



EMPLOYMENT TRIBUNALS

Claimant: Ms AB
Respondent: An NHS Foundation Trust

Heard at: Ashford On: 19-21 & 24-27 June 2019
28 June 2019 (In Chambers)

Before: EMPLOYMENT JUDGE CORRIGAN
Members: Mrs J Jerram
Mr D Newlyn

Representation
Claimant: Ms A Parmer, Counsel
Respondent: Mr C Edwards, Counsel

RESERVED JUDGMENT

1. The Tribunal has found contraventions of the Equality Act 2010 (discrimination arising from disability, failure to make reasonable adjustments and disability related harassment).
2. The Claimant's complaint in respect of unlawful deduction of wages is dismissed upon withdrawal.

REASONS

Claims and issues

1. The Claimant, by her claim dated 12 April 2018, brought complaints of unlawful deduction of wages and disability discrimination (discrimination arising from, failure to make reasonable adjustments and disability related harassment).
2. The parties resolved the wages claim during the hearing and it has been dismissed upon withdrawal.

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3. The issues for the Tribunal to determine were discussed with the parties at the outset, and reviewed during the hearing, and agreed to be:

Time Limits

4. Those matters which preceded 13 November 2017 are prima facie out of time.
5. Were the Claimant's claims presented before the end of the period of three months beginning when the act complained of was done?
6. Did the matters complained of prior to 13 November 2017 amount to conduct extending over a period ending within the period of three months prior to the presentation of the claim?
7. To the extent that any of the Claimant's complaints are out of time would it be just and equitable to extend time?

Disability

8. The disabilities relied upon are anxiety, depression, ADHD and EUPD (or PTSD).
9. The Respondent conceded that the Claimant was disabled at the relevant time by virtue of a mental impairment or impairments.

Discrimination arising from disability

10. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disabilities? The Claimant contends the "something arising" is her sickness absence record.
11. In particular did the following acts/omissions amount to unfavourable treatment?
 - 11.1 Monitoring the Claimant's attendance from 25 April 2016 with no end date?
 - 11.2 Threatening imposition of a formal warning for sickness absence on or around 20 September 2016?
 - 11.3 Imposition of a formal warning for absences backdated to 6 October 2016, on 6 December 2016?
12. Did the Respondent not know, and could it not reasonably have been expected to know, that the Claimant has a disability? In submissions the Respondent conceded constructive knowledge.
13. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

14. Did the Respondent apply the following PCPs to the Claimant:
 - 14.1 the requirement of daily attendance at the Midwife Office from August 2016 to December 2016?
 - 14.2 the requirement to undertake a full workload from August 2016 to December 2016?

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- 14.3 the requirement to carry out long day shifts from September 2017 to December 2017?
- 14.4 the requirement to carry out on call shifts from September 2017 to December 2017?
- 14.5 the requirement to attend welfare meetings/health reviews in February 2018?
15. Did the PCP(s) put the Claimant at a substantial disadvantage in comparison with workers who do not have disabilities? The substantial disadvantages relied on were:
 - 15.1 anxiety caused by attending a busy and crowded office;
 - 15.2 exacerbation of her disabilities by the burden of a full workload;
 - 15.3 exacerbation of her disabilities by the burden of being rostered for long days;
 - 15.4 exacerbation of her disabilities by the burden of being rostered for on call shifts;
 - 15.5 exacerbation of her disabilities by the requirement to attend welfare meetings/health reviews.
16. Did the Respondent take such steps as it was reasonable to have taken in order to avoid that disadvantage? The Claimant contends the Respondent should have taken the following steps.
 - 16.1 allowing the Claimant to receive her daily workload from home;
 - 16.2 a reduction in workload;
 - 16.3 avoiding long day shifts;
 - 16.4 avoiding on call shifts;
 - 16.5 postponement of welfare meetings/health reviews.
17. Did the Respondent know or could it reasonably have been expected to know (a) that the Claimant was disabled and (b) that the Claimant was likely to be placed at the disadvantage alleged?

Harassment

18. Did the Respondent subject the Claimant to conduct which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to the perception of the Claimant, the circumstances of the case, and whether it was reasonable for the conduct to have that effect?
19. If so, was all or any of the unwanted conduct related to disability?
20. The Claimant relied on the following events as harassment related to disability (other matters that had been raised were withdrawn during the hearing):
 - 20.1 Team Leader I's assertion that the team were "pissed off" at other people working from home, and rostering the Claimant to come into the office, in around late July/early August 2016;

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- 20.2 Removal of the agreed working from home adjustment, and requiring the Claimant to attend the office to collect and sort out the day's work, even when rostered on call, from mid-August 2016;
- 20.3 Team Leader 1 amending the Claimant's record to reflect annual leave instead of certified sickness absence, on or around 25 September 2016; and subsequently recording the Claimant's sick leave as two separate periods adversely affecting the Claimant's sickness record;
- 20.4 Team Leader 1's threat of a formal warning for sickness absence, in a meeting held in a storeroom, on or around 20 September 2016;
- 20.5 Team Leader 1 saying "you are not the only one in this team with problems. It is not my job to mother you. I could do without this. What am I supposed to tell you, you're never bloody here" on or around 20 September 2016;
- 20.6 Team Leader 1 telling the Claimant in a meeting on 11 October 2016 that she was being "too sensitive" to complain about the remark at 20.1 above, and that it "wasn't personal";
- 20.7 Team Leader 1 and Matron 1 advising that the Claimant's workload would increase if she wanted to start her work day from home, on or around 6 December 2016;
- 20.8 The Claimant having to consistently raise with Team Leader 2 that she had been rostered for long days and on catl shifts, even though it had been agreed that these would be avoided for her, between 26 September 2017 and 15 January 2018;
- 20.9 The Head of Midwifery's failure to remove the formal warning from the Claimant's record on or around 2 November 2017;
- 20.10 Team leader 3 advising the Claimant she was expected to cover an on call shift on 25 November 2017, as her adjusted rota was straining the service and other midwives were being inconvenienced?
- 20.11 Matron 3's hostility towards the Claimant on 30 November 2017, erroneously believing that the Claimant had refused to attend the Birth Centre, and her comment that the Claimant was inconveniencing other midwives?
- 20.12 Team Leader 2 and HR's decision to proceed wjth the Health review on 26 February 2018.

Hearing

21. The Tribunal heard evidence from the Claimant and from her RCM Workplace Representative on her behalf.
22. On behalf of the Respondent, the Tribunal heard evidence from (in this order) Team Leader 2; Team leader 3; Matron for the Maternity Ward and Birth Centre (Matron 2); Head of Midwifery; Team leader 1 (a Band 7 Midwife at the relevant time); and Community & Ante natal Matron

(Matron 1). We also read a statement from a colleague and another RCM representative prepared in support of the Claimant and two statements prepared in support of the Respondent from another midwife and the Lead Nurse for Gynaecology.

23. There was an agreed bundle of 497 pages. Further pages were added in supplementary bundles during the hearing with the agreement of the parties (including bundle T). The parties' representatives made oral submissions.
24. Based on the evidence heard and the documents before us we made the following findings of fact.

Facts

25. The Claimant commenced employment as community midwife on 21 June 2010.
26. The Trust has a sickness absence policy. At paragraph 5.3 (page 80) it states "The Trust has agreed trigger points which will require managers to review an employee's sickness record and invoke the informal monitoring stage when reached". The triggers for concern are listed as being three episodes in any six month period and/or or six working days in any six month period. If sickness absence remains a cause for concern there is a three stage formal procedure. At 5.5 (page 82) the policy deals with how disability-related absences should be addressed and states that warnings will not be issued for disability-related absences however the process will mirror the usual sickness absence process.
27. Throughout the relevant period the Claimant had a disability including anxiety and depression as set out at paragraphs 8 and 9 above.
28. Team Leader 1 took over the management of the Claimant in around 2014. She knew about the Claimant's underlying condition. She said she knew her depression was an ongoing thing and also knew that the Claimant's then situation at home caused a great deal of anxiety and depression. This is supported by messages between the two at T26. Until the matters in question the two had a good relationship as evidenced by a number of text messages.
29. There was an Occupational Health report obtained in respect of the Claimant dated 9 March 2015 (pages 176A-B). The box in respect of whether the Claimant fell within the scope of the Equality Act was not ticked but in our view it was clear from the opinion provided there was an underlying mental health condition: "[the Claimant]...was signed off work for four weeks...due to fatigue and other symptoms....she has been diagnosed with a health condition in the past and now self manages her symptoms using mindfulness techniques...she has been using these techniques for about five years and now is aware of her triggers to feeling unwell and up until this period of absence her symptoms had been stable for about a year".
30. The Claimant was absent from 14-19 November 2015. This was an absence of 6 days. That absence on its own was long enough to trigger

the informal sickness management process as set out at paragraph 16 above but the process was not commenced at that time. There are no contemporaneous documents in respect of the November absence such as return to work documentation.

