EMPLOYMENT TRIBUNALS

Claimant: **Mrs. S Morgan-Freelander**

Respondent: South West London and St George's Mental Health NHS Trust

Heard at: London South via CVP On: 6 to 9 February 2023.

Before: Employment Judge Mclaren
Members: Mr. N Shanks
Mr. C Wilby

Representation
Claimant: In Person
Respondent: Ms. E Skinner, Counsel

JUDGMENT

The unanimous decision of the employment tribunal is as follows: –

1. **The tribunal has no jurisdiction to hear the claims of harassment related to disability that took place on the 16th and 17th of March. These are brought out of time and not just and equitable to extend time.**
2. **The respondent did not contravene section 15 of the Equality Act. This means these claims do not succeed.**
3. **The respondent did contravene section 20 and 21 of the Equality Act in failing to make reasonable adjustments. This claim succeeds.**
4. **The respondent did not contravene section 26 of the Equality Act in relation to issues 4.1.4 but did contravene this section of the Equality Act in relation to issues 4.1.5, 4.1.6, 4.1.7 and 4.1.8. These claims of harassment related to disability therefore succeed.**

REASONS

Evidence

1. We heard evidence from the claimant and from three witnesses for the respondent. These were Simon Coningsby, at the time the clinical manager for Richmond adult community services, Sally French, lead

occupational therapist for Kingston and Richmond, and Arlene Marshall, the claimant's line manager.

2. We were provided with a bundle of 282 pages and an agreed cast list and chronology. The parties, by agreement, also provided the tribunal with additional documents. These were the timeline of UK coronavirus lockdowns from March 2020 to March 2021, sourced from the Institute for Government Analysis, and an email from Mr Coningsby, dated 27 March, sent to his staff enclosing the latest occupational health guidance sent on 26 March. We added these to our bundle.
3. During the hearing we identified it would be useful to have the full text of the Prime Minister's statement of 16 March. We were also provided with a copy of the full statement of 10 May, an article from the BBC website, and an article from the Guardian of 15 March referring to isolation for the over 70s. The claimant provided us with a copy of the front page of the Sunday Express and links to an interview with Mr Hancock on the subject, and an article written by a firm of solicitors summarising the position on the 15 and 16 of March.
4. We were also assisted by helpful submissions from the respondent which was provided in written form. The claimant made very brief submissions and confirmed she did not wish to do more.
5. The findings of fact set out below were reached by the tribunal on a balance of probabilities, having considered all the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the tribunal's assessment of the witness evidence.
6. Only findings of fact relevant to the issues, and those necessary for the tribunal to determine, have been referred to in this judgement. It would not be necessary, and neither would it be proportionate, to determine each and every fact in dispute. If the tribunal has not referred to every document it has read and/or was taken to in the findings below, that does not mean it was not considered if it was referred to in the witness statements/evidence.

<u>Issues</u>

7. The Claimant brings complaints of discrimination arising from disability (section 15 EQA 10), a failure to make reasonable adjustments (section 20/21 EQA 10) and harassment relating to disability (section 26 EQA10).
8. The issues had been agreed at a preliminary hearing and the parties confirmed they were as described at that hearing but with two changes. The relevant date that any complaint is said to be out of time is 9 May 2020, and the question of the respondent's knowledge was accepted. Issue 1.1 was therefore amended and issue 2.7 deleted.
9. As the time allocation for the hearing had been reduced by one day, we agreed with the parties that this hearing would consider liability only. Remedy, if required, would be addressed at a separate hearing. We have not included the issues on remedy in the list of issues.
10. The issues that the Tribunal will decide are set out below (with the amendments referred to above).

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 10 May 2020 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

> 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
> 1.2.2 If not, was there conduct extending over a period?
> 1.2.3 If so, was the claim made to the Tribunal within three months. (plus, early conciliation extension) of the end of that period?
> 1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?
>
> The Tribunal will decide:
> 1.2.4.1 Why were the complaints not made to the Tribunal in time?
> 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the First Respondent treat the Claimant unfavourably by:

> 2.1.1 Undertaking an insufficient risk assessment on 22 May 2020 in that the First Respondent failed to undertake an individual risk assessment of the Claimant and there was a failure to discuss the Claimant's type 1 diabetes and how her role would be adapted to minimise risk
> 2.1.2 Requiring the Claimant to attend the First Respondent's premises on 29 May 2020
> 2.1.3 Terminating the Claimant's placement with the First Respondent on 29 May 2020 by means of one week's notice.

