 January meeting. As such this was not unwanted conduct.

7 January 2016

85. This complaint refers to the letter alone and not the meeting.
86. It is correct that Ms Patel confirmed that the respondent would not implement one of the OH recommendations, namely working a five hour shift. That may well have been unwanted conduct as far as the claimant was concerned. It does relate to her disability. However, we find that it did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We considered whether it had that effect and took into account the claimant's perception and all the circumstances. However, we concluded that it was not reasonable for the conduct to have that effect in the circumstances which we find was a reasonable and appropriate management decision.

13 April 2016

87. We find that the prospect of a job share was considered at the meeting but, in reality, what was being pursued by the claimant was a shift share. We will deal with this when considering reasonable adjustments.
88. It is correct that at the meeting it was clear that the respondent would not implement one recommendation, namely the five hour shift.
89. It is not correct that the claimant was dismissed on the ground of her disability. She was dismissed for failing to complete her probation period, albeit that that failure was related to her disability. We will deal with that further in relation to the s.15 claim.
90. This was unwanted conduct and it was related to the claimant's disability. However, we find that it did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We considered whether it had that effect and took into account the claimant's perception and the circumstances. However we concluded that it was not reasonable for the conduct to have that effect in the circumstances which we find was a reasonable and appropriate management decision.

18 April

91. It is correct that Ms Cole decided to dismiss the claimant. That was unwanted conduct and related to the claimant's disability. However, we find that it did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We considered whether it had that effect and took into account the claimant's perception and the circumstances. However, we concluded that it was not reasonable for the conduct to have that effect in the circumstances, which we find was a reasonable and appropriate management decision.

Reasonable adjustments

92. It is common ground that the OH recommendations included a number of adjustments. The main and significant one in this case was the recommendation that the claimant should only work five hour shifts. A fifteen minute break after every two hours and the ability to sit down regularly were reasonable adjustments and we find they were made. Ms Patel stated she had no problem with these.
93. The respondent's case on the five hour shift was that it was not a reasonable adjustment. It would have meant that the balance of the shift of two and a half hours was not worked by a Staff Nurse. This was because the experience of the respondent was that it would be impossible to get another Band 5 Nurse to shift share for only two and a half hours work. Further, the respondent's internal bank system would not cover the two and a half hours and nor would agency nurses. This was due to the fact that two and a half hours work would not be an attractive proposition given travel time in and the low remuneration. It is fair to say that the respondent did not specifically ascertain whether the two and a half hours could be covered on a permanent basis in this instance. However, the evidence was that they had the greatest difficulty on a regular basis even covering seven and a half hour day shifts. By definition, two and a half hour shifts would be far harder.
94. Ms Cole gave evidence that she had never come across a shift share for two and a half hours. She had tried for four hours in the past and failed.
95. We find that an adjustment to allow the claimant to only work a five hour shift was not a reasonable one. It would leave the Outpatient Department short of a Band 5 Nurse for two and a half hours which would place patient welfare at risk and compromise the smooth running of the clinic. To employ another nurse on a full shift to cover and overlap was unreasonable in terms of expense. It would raise the establishment from 4.6 to 5.6 FTE band 5 nurses.
96. In any event, we find that a five hour shift was unlikely to prevent the substantial disadvantage. The OH recommendations do not realistically address the claimant's restriction on standing and walking, despite the provision of a stool. It is notable that when the claimant was working a short shift of four hours in January 2016, during her phased return to work, she was, on her own account, able to cope only due to the healthcare workers

doing a lot of the fetching and carrying for her and an extra nurse being employed.

- 97. We find that this was not a feasible long term adjustment to be made given the essential aspect of the job which was the fetching and carrying of COFs. The reality is that, as with the post on the Duke of Gloucester ward, the Outpatient role was unsuitable for the claimant with all conceivable reasonable adjustments. Consequently, we find that the respondent did take such steps as were reasonable to avoid the disadvantage.
- 98. We find that the respondent did apply the following provision, criterion and/or practice, namely requiring the claimant to work for over five hour shifts, requiring the claimant to stand for more than five minutes and requiring the claimant to walk for over ten minutes. The respondent was prepared to contemplate the claimant working a job share in terms of a full shift but would not allow the claimant to shift share.
- 99. The PCPs found did put the claimant at a substantial disadvantage in relation to her ability to work on the Outpatients Clinic in comparison with persons who are not disabled. We have already found that the respondent did take such steps as were reasonable to avoid the disadvantage.

Section 15 discrimination arising from disability

- 100. It is agreed that the respondent dismissed the claimant and that was something arising in consequence of the disability.
- 101. We find that the respondent has proved that the treatment was a proportionate means of achieving a legitimate aim. No further reasonable adjustments could have been made. The legitimate aim was the requirement to ensure that the claimant was capable doing the job and that this was a proportionate approach to her employment.

Time

- 102. In the circumstances and given our findings, we do not have to deal with the time issue.
- 103. Consequently, for the aforesaid reasons, the claimant’s claim is dismissed.

Employment Judge Alliot

Date: 15/1/2018

Sent to the parties on:

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For the Tribunal Office