31. The Claimant also had a further 2 days' absence in January 2016. Again there were no contemporaneous documents.
32. The first reference to both absences was in text messages on 8 February 2016 between the Claimant and Team Leader 1 (T27), when the Claimant was asked what the reasons were and she said "Nov diarrhoea...Jan flu". She then sent a further message on 9 February 2016 saying "Better put depression...too...", without being more specific about which absence she meant.
33. There was then a return to work meeting in respect of those earlier absences on 9 February 2016, conducted by Team Leader 1 (pp331-332). There was no reason for this occurring on that date in that the Claimant had already returned to work. The two absences were addressed together on the same form. In the box for "Reason for absence" it was stated "Flu. Adrenal fatigue/vertigo/depression/stress." On page 332 it was recorded there were "ongoing concerns with adrenal fatigue and stress". It was agreed the Claimant would be referred to OH and also in response to a question about what support would be helpful it is recorded "Where possible no long stretches at work and working from home". This was a reference to picking up appointments by phone rather than coming into the office to get appointments. In response to a question about what would avoid further absence the response recorded was "reduce stress where possible". Under management action it was recorded that a stress risk assessment needed to be done, but this was never done. The evidence of Team Leader 1 was that a discussion about stress triggers was had in that meeting so we find that in response to those absences in November and January the Respondent was looking at managing the Claimant's stress, which was seen as connected to those absences.
34. The first letter under the informal absence procedure was sent to the Claimant on 2 March 2016 (page 332A). That referred to the meeting on 9 February 2016 as an informal sickness absence meeting, the same meeting that was a return to work meeting and a stress risk assessment. That does appear to be envisaged by the policy (paragraph 5.3 at page 81) though the expectation is that the meeting should be upon the person's first day of return to work after absence (paragraph 5.1, page 80). A feature of this case throughout is that there are no notes of the meetings, only follow up correspondence, not always produced promptly after the meeting.
35. The letter is incorrect in respect of the number of days and episodes (it states 12.5 days over 3 episodes). The Claimant had been absent for 2 episodes amounting to 8 days. The number of days nevertheless are sufficient to trigger the policy. In that letter the absences are listed as being for "diarrhoea, vertigo, depression and adrenal fatigue in respect of November 2015 and flu in respect of January 2016. The letter referred

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to the referral to OH and records that the additional support which would help facilitate regular attendance at work was "working from home as much as possible and no long stretches at work on the rota (where sustainable)". The Claimant was told her level of absence was to be monitored for the next 6 months.

36. The OH report obtained was dated 22 March 2016. Again the Equality Act/disability box was not ticked (page 182). In the report it stated that the Claimant "is prone to low mood and increased stress but over the years has learnt strategies to deal with these symptoms including using mindfulness techniques..." It suggested the Respondent consider a shift pattern which did not involve working more than 4 days in a row. There was no mention of the working from home (PPI 82- 182A).
37. The Claimant was then absent again 12-15 April 2016. On her self certificate (page 335) she said she had a cold.
38. There was a further sickness absence meeting on 25 April 2016 conducted by Team Leader 1 recorded in the subsequent letter at pages 333-334. In this letter the reasons for the November absence were modified to state simply adrenal fatigue. The April absence is recorded as being for a cold but this is followed by a note that the Claimant said adrenal fatigue makes her prone to flu/colds.
39. The letter made reference to the OH report and the recommendation that the Claimant does not work too many days in a row and to work from home (despite the latter not being in the OH report). Again it said the Claimant's absence would be monitored over the next 6 months.
40. The adjustments discussed were made. The Respondent did not roster the Claimant for more than 4 shifts in a row and she was able to call in from home to get her appointments without needing to attend the office.
41. The Claimant then began feeling sufficiently better to do extra bank shifts June 2016 through to August 2016. Although the Respondent did not roster the Claimant more than 4 shifts in a row, by doing bank shifts there were occasions she was doing 8/9 shifts in a row. She said this was made possible by the support she had at that stage from a 3rd year student who does now work fully for the Trust. She also could cancel the bank shifts at short notice if she did not feel up to doing them. She would also attend the office during bank shifts but this was in the afternoon when it was quieter and more manageable.
42. In July 2016 the Claimant was scheduled to do 5 bank shifts whilst on annual leave and told Team leader 1 in passing in a text message the week before. She did not do 5 in a row (pp38-39 bundle and pT4). There was a conversation between Team leader 1 and the Claimant during a bank shift when the Claimant had come into the office. The Claimant says Team Leader 1 told her that people in the team were "pissed off" with people working from home so after the Claimant's leave she was going to roster her to come into the office.
43. Team Leader 1 disputes this. She says she inferred from the Claimant working so many bank shifts that that the Claimant was better and agrees she approached her about doing some early shifts and opening the office, just over August. However for the reasons which follow, on balance we prefer the Claimant's account.

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44. The Claimant's version was partially supported by her colleague who has written a statement but not attended the Tribunal, but who also wrote an email during the Claimant's grievance process (at 412A-B) stating that she had overheard the conversation and that Team Leader 1 had told the Claimant that "people in the team were getting 'pissed off' with the same people working from home. She also said she would be allocating people to come in to the office to sort the office stuff".
45. The Claimant's workplace representative (who gave evidence on her behalf) also supports the Claimant's version as she recalls that in the later absence meeting this conversation was discussed and she remembers saying that she agreed with the Claimant and that she had a right to be upset. She recalls saying "I would be upset if I thought the team were talking like that".
46. In her own response to the grievance (pl 84C) Team Leader 1 agrees that she asked the Claimant to come into the office more "in order to undertake some of the admin work that the other team members face on a daily basis...as team leader I wanted to give her this opportunity to support her colleagues." She said I certainly do not remember using the term "pissed off" when discussing how other team members felt but wanted to make her aware that as

a team we all need support at times". In her statement during the grievance (page 428) she said that two colleagues had approached her to clarify the arrangements in respect of the Claimant working from home as they felt it was unfair as it continually increased their administrative workload. The conversation therefore occurred in the context that two members of staff were disgruntled with the arrangement.
47. Team Leader I's account at 184 C in the context of that complaint from colleagues does suggest the issue was raised with the Claimant that she needed to support her colleagues more in those morning duties because of how they felt. There was no mention that it was just for the holiday period. She denies using "pissed off" as she says it is not a term she would use, but it is clear from the text messages that both she and the Claimant were close enough to use that kind of language with each other.
48. The grievance outcome found that "[Team Leader IJ felt that she had attempted to accommodate [the Claimant's] needs by agreeing working from home...but that also had to support the running of the service and ensure fairness to the other members of team".
49. We also note that Team leader I's oral evidence was that it was the Claimant who brought up others talking about her and she said "I hadn't heard anything". She said she said then that she "would nip it in the bud" and that was when she broached the subject of coming in if the Claimant felt able to. We find this was a significant change in her account from that given previously.
50. On balance overall we prefer the Claimant's account. We also accept the Claimant's account that Team Leader 1 wrote down the days she was to come in and that these are reflected in her diary. There were 5 in total out of 8 when she was not already due to start

a clinic. Though one was a weekend when the Claimant accepts the office is less busy.

51. The comment made by Team Leader 1 had a severe effect on the Claimant's health, in part because she then felt isolated from the team, believing them to be unhappy with her. She had a panic attack on 27 August 2016 and several on 29 August 2016. 27 August was not a date when she had to come in early and the trigger was giving a parent education talk. The trigger on 29 August 2016 was having to come into the office.
52. On 1 September 2016 the Claimant found a breast lump and went straight to her GP and began a two week period of tests. She was signed off for two weeks. Initially the certificate said breast lump but was amended on 20 September (her first day back) to "lump in breast/anxiety problems". It is confirmed in her GP records that this dated back to 1 September and the record for 1 September 2016 includes a reference to "bullied by managed". We find this was a reference to Team Leader 1's comment about early attendance at the office (pp 280/281). In the Claimant's diary for 1 September 2016 there is an entry "off sick breast lump & anxiety".
53. Messages between Team Leader 1 and the Claimant continued whilst she was off sick having tests for the lump (T9). The Claimant did ask Team Leader 1 to come visit her at home and we accept this was an attempt to try to speak to Team Leader 1 about how upset she was at how she had been treated. By 9 September the Claimant knew that her breast lump was not sinister though tests were ongoing. Team Leader 1 asked in a message about the reason for the April sickness. The Claimant replied that she was on a meditation wellness retreat for 3 days but that she thinks the reason was flu.
54. On 20 September 2016, the Claimant's first day back, the Claimant and Team Leader 1 had a conversation in a side room which the Claimant refers to as a storeroom/cupboard. The room had a window and desk but not enough chairs.
55. It did not go well as reflected in the Claimant's text on pT13 which was not contradicted. The Claimant says she was told she was going to have or was threatened with a formal warning for sickness. Team leader 1 says she was giving the Claimant fair warning that she had triggered the formal process. From the text messages and her oral evidence it is likely she said the Claimant had "triggered a formal". Having heard her evidence it is likely her own understanding was that the process was triggered and a warning would be automatic. As an afterthought in the subsequent texts she said "also, before I put anything in writing let's have a proper chat about sickness.. e". She therefore did then promptly suggest a meeting first. However the way the text message was phrased does suggest she must have indicated the Claimant would be getting a warning as she then suggests a "proper chat", namely a proper meeting, before she put anything in writing. If she was only speaking about the formal process, the letter in writing inviting to the meeting would come before the meeting, not after.