2.2 Did the following things arise in consequence of the Claimant's disability, namely the Claimant's increased risk of Covid 19

2.3 Was the unfavourable treatment because of any of those things?

2.4 Was the treatment a proportionate means of achieving a legitimate aim?

2.5 The First Respondent says that its aims were:

2.5.1 The need of the service and vulnerable service users
2.5.2 The equitable distribution of work among staff
2.5.3 The appropriate management of staff
2.5.4 Following relevant guidance, including in relation to staff deemed to be clinically vulnerable.
2.5.5 Management of the first respondent and its resources appropriately during an emergency pandemic
2.5.6 Cost

2.6 The Tribunal will decide in particular:

2.6.1 was the treatment an appropriate and reasonably necessary way to achieve those aims.
2.6.2 could something less discriminatory have been done instead;
2.6.3 how should the needs of the Claimant and the Respondent be balanced?

3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

3.1 A "PCP" is a provision, criterion or practice. Did the First Respondent have the following PCPs:

3.1.1 The requirement to attend the First Respondent premises to see service users/patients in person from May 2020.
3.1.2 The requirement to work in the community.

3.2 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that increased risk of serious illness due to Covid 19

3.4 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

3.4.1 The First Respondent should have undertaken a thorough and detailed individual risk assessment in conjunction with Occupational Health

3.5 Was it reasonable for the First Respondent to have to take those steps and when?
3.6 Did the First Respondent fail to take those steps?

4. Harassment related to disability (Equality Act 2010 section

26)

4.1 Did the First Respondent do the following things:

4.1.1 On or about 16 March 2020 coerce the Claimant to covering a depot clinic without any PPE.

4.1.2 On or about 17 March 2020 did Mr Simon Coningsby tell the Claimant, when she raised Covid 19 and her diabetes, that she was being "over anxious about my condition/risk wasn't serious" and the Prime Ministers response as "draconian" in suggesting people such as the Claimant should work from home

4.1.3 On or about 17 March 2020 did Mr Coningsby tell the Claimant that he would put her in touch with another type I diabetes colleague so she could discuss her condition and despite the claimant expressly declining that offer then proceed to send an email to Ms Melissa Ellison.

4.1.4 Ms Sally French on or about 14 May 2020 in the conduct of a risk assessment state to the Claimant that she was unable to record the risks at the Claimant's base as she did not work there and if she did not return to work it was likely Mr Coningsby would let her go.

4.1.5 The conduct of Ms Arlene Marshall on or about 22 May 2020 in discussing the risk assessment with the Claimant in that the Claimant was not shown a general or individual risk assessment and there was a failure to discuss the Claimant's type 1 diabetes or how her role would be adapted to minimise risk

4.1.6 The contents of a risk assessment received by the Claimant on or about 26 May 2020 and in particular the failure to record the Claimant's type 1 diabetes or of any reasonable adjustments.

4.1.7 The comments of Mr Simon Coningsby and Ms Arlene Marshall on or about 29 May 2020 regarding the Claimant's concerns as to Covid 19 and in particular that the Claimant should return to working at Barnes hospital and the advice received by the Claimant from an occupational health nurse did not apply and the Claimant needed to be placed elsewhere. It was then suggested the Claimant's placement be terminated.

4.1.8 The termination of the Claimant's placement at the Second Respondent on 05 June 2020.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to the Claimant's disability?

