EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms L Loureiro **v** **Royal National Orthopaedic Hospital NHS Trust**

Heard at: Watford (in person and CVP) **On**: 23 to 26 August 2021

Before: Employment Judge Manley
Members: Ms Robinson
Mr Middleton

Appearances
For the Claimant: In person
For the Respondent: Mr Kennedy, Counsel

JUDGMENT

1. The claimant was a disabled person at the material time in 2018 and 2019.

2. The claimant's claim for failure to make reasonable adjustments fails.

3. The claimant's claim for harassment about alleged matters on 12 June 2018 was presented out of time and it is not just and equitable to extend time. Even if time had been extended, the claim would have failed.

4. The claim for harassment for alleged matters on 19 February 2019 fails.

5. The claim for victimisation fails.

6. All the claimant's claims for disability discrimination fail and are dismissed.

REASONS

Introduction and issues

1. The claimant brought claims for disability discrimination which include claims for failure to make reasonable adjustments, harassment and victimisation.

2. The claims were set out in a case management summary after a hearing in March 2021. At paragraph 10 of the summary sent to the parties, this is recorded:

> "10 The claims that the claimant was making about what happened on 18 February 2019 were, I ascertain from what she told me, these.
>
> 10.1 There had been a failure to make a reasonable adjustment within the meaning of section 20 of the EqA 2010 for what she claimed were the manifestations of her impairment in the form of what she called dyslexia, which had led to the respondent, acting through Ms Nita Gami, failing to ensure that the claimant understood what she was required by the applicable rota to do and therefore when and where she was next required to attend work. The provision, criterion or practice ("PCP") on which the claimant relied, she agreed after discussion with me, was that employees understand rotas properly and act in accordance with them. It is the claimant's case that a reasonable adjustment in the form of a short email to her to remind her of where she was going to work for her next shift should have been made, if and when there was any deviation from her usual working pattern and/or workplace.
>
> 10.2 Ms Gami had harassed the claimant in breach of section 26(1) of the EqA 2010, by saying the things set out in the second paragraph in box 8.2 of the claim form.
>
> 10.3 The way in which Ms Gami had treated the claimant as described in the two preceding subparagraphs above was a breach of section 27 of the EqA 2010, in retaliation for a grievance that the claimant had submitted in 2018 about the manner in which she had been treated by Ms Gami in that year."

3. It was also set out in that document that there was a claim for victimisation. Paragraph 12 of the summary stated that the claimant was pursing claims for breach of s.26 of the Equality Act 2010 in respect of the manner in which she says she was treated in 2018 as described in Box 15 of the claim form. This is a reference to an alleged incident in June 2018. That paragraph in the case management summary goes on to explain that claim was out of time unless time is extended on the basis of it being just and equitable to do so.

The hearing

4. At the hearing we heard from four witnesses for the respondent: Ms Gami, Lead Ward Clerk, Ms Ansell and Ms Hoey, Ward managers and Ms Kehoe, Divisional Head of Nursing. The claimant also gave evidence.

5. The claimant had also produced some letters from people who were not in attendance that she asked us to take into account and they were included with the witness statements. We read them and they contained a number of concerns about management, and Ms Gami in particular, but did not touch on any of the issues in this case. Of course, as these people could not be cross examined, little weight could have been placed on them in any event.

6. The bundle was almost 1000 pages long but we read only a very small proportion of that bundle. The claimant had sent in more documents to the tribunal on the Friday before the hearing. The respondent objected to those documents but we looked at them briefly to ascertain if they might be relevant. The claimant was told that she could refer to any of those documents as long as they were relevant to the issues. She did introduce two such documents during cross examination which did not really take us any further.