56. We accept Team Leader 1's evidence that she was trying to be helpful. She phoned HR to try to keep the Claimant on the informal process. It is also clear from her message she wanted a "proper' chat. She wanted to do it properly and she also referred the Claimant to OH. Nevertheless the language used left the Claimant believing she had been given a warning. The Claimant made a note in her diary "on formal re sickness" and we accept she believed she had been given a warning and that the reference to triggering a formal caused the Claimant distress, as Team Leader 1 accepts.
57. The Claimant also tried to raise the "pissed off" comment. Team Leader 1 denied saying it.
58. We do not find it more likely than not that she said "prove i?" or that she referenced text messages or voice recording as alleged (and which she disputes). It does not fit with the wider context of Team Leader 1 seeking to argue in favour of the Claimant remaining on the informal process with HR because she knew how upset the process was making the Claimant (which we accept). We find she did say everyone has problems (as she accepts this herself), but not in the context that the Claimant alleges. We do not find that she said "it is not my job to mother you" and "you are never bloody here, what am i supposed to tell you". The text messages straight afterwards were supportive as was the attempt to keep the Claimant on the informal process which is inconsistent with this. We also note that there is no reference to these comments in the later meeting with the Claimant's workplace representative, unlike the "pissed off' comment. The Claimant was able to remain at work after this incident and also in text messages shortly after said to Team Leader 1 "I hope you are okay mate".
59. On 25 September 2016 Team Leader 1 raised with the Claimant that as she had been on the meditation wellness retreat she had to change her sick leave to annual leave. This was a result of having discussed the Claimant's case with HR and an assumption that she was away on a retreat rather than off sick. This was initially actioned (p337C). The Claimant accepts that the reference to a meditation wellness retreat can give the impression that she is on a spa or similar whereas actually it was treatment. The detriment to the Claimant is not immediately apparent as if the absence is recorded as annual leave then it reduces the number of days off sick, but increases the episodes. Either way the next stage of the process would have been triggered under the Respondent's policy. Understanding the detriment is complicated, and relates to the potential for a further sickness absence to lead to further action more quickly. After that meeting with the Claimant Team Leader 1 spoke again to HR and the sickness absence was reinstated for the time she was on retreat.
60. On 3 October 2016 a letter was sent inviting the Claimant to a formal sickness meeting on 11 October 2016. That advised she already had an informal written warning/trigger letter and that a potential outcome of the meeting was a first formal written warning (p337P). This letter therefore clarified that it was a formal process that had been triggered, and that there would be a process before any warning was issued.

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61. A further OH report was received dated 10 October 2016 (p184). This reports the Claimant was diagnosed with depression in 2009 but now is more prone to anxiety and panic attacks. It records that the Claimant said her sickness absence is being formally monitored following a two week absence due to anxiety caused by work issues and a health issue and that she had attended a 2 day meditation workshop which she found very helpful following her recent flare up in anxiety symptoms. The report is equivocal on whether the Claimant is protected by the Equality Act. Again the relevant box was not ticked and the report said that only an Employment Tribunal can make that decision, and that the Claimant reports that she is prone to episodes of anxiety and panic attacks but these have been stable until recently.
62. There was a return to work meeting on 11 October 2016 (pp338-339) again some time after her return from absence. The reason for the absence was recorded as lump in breast/anxiety. It says the reason for absence was anxiety triggers — health/personal circumstances and work issues. It says that the support needed is not to add to the Claimant's anxiety, and that the Respondent can avoid further absences by understanding the Claimant's condition. This was also the first formal sickness absence meeting under the procedure, and the Claimant was accompanied by her Workplace representative. There are no other formal notes of the meeting apart from the return to work form. The Claimant tried to raise the "pissed off" comment and Team Leader 1 told her she was being too sensitive. The reference to the Claimant being told she was oversensitive was supported by her Workplace Representative who gave evidence on her behalf, and we accept this evidence. The did not complain in this meeting about the comments described at paragraph 58.
63. It was left that the Claimant would be informed about the warning but no outcome or minutes were then sent. As shown on page T20 in the text messages Team Leader 1 went back to HR and argued that the Claimant's sickness had improved but they said the Claimant still triggered a formal. She told the Claimant she wanted HR present as she was not happy to do it herself. Text messages from the Claimant to Team Leader 1 were still very affectionate at this time. She also said in evidence that if she had understood that she had discretion she would have extended the informal stage. She could see how difficult it was for the Claimant that the formal stage had been triggered and the detrimental effect it was having on her, that it was causing her anxiety.
64. On 28 October 2016 the Claimant was invited to another First Stage Formal Sickness Meeting on 17 November 2016. The recorded reason for the sickness absence was "anxiety problems following lump found in breast" which was not an accurate reflection of either the sick note or the OH report. HR were to be present at the meeting. In the event it was postponed as HR could not attend. On 22 November 2016 the Claimant was invited to a further meeting on 6 December 2016 with Matron 1 in attendance as HR could not be there. That letter states the reason for the September absence was lump in breast although "anxiety problems" was added by hand by Team Leader 1 after it was raised by the Claimant.

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65. In the meantime the Claimant went to Matron 1 on 1 December 2016 and said she was being bullied by Team Leader 1. Her main concern was still the "pissed off" comment and the difficulty she was having explaining its impact to Team Leader 1. Matron 1 directed the Claimant to the grievance policy. She said she would be supporting Team Leader 1 on 6 December 2016 and the Claimant could bring it up. The Claimant felt that meant she would be taking Team Leader 1's side.
66. All this time the Claimant continued to come into the office a number of times rather than get her appointments from home, as is supported by her diary. We accept it may not have been more often than not, but we also accept that however many times it was, it caused the Claimant difficulty.
67. The meeting of 6 December 2016 is recorded in the letter dated 7 December 2016 (pages 346-347). As she thought had been promised by Matron 1 the Claimant tried to reopen the question of what Team Leader 1 had said in relation to the team being "pissed off". Matron 1 felt it was going round in circles and was what she described as a "personal issue" so she intervened and took over the meeting, to focus on the absence. She did not see the Claimant's concerns as being connected to the absence.
68. When asked if there was an underlying condition the Claimant said stress and anxiety due to a medical condition that has now resolved and additionally she felt her anxiety and panic attacks had increased due to the busy office working environment (p346).
69. The letter states that the Claimant acknowledged that her level of sickness absence was high due to this increase in anxiety, stress and panic attacks. It was agreed the Respondent would work with her Team Leader to put the days she came into the office on the quieter working days, and on other days she could start from home, potentially taking a slight increase in the workload to accommodate avoiding the busier office situation. The Matron's evidence was that as explained in the meeting this was about having an extra visit so that she was doing a comparable workload, not a higher workload. The Claimant accepted that this was a fair swap, an extra visit instead of attending the office, but the Respondent accepts this was a badly worded letter.
70. The Claimant was also offered to move to a team with a quieter office which she did not immediately accept but eventually did on 13 December 2016.
71. Nevertheless a stage 1 formal warning was issued, to remain on file for 12 months from the first meeting of 6 October 2016. The Claimant's absence was still to be monitored and if sickness did not improve she would move to the next stage of the policy which could ultimately result in termination of employment. Matron 1's reason for the warning appeared to be that the Claimant had not had any further absence up to December, she had triggered the formal policy and it was reasonable to follow it. She accepted that she would not give someone with a disability covered by the Equality Act a formal warning and accepted if the OH report had ticked the disability box she might have given a different outcome. The warning was backdated to shorten the period remaining.