4.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

<u>Adjustments</u>

11. The claimant has Type 1 Diabetes. She had identified in her ET1 that she would require breaks in proceedings to allow her to test and adjust her glucose level if needed, and perhaps to eat regularly. She would also need access to her mobile phone in order to monitor her blood glucose levels.
12. The claimant had asked in advance for permission for her mother to take over as a representative if she needed a lengthy break. This had been granted, but it had been explained to the claimant that if she needed a break then the whole tribunal would break at the same time and would not continue in her absence. During the hearing we tried a number of break patterns and settled on a break of 10 minutes every hour, plus any additional breaks requested by the claimant.
13. During the hearing the respondent expressed some concern about Mrs Freelander's proximity to the claimant and questioned whether that was required. Some concerns were also raised about whether Mrs Freelander was prompting her daughter or providing her with notes and whether the documentation that was being used while the claimant was giving evidence was annotated.
14. After some discussion we decided that the best course to provide the respondent with reassurance was to ask Mrs Freelander questions under oath. She confirmed that she was not prompting her daughter, she was not providing her with notes and the documents that were being used while the claimant gave her evidence were unmarked copies. We discussed seating arrangements. It was not practicable for Mrs Freelander to sit further away. She also confirmed that an additional adjustment was required. She needed to keep a visual check on her daughter to ensure that her blood sugar levels were within reasonable limits and so needed to sit where she could observe her expressions. By observing her daughter's behaviour and manner of answering questions she was able to identify that there were potential health issues arising.
15. Mrs Freelander confirmed she understood the position. We agreed that she should remain next to her daughter and that this would be a reasonable adjustment to the proceedings as it was required to safeguard her daughter's health and well-being.

Finding of Facts

Background

16. The respondent is an NHS trust that provides mental health services for adults, older people, children and adolescents living in the southwest of London. The Richmond Recovery Support Team (RRST) is a community mental health service for people experiencing severe and enduring mental illness.
17. The claimant worked as a locum occupational therapist/care coordinator for the respondent. She started work with RRST on 9 March 2020 and left after 13 weeks, on 5 June 2020. The role was based out of Barnes hospital.
18. Her direct line manager was Ms Marshall who in turn reported to Mr Coningsby. Her clinical supervisor was Ms French.

Knowledge of the claimant's medical condition (former issue 2.7 now conceded)

19. The claimant told us that on her first day at work on 9 March, she met with Mr Coningsby, the clinical manager of RRST and told him of her diabetes. He recollected that she did make him aware of this in the introductory meeting and he accepted that this was on 9 March. He recollected they claimant told him that at that point her diabetes was well controlled.
20. Ms French said that she was aware of this condition from around 18 March as she was copied into email exchanges where that was mentioned (page 147 – 148). Ms Marshall told us that she was not aware when the claimant first started, but her manager, Mr Coningsby informed her about the condition from conversations he had with the claimant. This in turn led Ms Marshall to have conversations with the claimant about what that would mean regarding her caseload. Ms Marshall accepts there was a conversation with the claimant, and she was aware of the diabetes.
21. It is not disputed by the respondent that it had knowledge of the claimant's disability, and we find this was the case from her first meeting with Mr Coningsby on 9 March.

<u>The nature of the work and the team</u>

22. The RRST had around 200-300 patients in March 2020. Mr Coningsby said that of those around 90 to 95 at any time were allocated a clinician other than a psychiatrist or psychologist. He also explained that the degree of risk experienced by a patient at any one time in regard to their own health and safety, or the safety of others, was categorised as either red, amber, or green using what was described as "zoning criteria".
23. The respondent had prescribed timeframes for the frequency and form of contact by a professional with a patient according to this zoning criteria. Red zoned patients needed to be seen in person at least once a fortnight. There would have between 5 to 10 such red zoned patients in any given week. Amber patients had to be seen every three weeks and green zoned patients once a month.
24. It was agreed that the claimant's role as occupational therapist and care coordinator meant that the normal method of working was for her to attend the Barnes hospital site, to work from the office and complete face-to-face meetings of the team, patient and external teams. It also involved going out into the community to meet with patients who were hard to engage and also meet external partners. As a care coordinator the claimant would also be required to visit any patients from her caseload on hospital wards if they had been admitted and visit any patients at home following discharge.
25. It was agreed that within the RRST occupational therapists were expected to undertake a generic role including ""duty"" work. "Duty" is a term used to describe the support given to service users, families and outside agencies who call with a crisis when their allocated worker is not available. In order to assess manage and plan an individual's risk and support appropriately, these requests have to be dealt with. These are generally face to face.
26. When the claimant joined the team, it consisted of three full-time community psychiatric nurses and one part-time community psychiatric nurse. There were three doctors and one GP trainee, two clinic nurses, two recovery support workers and one employment specialist. The claimant was the only occupational therapist on the team.
27. The clinic nurses, recovery support workers and employment specialist

were not clinicians and were unable to cover "duty" work.