7. After we finished the cross examination of the respondent's witnesses and the claimant, time was allowed for the claimant and the respondent's representatives to prepare written submissions. The tribunal was told that the respondent sent their submissions to the claimant before 9am on the third day. We had agreed to meet at 12 noon to allow time for the parties to read each other's written submissions. The claimant made oral submissions as did the respondent's representative on the third day but the claimant indicated that she had not read all of the respondent's representative's submissions so she was allowed further time to read them and she then addressed us again. We then deliberated and the Employment Judge gave oral judgment at 2pm on the fourth day.

The facts

8. These are the relevant facts.

9. The claimant was diagnosed with dyslexia in 2007 and a report was prepared for when the claimant was due to attend university. A copy of that report was in that bundle and has now been seen by the respondent but not before the incidents that we will shortly come to.

10. In summary, the report which was by a Chartered Education Psychologist has this conclusion (page 921). That the claimant:

> "Appears to be achieving at a significantly lower level than her expected for someone of her ability in some key areas of literacy skills development. Given the additional evidence of working memory/processing speed difficulties along with some associated phonological problems, it is quite reasonable to describe Lucia as someone who additionally experiences a dyslexic type Specific Learning Difficulty combined with her general learning difficulty."

11. There are more examples on the effects of that disability in the report. They include matters such as slow reading speed, difficulty summarising information and finding it hard to organise etc.

12. We also had the claimant's evidence about the effects of her alleged disability on her normal day to day activities. These are at paragraphs 4 and 5 of her witness statement. At paragraph 4 and 5 she says:

> "I have a very limited short-term memory span but a good long-term memory. That, I learnt best by doing and repetitions. I ask odd questions until I understood concepts or I am clear that I understood what was unclear to me. That, I have difficulties with memorising names, sometimes I swap words roster, times/dates

> thus I need to pay particular attention and sometimes to be reminded off. I am a slow learner and reader that I have several difficulties writing especially under stress and I do not notice that I expand and repeat myself speaking/writing.
>
> I colour code things to help me, highlight and use bold writing a lot to stress what I want to express or is important; I make different to do lists, must have a set routine and keep things in a certain order to manage multitasking which is a big challenge for me".

13. What is not said by the claimant there is anything to do with having difficulty reading a rota although she does make reference to memory issues.

14. The claimant worked as a bank ward clerk for the respondent from 2015. The respondent is of course an NHS hospital. It therefore has a significant number of workers and the usual polices for grievances; assistance from an HR Department and referrals to Occupational Health. At the time the claimant started it was recorded by Occupational Health that she had indicated that she had no disabilities that would affect her ability to perform the role (page 389). As a bank ward clerk, the claimant needed to look at the rota to check when she was to be working and it would change according to need. There were no reported concerns about her missing any shifts.

15. The claimant was interviewed and appointed to work for the ward clerk permanent role in June 2017. The lead ward clerk then was Ms Moore and Ms Gami, who had been a ward clerk, was appointed to lead ward clerk in October 2017. The tasks of a ward clerk involves admissions, discharges and appointments. The lead ward clerk is responsible for 13 ward clerks including setting up the rota and matters arising from it.

16. Ms Gami's evidence is of a good working relationship with the claimant before her appointment as lead ward clerk. There was nothing to suggest otherwise by the claimant. Around the time of her appointment Ms Gami was informed by the claimant that she was dyslexic.

17. In Ms Gami's witness statement she set out details of what she said to the claimant at the time she was told about the dyslexia. Paragraph 4 reads:

> "When I asked her if she needed any further support she informed me that she didn't. I suggested during a one to one meeting around October/November 2017 that she could receive training on the Trusts "ReadWrite" programme which could be installed on her computer to support her with her dyslexia. I also suggested there is a scanning device used by medical records to scan patient numbers which would assist her with processing notes and that we could request that device for her.

18. Our understanding is that the claimant says the ReadWrite programme was in any event either already installed or installed shortly thereafter.

19. There was an appraisal with the claimant on 22 February 2018 with Ms Gami and Ms Ansell. Notes of this are at page 954. This was a positive appraisal for the claimant. The claimant's dyslexia was also mentioned and

there was reference to improvements to the workstation. There was a suggestion made to talk to an appropriate officer to support the claimant in connection with her dyslexia.