72. The Claimant was given a right of appeal. The Claimant was signed off sick from 13 December 2016. She exercised her right to appeal on 22 December 2016. She also submitted a grievance about bullying on 22 January 2017. On 31 January 2017 the Claimant was told of the Respondent's decision not to address the appeal until after grievance (page 389).
73. The Claimant remained absent on sick leave until 4 September 2017. During her absence there were referrals to Occupational Health. The first report is dated 13 April 2017. At this stage Occupational Health began ticking the box that the Claimant has a disability and is likely to be covered by the Equality Act (pages 185-187). The report said she reported anxiety, depression and regular panic attacks (weekly). The triggers for panic attacks were recorded as noisy/chaotic environments, confrontational situations, and situations where she feels trapped. It further states: "Her mood is described as low with problems with sleep and concentration. She reports a number of work related stressors as impacting on her mood. In my opinion [the Claimant] has a mental health Impairment that is likely to qualify as a disability under the [Equality Act]." The report confirmed the Claimant was fit to attend an investigatory meeting with support present.
74. The next assessment was on 10 May 2017 (pp201-203). It records that the Claimant reported worsening anxiety in relation to the delayed investigation. It said the Claimant was not fit to return until an initial investigatory meeting was held to assess unresolved conflict, which was impacting her mental health.
75. The Claimant's grievance interview then took place on 22 May 2017. The Claimant emailed her colleague's statement the next day (pp412A-B), addressed above at paragraph 34.
76. On 26 May 2017 Team Leader 2 met with the Claimant and confirmed the meeting by letter (pages 413-414). Team Leader 2 was now the Claimant's Line Manager. The Claimant's position was that she was not able to return until the grievance had been resolved. A potential return to work in August was discussed, and that the Claimant would have a phased return.
77. There was a further OH assessment on 19 July 2017 and the report is at pages 204A —C. That reports that the Claimant reported that the unresolved conflict was the main barrier to a return to work. It said the Claimant would be fit to return in 4-6 weeks after an investigatory meeting to resolve the work related conflict is addressed. It advised a stress risk assessment to determine if redeployment was needed (which had already happened). It advised a supportive environment on the Claimants return with a gradual increase in workload and hours over 4 weeks. Occupational Health was to review in two months. The box relating to disability was not ticked.
78. At a meeting with Team Leader 2 and HR on 20 July 2017 it was agreed the Claimant would aim to return on 4 September 2017 with

a phased return over a 4 week period as per the OH advice (419-420).

79. The grievance outcome report was forwarded to Matron 2 on 7 August 2017 and she met with the Claimant on 24 August to give her the outcome (pages 435-437). The Claimant was told the grievance was not upheld. This appears to have been on the basis that it was not considered that Matron 1 or Team leader 1 had purposefully intimidated or undermined the Claimant or been malicious. Nevertheless it did find poor understanding and poor adherence to the sickness absence policy and poor communication and that this had contributed to the overall issues and impacted on the Claimant's wellbeing. It records that Team Leader 1 and Matron 1 had reflected on their management of the case and acknowledged and apologised for where it may have impacted on the Claimant's well-being. It was acknowledged that poor communication on a number of occasions could have contributed to the Claimant feeling isolated and unsupported. They were both required to attend additional training

and an outcome letter with recommendations was to be placed on their personnel files.

80. The Claimant's return to work with an extended phased return was discussed. The detail of this is recorded in the email from Matron 2 to Team Leader 2 on 29 August 2017 at page 433. The phased return was to be over a minimum of 4 weeks but Matron 2 said that staff who had been off a long time usually used annual leave to extend this. She said that after the phased return the Claimant ought to be able to return to normal duties. She recorded that she was going on leave until 15 September 2017.
81. On 4 September 2017 the Claimant did return. At the outset she did training and was supernumerary over 3 days a week, though she had to use annual leave in week 4 but no issues are raised about this. She was due to begin normal shifts in the community on 2 October 2017.
82. Meanwhile the 2 month review by OH took place and the report was dated 20 September 2017 (pages 206 -207) which went to HR and Team Leader 2 but not Matron 2. The disability/ Equality Act box was not ticked. It did say a stress risk assessment should be carried out to facilitate a supportive work environment to reduce stressors which could impact the Claimant's mood condition. It said the Claimant reported a successful phased return, but that she had anxieties and concerns about returning to full time work. It reports fatigue was an ongoing symptom.
83. The assessment was that the Claimant was partially fit for her current role. OH advised a restriction in duties to avoid on call or long days for a further 3 months, and to discuss less than full time work if operationally feasible for the next 3-6 months.
84. There was a meeting between the Claimant and Matron 2 on 26 September 2017. The Claimant says this most recent report was discussed and that she thought they were agreeing the plan pursuant to that. We accept her evidence. Matron 2 says she was unaware of the report but we do not find this credible. She was aware a report was due from the previous report, which she was still working to. We find it is clear

from the email chain at pages 438-439 involving the Claimant and Matron 2 that the recommendations within the report were discussed. The Claimant at page 439 referred to Matron 2 authorising her rota being changed to supernumerary, 3 days per week, no long days or on calls (which reflect the OH recommendations). According to Matron 2 the meeting was to see how the Claimant was getting on and we find it very unlikely that there was no reference at all to the new report, given the meeting was about extending the phased return.

85. On 28 September 2017 Team Leader 2 took the Claimant off a long day she had been scheduled to do, working to the OH report.
86. On 2 October 2017 the Claimant had to chase authorisation for her rota to be "supernumerary, 3 days per week, no long days, or on calls" (page 439, referred to above).
87. On 2 October 2017 Matron 2 emailed the plan on p438 to the Claimant, copied to Team Leader 2, and recorded her meeting with the Claimant on 26 September 2017. She confirmed she advised a longer period of supernumerary, no on calls for 8 weeks (from the start of the phased return) to 30 October 2017, and no long days for the 'first few weeks either'. She also recommended the phased return be extended using annual leave. She recorded the Claimant as having said she was settling in well. We find that up to 26 September 2017, when the conversation took place, the Claimant did feel she was settling in well.
88. The plan Matron 2 then set out in the email says:
"I recommended:
Week 2nd October - supernumerary, no on call, no long day
Week 9th October - supernumerary, no on call
Week 1 6th October - no longer supernumerary no on call
Week 23rd October- 3 days working 1 day annual leave, no on call
Week 30th October - 3 days working, 1 day annual leave
Week 6th November — 3 days working, 1 day annual leave
Review prior to Week 18th November, consider if suitable for full duties then."
89. The only time no long day was recorded was the week of 2 October 2017, the Claimant's 5th week back. So, reading the statement that there should be "no long days for the first few weeks" and the plan, suggests that whatever her intention, the long days could then start from Week 9th October.
90. Matron 2 accepts this was less than OH had recommended on 20 September 2017. She says that had she known about the OH advice she would have given the full period recommended, as that is the normal approach. We find she did know, but for whatever reason, did not grant the full period. Team Leader 1 saw this instruction from Matron 2 as overriding the OH recommendations. Her understanding was that OH recommendations do not necessarily have to be followed.

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91. On 3 October 2017 the Claimant obtained a written copy of her grievance outcome. On 16 October 2017 she appealed the grievance outcome. In her email she said she felt well supported in rehabilitation back to work by Team Leader 2 and Matron 2 (p441A). She was directed where to send her appeal.
92. Unlike the early period of the phased return, where the phased return was clear on the rota, on calls and long days were put on the Claimant's rota at least from the 23 October 2017 rota (we are missing the rota before) but were then removed (pT46 entries for 25 October 2017 (long day), 2 November (on call), 10 November (on call)). At some point before 20 October 2017 they had been crossed off as Team Leader 2 said the Claimant did not have an on call scheduled until 25 November 2017 on that date (pages 439 A and 440). We accept this longer period of phased return must have come from the Claimant asking for this as the "no long day" ceased week of 9 October and "no on calls" ceased the week of 30 October in Matron 2's plan. We do not accept that the Claimant had to keep asking for long days/on calls to be removed on each occasion as they were removed before 20 October but we do accept she did have to ask for them to be removed at some point as they were not removed as part of Matron 2's plan.
93. On 20 October 2017 the Claimant did then say to Team Leader 2 that she did not feel able to do on calls or long days. Her family member was in hospital which was an additional stressor. At that point Team Leader 2 records they were not rostered until 25 November in any event and they would see how things go on a weekly basis. It was agreed they would meet 3 November 2017 and the Claimant was asked to let her know if she had concerns prior to this (pp439A).
94. We note this was still not the OH recommendation, which would have meant no on calls or long days for the period up to 20 December 2017.
95. Matron 2 was updated on what was discussed and agreed (p440). Team Leader 2 recorded the Claimant as having said she feels well supported in the team. Matron 2 replied to confirm that she was happy to defer the on calls and long days a bit longer. However there was still no suggestion they would be for the period recommended by OH.
96. On 24 October 2017 the Claimant submitted her grievance appeal. On 2 November 2017 the Claimant asked Matron 2 for the stage 1 warning (paragraph 59 above) to be removed from her record though she acknowledged it had expired (pp441C-D). Matron 2 said she would get back to her (p441C). The Claimant replied saying she would appreciate it as she had waited a very long time to have it looked at and hopefully removed. Matron 2 did not reply to the Claimant. She acknowledges that she should have, but overlooked it. She did make enquiries and was told that it was to be kept separate and dealt with after the grievance which was still ongoing, and that as it had expired it would have no impact, but the Respondent would not remove documents from a record.
97. The Claimant's appeal of the warning was never considered.