16 March (issue 4.1.1)

28. On 15 March government ministers appeared on various BBC programmes and gave interviews about what was likely to happen in response to Covid 19. It was anticipated that there would be isolation for the over 70s within a matter of weeks. The claimant referred us to a clip from Matt Hancock's Interview by Andrew Marr on 15 March 2020. At around 0:47 seconds into the clip he refers to protecting those most vulnerable from the disease who are the elderly and those with "pre-existing health conditions".
29. The claimant confirmed that she was already concerned that individuals with diabetes were at risk. At the time the virus was known to be a form of SARS and consequently diabetics, who were a known risk from flu, were at greater risk. She referred us to page 234 of the bundle which was information provided by the National Speciality Adviser for diabetes and NHS England. This document is headed "managing worry about Covid 19 type I diabetes". We find that it reflects generic advice and does not specify self-isolating other than when symptomatic with Covid. We find that the respondent would not reasonably have been on notice of a particular issue for diabetics based on the public information available at this point.
30. On the same day, 16 March, the claimant covered a depot clinic which she explained was a clinic held to administer antipsychotic medication injections, something she was not able to do. Ms Marshall stated that having checked the handover note on that day, the claimant was to support a clozapine clinic. It was agreed that there is a technical difference between a depot and a clozapine clinic, but the claimant said that she thought of them as the same thing. Nothing material turns on the nature of the clinic.
31. Whatever the nature of the clinic, it is agreed that the claimant attended such a clinic where her role was to record keep and open the door to patients. Ms French confirmed that carrying out this role was part of the generic work required of occupational therapists. We accept that for this organisation that was the case, although it was not something the claimant had previously experienced in other roles.
32. The claimant feels that she was coerced into attending on that particular day. She explained that when she was asked, she raised her concerns with both Ms Marshall and the senior locum nurse about the fact that she was type I diabetic and, because of that, was not comfortable with being in the clinic without PPE given the emerging risk of Covid.
33. On her account her concerns were met with silence, and she was made to feel inadequate by bringing this to their attention. She was told that she would only be sitting in the room and using the computer and would not need to touch the patients. While the claimant agreed this was the role, she felt that the comment "you are only sitting at the computer" was used to coerce and persuade her to do this against her better judgement. While the claimant accepted that in the event no patient did touch her, she said that a number came towards her to shake her hand and wanted to hug her and she had to refuse which made her feel very awkward. The claimant was upset by what happened and, in her evidence, described this as making her feel inadequate and feel like an uncaring person.
34. The claimant says that Ms Marshall was present on site in the morning, although she did not come into the clinic. Ms Marshall was equally adamant

in her evidence that this was not the case. She had been on leave. She had checked diary dates in order to give evidence to this tribunal and was not working on this day. While she was initially unclear when she did return to work, she thought it was probably the Wednesday of that week and was certain it was not 16 March. There is a second clozapine clinic on the Wednesday which would have been 18 March and Ms Marshall believes she was at work then. The respondent did not produce any documents to evidence the period of leave.

35. The claimant suggested that if it was not Ms Marshall with whom she had this conversation, she had it with whoever was deputising for Ms Marshall, and she did feel pressurised into attending the clinic.
36. The claimant also states that in this clinic there was lack of sufficient PPE available to wear, there was no hand sanitiser, facemasks, aprons or even pairs of gloves available for staff to use. The claimant had included a photograph in the bundle at page 233 which is a dispenser with some gloves in it but nothing else on that date. Ms Marshall accepted that the photograph showed there was a lack of items in the clozapine clinic room on the day, but said that facemasks were readily available, and staff have access to gloves and aprons. She stated that they were kept in a particular storage room and would have been available if requested. She was not, however, on site on that day and was not able to confirm this from her first-hand knowledge. Mr Coningsby, however, told us that it was possible there was insufficient PPE on site during the first week of the pandemic.
37. We accept the claimant's undisputed evidence from the photograph that full PPE was not available within the clinic. As a new and temporary member of staff, we find it unlikely that the claimant would have known how to find equipment if it were not in the appropriate storage area. We also find, on the balance of possibilities, that the equipment was not there, and we accept her evidence that she was not therefore provided with full PPE.
38. Despite the fact the respondent has not provided us with evidence of Ms Marshall's leave, on the balance of probabilities we accept her evidence even though this is contrary to the claimant's initial position. We reached this conclusion because the claimant did later suggest it could have been someone else and we find that Ms Marshall was a credible and helpful witness throughout and did answer fully where she was able to recollect events. We accept that she had no recollection of this conversation at all and that this was because she was absent on 16 March. We also accept that the claimant's account of what happened is largely accurate, save as to who the conversation was with. We also find the claimant to be a credible witness and find that the conversation the claimant reported did occur and she did feel that she was coerced into doing something against her better judgement, but this was not the action of Ms Marshall but of her deputy.
39. After the clinic had finished, at around 5 PM on 16 March 2020 the Prime Minister made a statement on coronavirus. He said that we need people to start working from home where they possibly can. There was advice about avoiding all unnecessary social contact which was said to be particularly important for people over 70, pregnant women and for those with some health conditions. The speech specified by that weekend it would be necessary to go further and to ensure that those with the most serious health conditions were largely shielded from social contact for around 12 weeks. It used the phrase a "draconian measure".
40. The claimant told us that she remembered reading information on the