20. The claimant recollects that she showed Ms Gami and Ms Ansell how she worked including the colour coding and so on but they could not remember when that happened precisely.

21. The claimant was unwell in April 2018 and her work was being covered by bank ward clerks and Ms Gami. The claimant worked with a colleague who covered afternoons and the claimant worked in the mornings. Some work was being left undone causing a backlog. Ms Gami became concerned and an audit showed that some things were being missed on this particular ward. Ms Gami decided she would hold informal meetings with each of the claimant and the colleague. The claimant was written to and invited to an informal meeting to "*discuss concerns that I have relating to your performance at work and identify ways in which I can support you."* (page 378). The claimant replied on 11 June querying the motives for the informal meeting. She said she was totally unprepared and that it was contradictory to say it was informal but advising her in the letter to speak to the trade union.

22. This led to a discussion between Ms Gami and the claimant on 12 June 2018. The claimant was anxious and Ms Gami sought to reassure her that there was nothing to worry about. The claimant thought the concern was about admitting a patient incorrectly as this had occurred a little earlier. The claimant had said she would repeat the error because she had been instructed by a nurse and she also always followed instructions. Ms Gami explained that nurses do not understand the system and the claimant repeated she would follow instructions. At this point Ms Gami said something like: "*What part of No do you not understand?".*

23. Ms Gami denies that she said the other things the claimant now recalls which include remarks such as: "*No means No*", and other matters alleged by the claimant including the comment *"Because you are dyslexic does that mean I have to let you do mistakes"*

24. This incident is, of course, now some time ago. It is unlikely that anyone would be able to remember precisely what was said. On a balance of probabilities, the employment tribunal believes that some of the alleged comments like these may well have been made. Although it was denied by Ms Gami, the claimant did report them very soon thereafter. The tribunal accepts that Ms Gami may have been rather frustrated as the claimant appeared to be refusing to follow her instructions. Ms Gami lacked management experience and she might well have made these or similar comments. We do not find that Ms Gami said "*Because you are dyslexic etc*". The tribunal also accepts that Ms Gami made it clear to the claimant that there was nothing to worry about and she was trying to set the claimant's mind at ease.

25. There then was the informal meeting on 14 June. It was attended by Ms Gami with the ward managers Ms Hoey and Ms Ansell. The claimant's attitude was described by those as anxious or indeed angry. The tribunal accepts she was certainly anxious and appeared defensive. A discussion began about what issues were arising but the claimant became agitated and mentioned bullying and harassment and the meeting ended. This was also partly because Ms Ansell and Ms Hoey thought that the other ward clerk should be present as it involved her too. The tribunal has seen notes of the meeting but they are not agreed by the claimant. In any event, the claimant then wrote to Ms Landers, who was Ms Gami's line manager, complaining about the meetings. This is at 397.

26. There was then a meeting with the claimant and Ms Gami and Ms Landers to try and resolve the issues. This is set out in paragraph 15 of Ms Gami's witness statement.

27. The claimant sent a grievance to the respondent later in June 2018. She was then on sick leave and there was an OH referral. Through the process of looking into the grievance, Ms Gami sent an apology. The apology is dated 24 October 2018 and reads:

> "Dear Lucia,
>
> Please accept my sincere apology for the process that was carried out for the matter of concern.
>
> To be honest it was not personal and it was not my intention to hurt you. I was following the process as a Lead Ward Clerk. It was my first time experience and I have learned alternative approaches to these situations.
>
> I hope that we can put this matter behind us and I look forward to working together."

28. The referral to Occupational Health in respect of dyslexia did not take matters very far because they said that did not do dyslexia assessments.

29. In any event, attempts were continuing to resolve matters and a mediation agreement was entered into as well as an action plan. The claimant told the tribunal that she did not receive a copy of the action plan but we heard evidence that there was such a plan and that indeed the actions were carried out.