98. On 13 November 2017 the Claimant and Team Leader 2 met. Team leader 2 emailed the Claimant the next day with her record of the meeting saying that "You told me that you have discussed and been advised by your health professional to commence on calls/long days but that a 3 day week would continue to benefit you" (p443). The Claimant disputes she said this. There is no evidence of a health professional giving this advice and it is contrary to the most recent OH advice. It is in conflict with previous communication from the Claimant and we find it unlikely she said this given also the report from her
psychiatrist nearest that date (9 November 2017 on page 215) which says "she is having to work longer hours, which is not helpful".
99. The Claimant replied on 21 November 2017 (p442). She said she found the team supportive but the work stressful especially not getting breaks and working beyond scheduled hours. She said she was due to see the OH on 20 December 2017. She said she was running out of annual leave so would need to do 4 days a week but that the on calls were not realistic. She did say she would like to try out the long days "if possible". The reason for this was she was working late any way and she thought she would benefit from the fixed end time. She did not actually dispute in that email what Team Leader 2 had said in her email but the Claimant's reply is not consistent with what Team Leader 2 has recorded. We have already found she did not say she had been advised to commence on calls/long days. She did not feel ready for on calls and was prepared to try the long days but that was not a commitment to doing them as normal.
100. The Claimant sent a second email on 21 November 2017 to team Leader 2 (page 445). In that she was clear she wanted to hold off on calls until she had seen OH on 20 December 2017.
101. The on calls were not removed from the rota. The Claimant received no reply from Team leader 2 until 28 November 2017 when she did confirm no on calls until 20 December 2017 and that the Claimant was to do long days (p444-445). P450B shows Team Leader 2 had agreed to this before 25 November 2017 but then had been absent due to sickness.
102. Also on 21 November 2017 the NMC informed the Claimant that she needed to provide evidence that she was capable of safe and effective practice taking her health into account. This caused the Claimant additional stress (E83-E84). On 23 November in her personal statement to the NMC the Claimant said that her manager had been following the recommendations of OH (E85A). On 26 November 2017 Team Leader 2 wrote a supportive letter for the NMC (p443A). In that she said it had been agreed that the Claimant would not commence on calls.
103. Meanwhile on 25 November 2017 the Claimant was still marked on the rota as on call (despite the agreement she would not do it). Team Leader 3 called the Claimant to check as was normal practice. The Claimant explained that she was not meant to be on call. We accept that Team Leader 3 was not critical of the Claimant nor asked prying questions. Her priority was to find someone else to cover at short notice so she asked the Claimant if anyone could cover and likely said she would have to call and find someone else. We accept she would have said she would bump

the third person on call up and find someone to cover her. We accept the conversation nevertheless left the Claimant feeling distressed and anxious that she had upset another manager and team.

104. The Claimant had agreed to work a long day on 30 November 2017. This normally included an on call component. There were supposed to be herself

and a colleague on duty, but the colleague had phoned in sick. Although she had kept in touch with the Birth Centre she had not been told about a parents' tour which was always done at 7pm. When no one attended to do it Matron 3 called to request assistance and accepts she would have been matter of fact about it. She wanted to know what the Claimant had to do and the Claimant was in the middle of a visit and she still had another visit. Another colleague who had been due to finish at 4pm therefore had to stay late to do the parents' visit. We find that Matron 3 did say that the colleague who was supposed to have left at 4pm would have to do it in such a way that the Claimant felt she was inconveniencing another colleague. The Claimant accepts though that Matron 3 did not ask the Claimant to come in and do the parents' visit herself. The Claimant then went in after her shift should have finished on her own volition, but was very emotional and distressed. The Claimant sent an email alerting her management of how she had felt promptly the next morning (pp448449).

105. Matron 1 replied saying there appeared to have been a miscommunication. She assured the Claimant she would speak to the people concerned and asked the Claimant to let her know if there was anything else she needed (p447).

106. On 30 November 2017 the Claimant replied to Team Leader 2's reply of 28 November 2017 in relation to the on calls (in which she had agreed to keep the Claimant off on calls until 20 December 2017, but had left an on call for 28

December 2017 on the rota saying the Claimant could update her after she had seen OH on 20 December 2017 (pp444-445)). In her reply the Claimant thanked Team Leader 2 and said it took away anxiety when looking at the rota (p444). When the December rota was published the Claimant saw she had been given two on calls for after 20 December, though the next OH review had not yet occurred. We find the rota was as per that email discussion on 28-30 November 2017 (pp444-445).

107. The Claimant was then signed off sick again on 5 December 2017. The sick note at p450 said "work not adhering to shorter week, shorter days and no on call". On 5 December 2017 the Claimant emailed Matron 2 (p450A). She raised a number of issues. She said she had still not heard about the stage 1 warning or her grievance appeal. She said "Unfortunately the plan that Occupational Health made did not transfer to the rota as I had hoped and I had to meet with yourself initially to modify it. And still the rota is not as Occupational Health has recommended nor as I wish it to be to facilitate my rehabilitation to work". She raised the fact she had not had the recommended stress assessment either. At p450B she explained that on calls had been put on the rota and she was having to go through the rota to get them removed which was stressful.

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She said it was stressful to see the on calls and long days on the rota and have to have a conversation about not doing them or feeling pressure to do them. She said she needed constant stability and to stick to a clear plan.

108. On 20 December 2017 (p219) at the OH review it was confirmed the Claimant had had a deterioration in her mood condition due to difficulty coping with workload demands/hours. She was not fit to work and would be reviewed in two months.
109. The Claimant was invited to a welfare meeting on 10 January 2018. At that meeting the Claimant said the OH recommendations had not been adhered to from November 2017. It was proposed that they would meet again for a stage 1 sickness meeting on 26 February 2018 after the Claimant's next OH review (pp451-453).
- 1 10. On 9 February 2018 the Claimant was informed that her appeal of the grievance was not upheld (p454).
- 1 1 1 . On 19 February 2018 the Claimant responded to the record of the welfare meeting with comments (p463). She said the meeting on 10 January 2017 had been a very long meeting (1 hour 45 minutes) and that she became very anxious and distressed several times and lost the thread of the conversations on occasion.
- 1 12. The Claimant contacted ACAS and early conciliation commenced on 12 February 2018.
- 1 13. On 21 February 2018 a further OH report was produced (p224-225). That said that the Claimant was not fit to attend work. It said that on assessment the Claimant was very tearful and distressed about the prospect of returning to work in any capacity. It said she was fit to attend a formal meeting with support from a nominated person however may need to leave early if distressed.
- 1 14. On 23 February 2018 at 3pm the Claimant requested a postponement of the meeting due on 26 February 2018 at 1.30pm for 2-3 weeks (p466). On the morning of 26 February the Claimant was informed the meeting was going ahead (p465).
- 1 15. The Claimant then replied repeating her request. She said she was finding it difficult to be outside without having panic attacks. She said her RCM Steward could attend if they felt unable to postpone. She found the situation very stressful. The RCM Steward was on her day off.
- 1 16. The response was to have the meeting in the Claimant's absence with the RCM Steward present and to call the Claimant if she was well enough.
- 1 17. In the event the Claimant did not feel well enough to be included by phone. The RCM Steward had been given the case at short notice and was not privy to any communication. Little progress was therefore possible. It was proposed that there would be a further meeting at the Claimant's home on 29 March 2018 (pp468-469).
- 1 18. The Claimant's GP then confirmed on 2 March 2018 (p482) that the Claimant was not fit to attend a meeting.

1 19. ACAS conciliation closed on 12 March 2018. This Claim was lodged on 12 April 2018.

Relevant law

Time limits

120. Where a complaint is brought more than three months after the act to which the complaint relates, the Employment Tribunal has power to extend time to such other period as it thinks just and equitable (section 123 Equality Act).

Discrimination arising from disability

121 . Section 15 Equality Act provides:

"(1)A person (A) discriminates against a disabled person (B) if—

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

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

122. Assessing justification is an objective exercise for the Tribunal. The Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer (Hensman v Moo UKEAT/0067/14/DM).

Failure to make reasonable adjustments

123. s20 Equality Act requires "...where a provision, criterion or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" [the employer]... 'to take such steps as it is reasonable to have to take to avoid the disadvantage."

124. RBS v Ashton [2011] ICR 632, in particular paragraphs 13 and 24, provides that:

"it is irrelevant.. .what an employer may or may not have thought in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned.. .it is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

125. The Tribunal does need to consider how effective the adjustment would be in removing or reducing the particular disadvantage, and a real

prospect of it doing so may make an adjustment reasonable (Romec Ltd v Rudham EAT 0069/07).

Harassment

126. S26 Equality Act 2010 states that a person (A) harasses another (B) if A engages in unwanted conduct related to disability that has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has such an effect the Tribunal must take into account B's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Conclusions

Time Limits

Those matters which preceded 13 November 2017 are prima facie out of time. Were the Claimant's claims presented before the end of the period of three months beginning when the act complained of was done? Did the matters complained of prior to 13 November 2017 amount to conduct extending over a period ending within the period of three months prior to the presentation of the claim? To the extent that any of the Claimant's complaints are out of time would it be just and equitable to extend time ?