government website about what the reference to those with some health conditions meant. She referred us to an article written by solicitors which summarises what happened on 16 March 2020. We were directed to the section under 'Who should work from home' it says: *"The definition from the WHO (World Health Organisation) of people at high risk are those with a "underlying medical conditions (such as cardiovascular disease, diabetes, chronic respiratory disease, and cancer)". The Government have also included all those over 70 and pregnant women within this category.".* The claimant confirmed that this was what she recalled reading on the website.

41. The claimant accepted that the clinic took place before the Prime Minister's speech. She accepted that no specific advice had been given to the respondent at this time but believed that there was already clear evidence of increased risk to those with her medical condition and she had raised this directly with the respondent.
42. We find that the claimant was legitimately concerned about her level of risk, but that while some reference had been made to the impact of covid on those with medical conditions, it was not at the time she was asked to attend the clinic something the respondent could reasonably have been aware of. We find that from the respondent's perspective, the request was within the duties carried out by an occupational therapist and, this request was not related to the claimant's disability. It did not have the purpose of creating a hostile or intimidating environment for the claimant but was an objectively reasonable request to ensure that the clinic could go ahead, and a member of staff carry out their role. While the claimant was upset by this her reaction was limited to feeling inadequate.

<u>Conversation with Mr Coningsby on 17 March (issue 4.1.2 and 4.1.3)</u>

43. The claimant referred us to the document at page 236 which was a screenshot of a tweet by the National Speciality Adviser for diabetes and NHS England. This was on 16 March and advised those with diabetes to work from home where possible. We also considered the article the claimant had provided to us.
44. Following the clinic and this advice, on the following day, the 17 March, the claimant approached Mr Coningsby to have a discussion with him about her working from home. She explained to Mr Coningsby that she was asking to do this because there was government advice that diabetics should be working from home in order to protect themselves from Covid 19.
45. The claimant states that Mr Coningsby told her that she was being "overanxious about her condition and her risk wasn't serious". She also reports that Mr Coningsby said that the Prime Minister was being draconian by suggesting people like her should work from home for 12 weeks and he could not understand how the economy would cope. She was clear that he was making these comments about her condition. They were not general comments, and he was not trying to be reassuring. The comments shocked her at the time.
46. Mr Coningsby accepts that he did say that the measures being suggested in relation to lockdowns by the Prime Minister seemed draconian to him, but this was in the context of the beginning of the pandemic, before a significant number of people had become seriously ill or died. Mr Coningsby stated that this was not a remark about the claimant's health

condition but about the unprecedented widespread lockdown measures. It was an aside and not a response to her expressing her concerns about her health and safety. Further, the word draconian reflected the wording used by the Prime Minister to describe the measures. He accepts that he told the claimant that at this point there was no specific information available in regard to type I diabetes and Covid.