30. The claimant returned from sick leave in October 2018 and Ms Gami emailed the claimant on 16 October about the rota for the rest of the year. She said her day off had changed for November, Tuesday to Wednesday and also said "*Also I will have to change your Saturday 8 December 2018 (opening of new building) to 1 December 2018."* There was also an outstanding leave request for 31 December to 8 January.

31. The claimant was on annual leave between 26 November and Friday 30 November. She was scheduled to work on Saturday 1 December as the email I have just read indicated. The claimant did not attend but she wrote

to Ms Gami on the following Monday and this appears at page 557-558 of the bundle. In essence, the claimant complained that there was some unfairness in changing the rota. She indicated that she had checked the rota. She told the tribunal later that she had apologised.

32. There were no further issues with attendance after that until the next matter we come to. The claimant attended in line with the rota until she had an injury to her ankle and was then on sick leave as a result.

33. There was then an issue when she was due to return as the ward she worked on needed the ward clerk to undertake regular door opening and that was difficult because of her bad ankle. There was therefore a discussion on 18 February 2019 with Ms Ansell and Ms Kehoe about the possibility of the claimant moving to a different ward without this door difficulty and she was offered to move to another ward on a temporary basis. What was said to her is that she could start "*tomorrow*", namely 19 February. The claimant did not say that that was her day off and the nurses involved were unaware as they were not able to check the rota that being part of the system that they did not have access to.

34. A letter was written to the claimant (page 996), which informed her that she should move to the new ward and start on 19 February.

35. The tribunal can understand that the claimant might have found this confusing because it was her day off. We do not understand why she did not mention to the nurses that it was her day off. As the tribunal understands it, the claimant did not think to check the rota for her day off and she therefore attended the next day, 19 February.

36. She had failed to check the rota and she later apologised. Ms Gami saw the claimant, remembered that it was her day off and she had booked a bank clerk to cover the claimant's work. Ms Gami therefore went to check with Ms Kehoe to see what had occurred and came back to discuss with the claimant why she had attended on her day off.

37. There is a dispute about the detail of what was said between the claimant and Ms Gami. Information about it is contained in various parts of the witness statements and the bundle. In particular, there is information in paragraphs 34, 37-41 of the claimant's witness statement and at page 592 of her grievance. Ms Gami deals with it at paragraph 27 and when she was asked about it at the grievance it appears at 682.

38. We also heard evidence in cross examination. First, the claimant says that Ms Gami said, "*Because you are dyslexic now you cannot read a rota*" or words to that effect. Ms Gami denies making that comment but accepts that she was asking questions because the claimant had referred to her dyslexia in relation to her coming to work. Ms Gami was trying to understand what the claimant was saying to avoid these situations in the future. The tribunal find that there was mention of the claimant's dyslexia and the query about whether that meant she could not read the rota. That appears to the tribunal to be a reasonable question given that the claimant herself had

made reference to that and we accept that this was the first time the claimant had suggested any issues with understanding the rota.

39. The claimant also says that Ms Gami said, "*I'll have to tell matron to read the rota for you*". Ms Gami denied in cross examination that she would say that because nurses cannot check the ward clerk's rota. It is possible that she put it as a question to the claimant as to whether the claimant was suggesting that nurses should or should have checked the rota but it is not entirely clear what part of the conversation that was. We accept that Ms Gami did not say it in the way in which it is now remembered by the claimant. The whole context of the meeting was to understand why the claimant had come into work on her day off and how to ensure that it did not happen again, Ms Gami having arranged bank staff to cover her.