127. It is noted that the Respondent's representative in submissions argued there were two separate periods of conduct: August-December 2016 prior to the Claimant's extended absence, and then from September 2017 when the Claimant returned to work in the new team. He accepted that acts in the later period was conduct extending over a period and we have found below acts that continued beyond 13 November 2017.
128. With respect to the issue of time limits we have considered first the question of whether we consider it just and equitable to extend time in respect of events which preceded 13 November 2017 to the date when the complaint was submitted, namely 12 April 2018. If so, there is no need to consider the other questions.
129. We do find it just and equitable to extend time. The parts of the claim preceding 13 November 2017 relate to the period when the Claimant was managed by Team Leader 1 and include the ongoing removal of the working from home adjustment until it was reinstated on 6 December 2016 and the way her sickness absence was managed up to the imposition of the warning on 6 December 2016. This was confirmed in writing on 7 December 2016 but not posted until 16 December 2016 and received 19 December 2016 (p357). The

Claimant had already been absent due to sickness from 13 December 2016 and was not fit to return until 4 September 2017, and was then on sick leave again from 5 December 2017 until after the date she submitted her claim. During her return between September to December 2017 the Claimant was on a phased return. She went through the grievance process in respect of the 2016 treatment. She lodged a grievance at a sensible point, on 22 January

2017. It took a long time to settle the grievance due to both the Claimant's health and absence and the pressures of work on the Respondent's staff. The Claimant's initial grievance meeting did not take place until 22 May 2017 due to the Claimant's sickness absence, then it took from 22 May to 24 August 2017 to give the Claimant the decision orally. Even then it took until 3 October 2017 to give the Claimant the written decision. She then tried to appeal this on 16 October 2017 and then again on 24 October 2017. Again she appealed promptly. She did not receive an outcome to the appeal until 9 February 2018. She contacted ACAS 3 days later on 12 February 2018. The conciliation closed on 12 March 2018 and the Claimant submitted her claim at an appropriate point after that, on 12 April 2018. For most of the period since 6 December 2016 the Claimant was unwell. Once she had the final outcome from the grievance she acted promptly, despite being very unwell, and too unwell to attend meetings in February and March 2018.

- 1 30. We considered whether there was prejudice to the Respondent in extending time. We accept the longer ago the events are the more difficult it is for witnesses to recall. However the Tribunal is used to dealing with cases that date this far back, and all concerned had the events on their mind since the Claimant's grievance on 22 January 2017 or shortly after. The Respondent's witnesses wrote their responses at the time. Team Leader 1's response at pages 184C-E is dated 26 January 2017. Matron 1 provided a statement dated 20 February 2017 and both Team Leader 1 and Matron 1 were interviewed in February 2017. We do not find this case particularly unusual in the length of time since the incidents and in any event the time period concerned is comparable to a civil claim, which have longer time limits. Moreover any prejudice arising from the passage of time in our view results from the Respondent's lack of contemporaneous note taking at the relevant meetings which is a feature in this case.
- 131 . It is just and equitable to extend time for submitting the claim to the 12 April 2018, the date the Claim was submitted.

Disability

132. The disabilities relied upon are anxiety, depression, ADHD and EUPD (or PTSD).
133. The Respondent conceded that the Claimant was disabled at the relevant time by virtue of a mental impairment or impairments.

Discrimination arising from disability

Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disabilities? The Claimant contends the "something arising" is her sickness absence record

134. The sickness absence record was 14-19 November 2015 (6 days); January 2016 (2 days); 12-15 April 2016 (4 days) followed by the 2 week absence in September 2016. The Respondent does not dispute that the reason for the treatment was the sickness absence record, but it is disputed that the sickness absence was something

arising from her disability. The Respondent submits that the Claimant would have been absent any way for diarrhoea (Nov 2015), flu (January 2016), a cold (April 2016) and the breast lump (September (2016)).

135. We do not agree with the Respondent's analysis, The absence in November 2015 was variously described in the Respondent's documentation as being due to vertigo, depression and adrenal fatigue in addition to diarrhoea. The Claimant initially said the reasons were diarrhoea and flu for the first two periods of absence but then added depression (pT27). in the return to work meeting the reasons for absence are recorded as "flu. Adrenal fatigue/vertigo/depression/stress" and ongoing concerns with adrenal fatigue and stress was also recorded as a reason for the absence. The Respondent in response saw the need for a risk assessment and discussed stress triggers. Although the April 2016 absence was recorded as being for a cold it was also recorded that the Claimant linked this and the flu to adrenal fatigue. In respect of the absence in September it was referred to as being both because of the breast lump and anxiety. The subsequent OH report said the absence was due to anxiety triggered both by a health issue and work issues, and the meditation workshop attended during that period was for the anxiety. We find the Respondent's consistent approach throughout in the return to work and monitoring letters was that there was an underlying health condition related to anxiety/stress. We therefore find there is a sufficient connection to the disability to find the sickness absences were something arising from the disability.

Did the following acts/omissions amount to unfavourable treatment?

Monitoring the Claimant's attendance from 25 April 2016 with no end date?

136. We do not find monitoring attendance to be unfavourable treatment. At this stage the process was informal. Under the policy the informal monitoring could have been commenced after the November absence of six days but was not begun until after the February absence. Monitoring is not itself a penalty and the Respondent needs to keep track of attendance. The first letter of 2 March 2016 said the monitoring would be for six months and that it could be extended. The Claimant was absent again in April 2016 leading to a further informal meeting and a further letter dated 25 April 2016. That letter again said the monitoring would be for six months in a paragraph identical to that in the first letter. In our view that letter did give an end date, as it said the monitoring would be for the next six months. Effectively the informal period was therefore extended, rather than starting the formal stage of the process at that stage.
137. We find the second letter could have been clearer and should have been amended to address the fact the Claimant was already being monitored. Nevertheless the second letter (the subject of the allegation) does give an end date of a further six month period. It was to the Claimant's advantage that she was given a further six months in the informal process. The Respondent could have triggered both the informal process and then the formal process sooner.

Threatening imposition of a formal warning for sickness absence?

138. This is a reference to the conversation with Team Leader 1 on 20 September 2016 (paragraphs 55-56). We found that the intention of Team Leader 1 in the conversation on 20 September 2016 was to warn the Claimant that the formal process was triggered to avoid her getting this news "out of the blue". However, Team leader 1 's understanding was that the process was triggered and a warning would be automatic. The way her subsequent text message was phrased does suggest she must have indicated the Claimant would be getting a warning as she then suggests a "proper chat", namely a proper meeting, before she put anything in writing. If she was only speaking about the formal process, the letter in writing inviting to the meeting would come before the meeting, not after.
139. We accept the conversation left the Claimant believing she had been given a warning and with the feeling that it was not being handled properly. This was only rectified when she did then receive a letter inviting her to a formal meeting on 3 October 2016.
140. We find that although it was not Team Leader 1 's intention, the conversation on 20 September 2016 was unfavourable treatment. She left the Claimant with the impression she had been given a warning without a process until she received the formal letter. This was as a result of the September absence and so was because of something arising from her disability. Moreover a warning for disability related absence is in contravention of the Respondent's policy.

Imposition of a formal warning for absences backdated to 6 October 2016, on 6 December 2016?

141. We do find the imposition of a formal warning for disability related absences to be unfavourable treatment. It was also in contravention of the policy which states that there will not be warnings for absences related to disability. In our view it was also inappropriate given the Respondent identified the need for adjustments for the Claimant's disability in the meeting. This is exacerbated by the fact the Claimant's appeal was never addressed as it was put to one side whilst the grievance was addressed and then when she sought to return to it and have it removed from her file in November 2017 it was considered unnecessary as it had expired. She never even received a response to her request.

Did the Respondent not know, and could it not reasonably have been expected to know, that the Claimant has a disability? Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

142. In submissions the Respondent's representative conceded constructive knowledge of the disability.
143. The aim of the conversation on 20 September 2017 was to give the Claimant warning in advance that she had "triggered a formal" however this had the opposite effect of giving the impression the Claimant had been given a warning outside of the Respondent's process and it is accepted caused her distress. Team Leader 1 said in evidence that had

she known she had discretion she would have extended the informal stage as she could see the detrimental impact on the Claimant's anxiety. We therefore do not find that giving the Claimant the impression she had been given a warning without a process was a proportionate means of achieving a legitimate aim.

144. The Respondent's aim in pursuing the formal procedure and issuing the formal warning was to manage sickness absence and reduce levels of sickness absence. However giving the Claimant the warning for a disability related absence had the opposite effect and led to the Claimant being off sick for 8 months. If the Respondent had waited to see how the effect of the agreed adjustments the likelihood is the Claimant would have remained at work. Again it is noted that Team Leader 1 argued for the Claimant to remain on the informal stage as she could see the impact that the formal stage was having on the Claimant. She did not believe she had discretion, having discussed the matter with HR. Had she known she could exercise discretion then she would have extended the informal stage, which in the circumstances would have been a pragmatic and sensible decision and a more proportionate response.
145. We therefore do not find the issuing of the warning to be a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

Did the Respondent apply the following PCPs to the Claimant? Did the PCP(s) put the Claimant at a substantial disadvantage in comparison with workers who do not have disabilities? Did the Respondent take such steps as it was reasonable to have taken in order to avoid that disadvantage? Did the Respondent know or could it reasonably have been expected to know (a) that the Claimant was disabled and (b) that the Claimant was likely to be placed at the disadvantage alleged?