47. While Mr Coningsby in his written statement denied that he said that there was no risk or that her risk of harm if she contracted Covid wasn't serious he then expanded on why he may in fact have said that the claimant was being overanxious and in giving the context agreed that he had, and we find that he did indeed make this comment. He explained that the claimant told him about the possible impact of her catching Covid. In addition to ending up in intensive care, she identified a social and a very long-term personal impact this could have on her life. He explained that he was quite flummoxed by this. He was shocked by the information the claimant had given him and this was the context in which he had said that they did not know the full picture and she was being overanxious. This was intended to be supportive.
48. We accept that Mr Coningsby's intentions were well-meaning in the comments he made, and he did not make them with the purpose of creating an intimidating or hostile environment. He did nonetheless tell the claimant that she was being overanxious, and her risks were not as serious as she thought. These comments were made in the context of the claimant's type I diabetes. The conduct was certainly unwanted. The claimant describes it making her feel dismissed and ignored and we find it was reasonable for her to feel so. She had shared very personal concerns which had been dismissed as overanxious. She was upset to the extent she could work no further that day.
49. In the same meeting both agree that Mr Coningsby offered to introduce the claimant to his counterpart in Kingston, Ms Ellison, as she was also a type I diabetic. Mr Coningsby explained that again he thought this was a supportive action which he took because he had been shocked by the level of concern the claimant had displayed and also because he was unclear of some of the terminology and information that she was giving him about her condition.
50. The claimant states she politely but firmly declined for such an introduction to be made. In cross-examination Mr Coningsby did agree that the claimant had declined the offer and that she had told him that she had good support, received hospital treatment, had diabetic friends and was a member of a WhatsApp group of health professionals. Her condition was managed. Mr Coningsby acknowledged in his oral evidence that he knew the claimant was not happy with the intended introduction, but he made it, despite her wishes, because he thought it might be helpful for the claimant.
51. Accordingly, he emailed the claimant, copying in Ms Ellison, to make the introduction (page 152). The claimant considered that sending this email was a degrading act because it implied that she could not manage her condition and needed assistance. Mr Coningsby acknowledged in his evidence that he knew this was not the case. The claimant believes that his comment in the email to her referring to continuing to work at this time was a veiled threat and amounted to harassment. She was perfectly happy to work, she just wanted to work from home. She was upset and unable to carry on working that day because of her interactions with Mr Coningsby.
52. There was some email exchange between the claimant and Ms Ellison the

last of which is on 23 March 2020. The claimant says that she felt that Ms Ellison was also an avenue of harassment and coercion. She relies on the email from Ms Ellison to Mr Coningsby of 11 June, page 149 of the bundle, which she interprets as the two colluding as Ms Ellison writes that she was saying the same thing as he was.

53. It was put to the claimant that the length and detail given in the email exchange indicates that the act of putting her in touch with Ms Ellison indicates that she did not subjectively find this created an intimidating or hostile environment. The claimant said that was not the case, she felt under pressure to reply to the email exchange, and she believed that she had not replied this would have been seen as an act of insubordination and Mr Coningsby would have ended her assignment. She would have difficulty in finding another job at that point given the emerging Covid situation. She was in no doubt that Mr Coningsby would have ended her contract if she had not responded, and she felt harassed and she was left trying to placate two managers.
54. We accept that the claimant was also very upset by Mr Coningsby's insistence on introducing her to another colleague. We find, however, that his motive in making this introduction was well-meaning, albeit it ignored the claimant's express wishes. It was not done with a hostile intention.
55. In looking at the email correspondence we find that the claimant provides a level of personal information and there is some detailed interaction between the two which we find to be inconsistent with the claimant's evidence that her motives for the correspondence were to avoid Mr Coningsby firing her, or Ms Ellison was also an avenue of harassment and coercion. We find that, the introduction to Ms Ellison and the subsequent email exchange was not intended to create an intimidating a hostile environment and we find that subjectively, at the time, it did not.

<u>The impact of Covid 19 on RRST</u>

56. Ms Marshall gave evidence as to the steps put in place at the start of the pandemic. She explained that there was an expectation that staff would attend work in person to see patients and there was no default working from home because staff were key workers in the NHS. Nonetheless, to manage the risk to staff a number of changes were made.
57. The number of patients coming in was reduced only to those that had a need for direct clinical care. Contact would be made first by telephone or E consultation and only if actually necessary took place in the hospital.
58. The zoning system was refined so that broadly speaking only red patients were seen face-to-face. There was a difference of recollection on this point. The claimant told us that there were weekly meetings to discuss all patients and decisions that face-to-face were taken on an individual basis and that she had some red zoned patients even though she was working from home. We accept the claimant's evidence that the response was on an individual basis and the categories were not prescriptive in the way Mr Coningsby suggested.
59. It was agreed that during this time the main patients who would come in were patients who required medication and injections which could not be given at home. Some face-to-face contact from staff on site was necessary. We accept that while "duty" was conducted virtually as much as possible, for the individuals who were acutely unwell, face to face intervention and

assessment was necessary to prevent a crisis.