40. The claimant complains that Ms Gami's tone of voice and what she called "*passive aggressive demeanour*" affected how she felt about what was said. We have heard evidence from Ms Kehoe who saw Ms Gami shortly after this discussion that Ms Gami appeared calm and thought that the discussion with the claimant had gone smoothly. The claimant agrees that Ms Gami was calm. The claimant has not been able to show that Ms Gami was displaying the demeanour complained of. Ms Gami was aware that the claimant had concerns about her management and this would be likely to lead to Ms Gami being extra careful with the claimant. The claimant's perception of the discussion is not based on the evidence before the tribunal. Questions were asked for clarification in a calm and non-confrontational manner and the claimant, who was obviously upset, has misinterpreted the situation. The claimant herself said to Ms Kehoe in an email sent that day, that she gets confused.

41. Ms Kehoe replied to an email the claimant sent saying that there was no intention to patronise or discrimination but there was an expectation that the claimant should be able to communicate her shift pattern.

42. The claimant then raised a formal grievance on 25 February. This was a long and detailed grievance and the procedure which followed it was very detailed. The report and accompanying papers extend to over 200 pages. The outcome was communicated to the claimant in July 2019 and as her grievance was not upheld, she appealed the outcome and the appeal outcome was sent to her in September.

43. The claimant remains in employment but is no longer managed by Ms Gami nor has she been for some time.

Law and submissions

44. We are concerned with a claim made under the Equality Act 2010 (EQA) concerning the protected characteristic of disability. Section 6 (EQA) provides the definition of disability which we must apply. We also take into account the EHCR definition guidance on definition of disability. The respondent does not accept that the claimant is disabled under the definition

in the EQA. The central question is whether there is an impairment that has a substantial adverse effect on the claimant's normal day to day activities.

45. The relevant parts of the other relevant sections of EQA are as follows:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) –

(5) -

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with a duty in relation to that person.

26 Harassment

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

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

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

(i) violating B's dignity, or

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

(2) -

(3) -

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

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

27 Victimisation

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

123 Time limits

(1)Proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(2) -

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136 Burden of proof

(1)This section applies to any proceedings relating to a contravention of this Act.

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person

(A) contravened the provision concerned, the court must hold that the contravention occurred.

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

(4)The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5)This section does not apply to proceedings for an offence under this Act.

(6)A reference to the court includes a reference to—

(a)an employment tribunal;

48. The burden of proof provisions at section 136 EQA require the tribunal to consider, on the oral and documentary evidence before it, whether there are facts which point to discrimination under the sections relied upon.

49. As far as the time limit under section 123 EQA is concerned, the guidance in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 still applies. "*The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*". The case of Ma v Merck Sharp & Dohme Ltd [2008] All ER 158 states that the claimant must have a "*reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs*".

50. If there is no continuing conduct and a complaint has been presented outside the three-month period, the tribunal has jurisdiction to hear claim if it decides that it can extend time on the basis that it would be just and equitable. In British Coal Corporation v Keeble [1997] IRLR 336 it was said that the discretion is as wide as that given to the civil courts by section 33 of the Limitation Act 1980. The court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension and to have regard to all the other circumstances, in particular the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected by delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. However, it is said that there is no legal requirement on a tribunal to go through such a list in every case provided of course that no significant factor has been left out of account by the tribunal in exercising its discretion. Another relevant case is Robinson v Post Office [2000] IRLR 804 where the claimant was following an internal process and that such a factor can be taken into account when deciding whether it is just and equitable to extend time. That case also

reminds me that time limits are exercised strictly in employment cases and that the exercise of discretion is the "exception rather than the rule"

51. The complaint of a failure to make reasonable adjustments under sections 20 and 21 EQA was central to this claim. The relevant sections are as set out above. The tribunal's task is to first consider the proposed provision, criterion or practice (PCP) and determine whether there was a PCP that placed the claimant, as a disabled person, at a substantial disadvantage. The question of whether there was substantial disadvantage requires identification of a non-disabled comparator (usually in these cases, a hypothetical comparator) who would not suffer the disadvantage.