The requirement of daily attendance at the Midwife Office from August 2016 to December 2016?

146. The Respondent did not require daily attendance at the Midwife Office at the relevant time. The Respondent did require the Claimant to share in the requirement to cover the office at the start of an early shift between August-

December 2016. The Claimant was allowed to modify this PCP to be "the requirement of early attendance at the Midwife Office from August 2016-December 2016". The Respondent did not object. The substantial disadvantage relied upon was the anxiety caused by attending a busy and crowded office. We accept that the Claimant did suffer the substantial disadvantage in the form of increased anxiety. It was a cause of the panic attack on 29 August 2016 in particular and of the increase in regularity of panic attacks generally.

147. it was reasonable to allow the Claimant to start her working day from home and only attend the office on quiet days eg weekends. The Respondent had been allowing this up until August 2016. It was allowed again from December 2016 after the formal sickness absence meeting. It was eminently achievable when it was considered necessary for the Claimant's needs.

148. The Respondent did not allow this adjustment sufficiently between August and December 2016 as there was some requirement to attend, with the consequent impact on the Claimant's panic attacks.
149. Constructive knowledge of disability was conceded. The Respondent knew the Claimant required the adjustment as it was recorded in the return to work documentation (see for example p331-3) and the adjustment had been agreed prior to August 2016. The return to work form reflects that the issue was ongoing stress and that the support required was "Working from home" which was a reference to this adjustment. Team Leader 1 removed the adjustment without any formal review or meeting because other midwives were not happy with it and the Claimant had been well enough to do the bank shifts over the summer, when she did attend the office, though not on early shifts.
150. There was a failure to make a reasonable adjustment to allow the Claimant to start early shifts from home between August and December 2016.

the requirement to undertake a full workload from August 2016 to December 2016?

151. The Claimant was happy to do a full workload. Her complaint in fact relates to the phrase in the letter dated 7 December 2016 stating that on the days she could start from home, she would potentially need to take a slight increase in the workload to accommodate avoiding the busier office situation. This was addressed at paragraph 69 above. This was badly phrased and was really a potential requirement to do an extra visit so that she was doing a comparable workload, not a higher workload. The Claimant accepted that this was a fair swap, an extra visit instead of attending the office. We find that this requirement did not substantially disadvantage the Claimant. The substantial disadvantage relied on was the exacerbation of her disabilities by the burden of a full workload. However, she agreed there was nothing wrong with this swap. This was not what caused the Claimant's subsequent absence. She was already doing such a swap informally.

the requirement to carry out long day shifts/on calls from September 2017 to December 2017?

152. It is a requirement that in normal circumstances midwives including the Claimant do on calls and long days.
153. The substantial disadvantage relied upon is the exacerbation of her disabilities by the burden of being rostered for long days and/or on call shifts. Such a requirement did put the Claimant at a substantial disadvantage as on her return from her long absence she was not initially well enough to do them. On 20 September 2017 Occupational Health advised a restriction in duties to avoid on call or long days for a further 3 months as she was only partially fit. This was in the context of the Claimant having an underlying mood condition and the need to reduce work place stressors which could impact on this (p207). We accept that the pressure to do the long days/on calls was also a substantial

disadvantage, with the Claimant becoming anxious seeing them on the rota and having to say she could not do them.

154. It would have been a reasonable step for the Respondent to have to take to follow the Occupational Health advice and not roster the Claimant at all for on calls or long days prior to the Occupational Health review on 20 December 2016 or such further period after that review as deemed necessary by Occupational Health at that time.
155. The Respondent partially took this step. The Claimant's duties were modified initially but not for the period recommended. She was rostered for on calls and long days in October until she asked not to be. They were removed by 20 October 2017 but we accept she had to ask for this as they were not removed in Matron 2's initial plan (see paragraph 92 above). On 20 October 2017 she said she had concerns working on calls and long days, nevertheless the 25th November on call was left on the roster and Team Leader 2 suggested they see how things go on a week to week basis, rather than simply provide the period recommended by Occupational Health. On 21 November 2017 the Claimant again said the on calls were not realistic. The reply confirming she would cease on calls for the time being was not sent until 28 November 2017. Team Leader 2 had agreed the Claimant would not do 25 November 2017 but the Claimant remained rostered meaning she was called about it on 25

November 2017 causing her significant distress. Then when it was agreed that she would not do on calls until 20 December 2017 on calls were left on the roster for after 20 December, though the next OH review had not yet occurred. The Claimant did commence long days prior to the OH review as can be seen from the incident on 30 November 2017 when she ended up working until midnight.

156. The parties went into depth as to what was known, and what was agreed between the parties in respect of the roster because they approached the case on the basis the PCP was what the Claimant was ultimately actually required to do in the period. We do not agree, in our view the PCP is the usual requirement for midwives to regularly do both on calls and long days. What the Claimant was actually required to do was an adjustment of that usual requirement. However it was not the full adjustment recommended by

Occupational Health because she was only partially fit, which was a step it was reasonable for the Respondent to have taken. It was reasonable for it to be agreed at the outset that the Claimant would not be rostered to do on calls or long days until the next OH review. Looking only at what the Claimant was actually required to do does not account for the pressure, anxiety and stress caused to the Claimant by leaving on calls and long days on the roster and her having to say she still could not do them.

157. The Respondent did have knowledge of the on calls and long days putting the Claimant at a substantial disadvantage as the Respondent had the Occupational Health report stating she was only partially fit to do her role and recommending that she not do on call or long day shifts for at least three months.

the requirement to attend welfare meetings/health reviews in February 2018 or to have them proceed in absence?

158. We find that the requirement was that a stage 1 sickness meeting was to be held on 26 February 2018 whether or not the Claimant could attend.
159. We find this did subject the Claimant to a substantial disadvantage as a result of her disability. She was not well enough to attend. She was having panic attacks at the thought of leaving her house and was informed on the morning that the meeting would be going ahead. She then had to get a representative who was on leave to deal with her case, though the representative was unfamiliar with it. The Claimant found the situation very stressful.
160. It would have been reasonable for the Respondent to give the Claimant the postponement she sought in order to avoid that disadvantage. She had requested a 2-3 week adjournment and there was to be an OH review in 4-6 weeks any way so granting the postponement was likely to have made little difference to anything the Respondent wanted to progress. The Claimant's representative could then have been briefed. The Respondent was not able to progress the meeting and had to adjourn to another date in any event. Had the Claimant's request been granted it could have avoided the stress caused to the Claimant by the attempt to press ahead in her absence.
161. The Respondent knew that from the Occupational Health report that, although the Claimant was fit to attend with a nominated representative, the Claimant was very tearful and distressed about the prospect of returning to work in any capacity and she might need to leave the meeting if she became too distressed. The Claimant initially requested the postponement as she was still unwell. In the event the Claimant also said she was finding it difficult to be outside without panic attacks. In those circumstances the Respondent ought to have known that the Claimant would be substantially disadvantaged by refusing the postponement on the morning of the meeting and insisting on proceeding in her absence.

Harassment

Did the Respondent subject the Claimant to conduct which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to the perception of the Claimant, the circumstances of the case, and whether it was reasonable for the conduct to have that effect? If so, was all or any of the unwanted conduct related to disability? The Claimant relied on the following events as harassment related to disability:

162. Firstly we find none of the treatment of the Claimant had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We find that those responsible were oblivious to the fact their actions could have that effect. The witnesses we heard did all intend to be supportive.

163. The question for us is whether any of the treatment alleged had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Team Leader I's assertion that the team were "pissed off" at other people working from home, and rostering the Claimant to come into the office, in around late July/early August 2016;

Removal of the agreed working from home adjustment, and requiring the Claimant to attend the office to collect and sort out the day's work, even when rostered on call, from mid-August 2016;

164. Our findings in relation to this are at paragraphs 42-51 above. Prior to this the Claimant had an adjustment to work from home in that she could receive her visits for the day at home rather than attend the office. We have accepted the Claimant's account that Team Leader 1 told her that colleagues were "pissed off" at others not coming into the office, that she would be rostering the Claimant to come in after her leave, and that she wrote these into the diary in front of the Claimant. According to Team Leader I's interview in the grievance two colleagues had raised an issue about the Claimant in particular (p394).

165. This incident had a severe effect on the Claimant's health and a number of panic attacks followed. The Claimant felt forced to do something that she could not cope with due to her disability and we have found this was a withdrawal of a reasonable adjustment to avoid her being put at a substantial disadvantage as a disabled person. The Claimant was intimidated by the idea of her colleagues' disapproval and felt isolated. She did not know that it was not the whole of the team that had expressed this disapproval. We find that it had the effect of creating a hostile environment for the Claimant. We find it reasonable that it had that effect in all the circumstances. It was disability related.