52. If there is a PCP and the employer has knowledge of the disability and its effects, the tribunal will move to consider whether the respondent can show it has taken such steps as were reasonable to avoid that disadvantage. This requires careful analysis of the evidence and finding of the relevant facts to which the legal tests should then be applied. In considering what steps would have been reasonable, with the burden of proof resting on the employer, the tribunal looks at all the relevant circumstances and determining that question objectively, may well consider practicability, cost, service delivery and/or business efficiency. The central question is whether the respondent has complied with this legal duty or not (see Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664). Guidance is also provided in Environment Agency v Rowan [2008] IRLR 20 that the tribunal should look at the nature of any substantial disadvantage caused to the claimant by any PCPs before looking at whether there was any failure to make reasonable adjustments. The purpose of such adjustments as are reasonable is to ameliorate the disadvantage as identified.

53. The claimant also complains of harassment. The tests are as set out in section 26 with the burden of proof resting on the claimant to show unwanted conduct related to disability. She also has to show that the unwanted conduct had the purpose or effect of violating her dignity or creating an intimidating etc environment. The question of whether any unwanted conduct related to disability had that effect must be considered objectively taking into account the claimant's subjective perception. In Grant v HM Land Registry and another [2011] IRLR 748, the Court of Appeal reminded tribunals that they should not "*cheapen the significance*" of the words of the harassment section as "*They are an important control to prevent minor upsets being caught by the concept of harassment*".

54. The victimisation claim arises under section 27 and requires the claimant to show a protected act. If there is such an act the claimant needs to show sufficient facts from which the tribunal could conclude there was less favourable treatment of the claimant because of that protected act.

55. In summary, the claimant bears the initial burden of proving all parts of her claim. If she proves facts from which we could conclude that discrimination has occurred then the burden of proof moves to the respondent.

56. Both parties made submissions and these were considered by the tribunal when deliberating. There was no dispute on the legal tests to be applied. The claimant expressed her concern that she had been treated badly, she believed, because of her dyslexia. The respondent's representative pointed us towards a number of helpful cases and extracts on the claims made.

Conclusions

57. The first question is whether the claimant was disabled. The tribunal have decided that the claimant was disabled at the material time. The assessment that we can see in 2007 refers to a number of facts which would support the finding that there were substantial adverse effects on normal day to day activities. The impairment is clearly long-term coupled with the claimant's level of understanding and memory difficulties. What she says in her witness statement at a number of other points in the evidence. The tribunal is satisfied that she was so disabled at the time of the events in 2018 and 2019.

58. We therefore go on to consider the reasonable adjustments claim. The first question is whether there was a provision criterion or practice, a PCP. The tribunal have decided that there was such a provision criterion and practice. The respondent did have the expectation that the ward clerks should read and understand the rota and act upon it.

59. We therefore turn to the question of whether the PCP caused any substantial disadvantage to the claimant. As indicated, the claimant bears the burden of proof for this and she has not managed to show that there is any evidence that such a PCP caused her substantial disadvantage. This requires comparisons to be made with a non-disabled person. In this case, likely to be someone on the rota without dyslexia. The claimant has failed to show such disadvantage. The claimant could read and understand the rota and she gave no direct evidence to the tribunal of having any issues with reading it. Rather the suggestion was in relation to the two instances where she had failed to check the rota. The claimant might well be arguing that she is more likely to forget, possibly more often than other people, but there were two instances only and this cannot amount to a substantial disadvantage. Particularly as there were no action taken against her by the respondent with respect to either instance.

60. Even if the claimant had shown a substantial disadvantage, she would not have been able to show us that there has been any failure to make reasonable adjustments. The reasonable adjustment suggested is an email reminder of any changes. The tribunal cannot find that that would be a reasonable adjustment as it would not appear to alleviate any disadvantage. On one of the occasions, for the 1 December 2018 change, the claimant had been sent an email which told her of that change. She clearly had simply forgotten to check.

61. For the other occasion, there was no change, her day off had remained the same and, again, she had forgotten to check. The nurses involved were making adjustments for the claimant's ankle and they were unaware that it

was her day off as the claimant did not tell them. The claimant was aware of the ward change and did not need to be told about it and it was a simple error that she was following the instruction rather than checking the rota. There was no criticism of the claimant. She was merely sent home after Ms Gami tried to find out how to avoid it happening again. The claimant was not criticised in the discussion by Ms Gami who was simply trying to understand the impact of what the claimant was saying which was connected to her disability. The respondent had not been aware before that there were any issues about the claimant checking the rota so they could not possibly have made this adjustment suggested before this meeting on 19 February at the earliest. The adjustment sought is not a reasonable adjustment, particularly as in many instances it is what does happen that emails are sent if there are changes.

62. The claimant did not suggest any other adjustments and the tribunal have not heard any evidence which would identify any other possible adjustments for any disadvantage, even if the claimant had been able to show such disadvantage.

63. The claim for failure to make reasonable adjustments must fail.

64. Turning then to the harassment claim, we look first at the first occasion, that is 12 June 2018. The first question is whether that claim was presented out of time. The tribunal asks whether there was conduct extending over a period and, if not, is it just and equitable to extend time?

65. The claimant suggested in her closing remarks that she was unaware of this issue but if it is clear that it was discussed at the preliminary hearing in March as it was recorded in the summary sent to the parties, and again in the respondent's opening note.

66. Clearly the complaint is out of time unless there is evidence of conduct extending over a period. There is no such conduct. There were no matters of concern or linking the events between June 2018 and February 2019. The grievance was being dealt with by mediation and action being taken. There is no link as the February 2019 matter concerned the moving of the wards for the claimant which was the responsibility of Ms Kehoe and not Ms Gami.

67. Nor has the claimant provided any evidence of it being just and equitable to extend time. The claimant was working unless she was away on sick leave and there were no issues about the rota until she attended on what should have been her day off in February 2019. The delay in bringing this claim is lengthy and there is clear prejudice to the respondent because that delay affects people's ability to recall what was said. No particular reason has been given for the delay and the claimant had the assistance of her trade union. The claimant has not shown that it would be just and equitable to extend time.

68. That complaint is out of time and the tribunal has no jurisdiction to her it.

69. Even if that complaint had been in time, what was said does not amount to harassment. Taking into account the claimant's perception, which is that what was said in some way violated her dignity, but also bearing in mind the objective tests in a s.26(4) (b) and (c) the circumstances of the case and whether it was reasonable for it to have that effect. In short, and putting it plainly, there was nothing untoward about the discussion on 12 June 2018. Even if we had been able to consider it, if it been in time or time was extended, the claimant would not have succeeded.

70. Turning then to the second harassment claim which was thought to be 18 February but is actually 19 February 2019. We ask ourselves whether any conduct of Ms Gami was such as to amount to having the purpose or effect of violating the claimant's dignity etc. The first question was whether there was such conduct and the tribunal find that there was not. It was a reasonable management discussion, in an attempt to understand the claimant's needs to prevent a recurrence. The mere mentioning pf the claimant's disability does not make it harassment. And in spite of the claimant's perception, we take into account all the circumstances and find that it was not reasonable for her to consider that it had that effect. Her harassment claims must all fail and are dismissed.

71. Turning then to the victimisation claim under s.27. The first question is whether there was a protected act. The respondent accepts as do we, that the grievance in June 2018 amounts to such an act. We therefore consider whether there was any connection between that act and what subsequently occurred and whether it was less favourable treatment.

72. The first problem for the claimant is that she cannot show any detriment as there has been no harassment or failure to make reasonable adjustments. Even if she could, she has failed to shift the burden of proof to the respondent to show that any steps taken by them were in any way connected to the grievance in 2018 which was being resolved through mediation.

73. The victimisation claim must fail. This means that all the claimant's claims must fail and are hereby dismissed.

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Employment Judge Manley

Date: 8 September 2021

Sent to the parties on:

21 October 2021

For the Tribunal Office