Team Leader 1 amending the Claimant's record to reflect annual leave instead of certified sickness absence, on or around 25 September 2016; and subsequently recording the Claimant's sick leave as Wo separate periods adversely affecting the Claimant's sickness record

166. Team Leader 1 did temporarily amend the sickness record for the period the Claimant was on retreat however after meeting with the Claimant this was reinstated as sick leave promptly. The Claimant accepts that the retreat can seem like she has gone to a spa and the disadvantage of recording that absence as fewer sick days but two discrete episodes of sickness is not straightforward. When she objected it was readily corrected and she never experienced any disadvantage. We do not find this had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her and it would not be reasonable to see it as having such an effect.

Team Leader 1 's threat of a formal warning for sickness absence, in a meeting held in a storeroom, on or around 20 September 2016.

167. We find that in the incident on 20 September 2016 Team Leader 1 was acting outside the formal processes. She intended to be helpful. Nevertheless, as set out above we accept she said the Claimant had

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"triggered a formal" and the implication of what she said was the Claimant would be getting a warning (without a process). What she said left the Claimant believing she had been given a warning and with the feeling that it was not being handled properly through the processes. This was only rectified when she did then receive a letter inviting her to a formal meeting on 3 October 2016.

168. The "triggering of the formal" was as a result of the September absence and so was because of something arising from her disability.
169. There were subsequent text messages which did not rectify the impression the Claimant had been given, though they do mention having a "proper chat",
170. Although the text conversations show that texts remained friendly between the two they also show a blurring of the lines between Team Leader 1 being a friendly colleague and a manager managing sickness. There is a later text message on 31 October 2016 (T20) where Team Leader 1 said "I went back to HR and argued that your sickness had improved but they said you still triggered for formal so I said that I want them present as not happy to do this myself". The suggestion is she is not making the decisions but that decisions are being imposed on her.
171. Team Leader 1 accepts the conversation of 20 September 2016 caused distress. From her evidence the suggestion was that she did not realise she had discretion whether or not to follow the formal process. She said that if she had understood that she had discretion she would have extended the informal stage. She could see how difficult it was for the Claimant that the formal stage had been triggered and the detrimental effect it was having on her, that it was causing her anxiety.
172. The lack of clarity around the process and terminology used by Team Leader 1 leaving the impression the Claimant would be getting a warning
outside of the proper processes, in the context of the blurring of lines between Team leader 1 as friendly colleague and her line manager had the effect of creating an intimidating environment. It was reasonable for it to have that effect.
173. The wider circumstances are that even once the process was followed and Matron 1 became involved it was not handled well, as reflected in the grievance outcome where it was found that there had been poor adherence to the sickness absence policy and poor communication and that this had contributed to the overall issues and impacted on the Claimant's wellbeing. She felt it was the weight of management against her. We have also found that the warning itself was discriminatory and she has not had an appeal.

Team Leader 1 saying "you are not the only one in this team with problems. It is not my job to mother you. I could do without this. What am I supposed to tell you, you're never bloody here" on or around 20 September 2016

174. This is addressed in the facts at paragraph 47 above. Although we accept that Team Leader 1 said "you are not the only one with problems"

it was not said in this context and we have not found overall that this allegation occurred as alleged by the Claimant.

Team Leader 1 telling the Claimant in a meeting on 11 October 2016 that she was being 'too sensitive' to complain about the remark at 20.1 above, and that it 'Wasn't personal'

175. We accept that the Claimant was told she was being too sensitive or over sensitive when she sought in the meeting on 11 October 2016 to address the remark about colleagues being "pissed off" and the withdrawal of the working from home/not attending the office. That this remark was said by Team Leader 1 in the meeting is supported by her union representative. We see this as compounding the effect of the remark about colleagues being "pissed off" and the withdrawal of the adjustment (addressed at paragraph 164-165 above). It is also part of the badly handled sickness process as the Claimant was prevented in the sickness process from explaining the link between the "pissed off" comment by Team Leader 1 and withdrawal of starting work from home and the Claimant's subsequent absence which triggered the "formal". This therefore did contribute to the intimidating and hostile environment identified in paragraphs 164-165 and 167-173.

Team Leader 1 and Matron 1 advising that the Claimant's workload would increase if she wanted to start her work day from home, on or around 6 December 2016

176. In fact the Claimant was told that if she started her work day from home she might have to do an extra visit in order to have the same workload as her colleagues, which the Claimant accepted was a fair swap. This is what was discussed at the meeting although the subsequent letter was badly worded and said she would potentially take a slight increase in the workload to accommodate avoiding the busier office situation. We therefore do not find this allegation occurred on the facts. What was said overall did not have the effect

of creating an intimidating, hostile, degrading, humiliating or offensive environment for her and it would not be reasonable to see it as having such an effect.

The Claimant having to consistently raise with Team Leader 2 that she had been rostered for long days and on call shifts, even though it had been agreed that these would be avoided for her, between 26 September 2017 and 15 January 2018

177. In respect of the situation once the Claimant was being managed by Team Leader 2 we have accepted that there was a failure to make reasonable adjustments in that the Occupational Health advice was only partially actioned, with some on calls and long days being left on the roster with a view to reviewing the situation before they occurred. This itself caused the Claimant stress and pressure. At that time there were a number of comments by the Claimant saying she felt well supported in

her new team including by Team leader 2, including as late as 21 November 2017 and a message thanking Team Leader 2 on 30 November 2017. She did write to Matron 2 on 5 December 2017 to express that the rota is not as Occupational Health recommended and that she was finding it stressful to go through and get on calls removed but did not express this as harassment (p450A). In our view this part of the claim is a failure to make a reasonable adjustment for failing to fully implement the Occupational Health advice, but not harassment. It created a stressful environment but not an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

The Head of Midwifery's failure to remove the formal warning from the Claimant's record on or around 2 November 2017

178. It is right that the formal warning was not removed from the record as it had expired and in any event expired warnings would not be removed from the record. This did not create an intimidating hostile, degrading, humiliating or offensive environment for the Claimant. The issue in respect of the formal warning is that it should not have been issued and the Claimant was not given an appeal. We have already addressed these above as discrimination arising from disability. We do not find this to be an act of harassment.

Team leader 3 advising the Claimant she was expected to cover an on call shift on 25 November 2017, as her adjusted rota was straining the service and other midwives were being inconvenienced

179. We have accepted that Team Leader 3 was not critical of the Claimant nor asked prying questions. Her priority was to find someone else to cover at short notice so she asked the Claimant if anyone could cover and likely said she would have to call and find someone else. We accept she would have said she would bump the third person on call up and find someone to cover her. We do not find this allegation proven. Team Leader 3 happened to be the person who was on duty and dealt with the consequence of the Claimant not being on call but having not been taken off the rota on 25 November 2017. She accepted what the Claimant said about not being on call.

Matron 3's hostility towards the Claimant on 30 November 2017, erroneously believing that the Claimant had refused to attend the Birth Centre, and her comment that the Claimant was inconveniencing other midwives

180. This was addressed at paragraph 104 above. Matron 3 happened to address the effect of the Claimant not having been informed about a parents' visit on her first long day. She addressed the situation in a matter of fact way but did not require the Claimant to come in. We do not find this allegation proven.
181. We find this incident, and the incident at paragraph 179, are not incidents of harassment but are the effect of the Claimant having been put on the on calls and long days too early, contrary to the Occupational Health advice.

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Team Leader 2 and HR's decision to proceed with the Health review on 26 February 2018.

182. We find the decision to proceed with the stage 1 formal meeting in response to the Claimant's request for the adjournment did create a hostile environment and it was reasonable to consider it had that effect. All the Claimant was asking for was a two-three week adjournment when she was having panic attacks at the thought of leaving the house. Occupational Health had in any event said the Claimant was at risk of needing to leave due to distress. It was not possible to make progress in her absence and all that was achieved by informing her on the morning that the meeting would go ahead was to put her in a stressful situation as she organised a representative to go in her absence at short notice.
183. This was the stage 1 formal meeting in respect of disability-related absence and the need for the adjournment was the fact the Claimant was unwell and experiencing panic attacks about leaving the house and so this was disability related.

Next steps

184. This matter will now be listed for a one day remedy hearing. If the parties consider one day is not sufficient they should contact the Employment Tribunal as soon as possible.
185. If the parties wish dates to avoid to be considered they should provide dates to avoid to the Employment Tribunal within 14 days of the decision being sent to the parties.
186. Should Case Management Orders be required for the remedy hearing the parties should inform the Employment Tribunal within 14 days of the decision being sent to the parties.
187. The above instructions are on the basis both sides remain legally represented. If this is not the case please inform the Tribunal as soon as possible.

**EMPLOYMENT JUDGE
CORRIGAN**

20 December 2019

RESERVED JUDGMENT & REASONS SENT TO
THE PARTIES ON: 14 JANUARY 2020

FOR THE TRIBUNAL OFFICE