60. It was also agreed that there were some RRST patients who did not have the appropriate equipment for remote consultations, and others who lacked the mental capacity to interact virtually. For those staff who came on site Ms Marshall told us that they provided staff who were on site with PPE level II aprons, face mask, gloves, extra antiseptic alcohol wipes, regular cleaning wipes and hand gel.
61. Ms French explained that in addition, there were aspects of occupational therapy intervention which were not possible virtually. That would include assessing someone in the home environment who could be at risk of serious self-neglect or need equipment to enable day-to-day function and safety.
62. The claimant said that that was right in theory, but there were workarounds. She gave an example of an occasion when she was required to carry out an assessment and environment that was able to get the local GP to carry this out for her. While we accept this, we find that the respondent did need to continue to provide a face-to-face service for some of its patients and that there was therefore a need for some staff to come onto site. It had a legitimate interest in requiring staff on site attendance as only that way could the needs of patients be met.

<u>Covid policies</u>

63. As part of its response to the pandemic, the respondent also prepared occupational health covid19 advice for staff on 18 May 2020 (p118). This identified diabetes as a condition which meant that an individual was at increased risk of severe illness from coronavirus. The policy advised such staff to be particularly rigorous in adhering to recommended infection control practice and, where possible, social distancing measures. It specified that could include working from home where possible.
64. For staff with clinical contact the policy set out that a risk assessment was highly recommended to ensure that these individuals were trained and competent in applying infection control practices, including necessary PPE, could be implemented, and adhered to at all times.
65. This policy was supplemented with a question-and-answer document to staff. That included a question about individuals with the claimant's condition and whether they should still come to work. The answer that was given was that "*It is important that you inform your manager if you have an underlying health condition at this time. Your managers will need to undertake a risk assessment and consider making any necessary work adjustments such as working remotely. Where working from home is not practicable managers need to look at other potential options such as alternative travel arrangements, modifying duties to minimise exposure or redeployment."* (p129)
66. A risk assessment template was provided to managers which summarised the risks, discussions and agreed actions/adjustments. (p133). This asked the manager to identify the category of risk that the individual fell into, low risk, moderate/high risk, or significant risk. For those who were moderate/high risk it specified the need for more social distancing away from risk patients and avoiding large groups of colleagues. It also indicated that for such colleagues the organisation should consider moving into low-risk area and homeworking if possible. For colleagues at significant risk,

they would be advised to follow the guidance and shield for a minimum period of 12 weeks.

67. To assist with the assessment of the risk level the template guidance identified certain conditions and categorised them. It identified diabetes and specified that it was low risk if it was controlled by diet or tablets with no diabetic complications. It was moderate/high risk if the diabetes was well controlled on insulin and without diabetic complications. It was a significant risk if the "diabetes controlled on insulin or diabetes with diabetic complications or poor glucose control".

Working from home (correspondence up to 31 March)

68. The claimant understood that following her meeting with Mr Coningsby discussions would be had regarding her being allowed to work from home and she did work remotely as a result of the pandemic from 18 March until 5 June when her placement with the respondent ended.
69. This covered the period of the first national lockdown which was announced by the Prime Minister on 23 March. At that point people were ordered to stay at home and lockdown measures legally came into force on 26 March 2020.
70. The bundle contained at pages 160 -165 an exchange of emails from 19 to 31 March regarding the claimant's home working arrangements. On 20 March Mr Coningsby emailed Ms Marshall and Ms French in which he confirmed he had agreed with the principle of the claimant working mostly remotely, but she did need to come to site two working days a week.
71. On 26 March (p158) Mr Coningsby sent an email with the subject heading "working from home is not an absolute". This was sent to the claimant and other colleagues working in RRST. This email explained that he was stepping in and that he wished to correct people's understanding of the current situation and working from home. The email was an instruction and not advice. He identified that all band six staff in the team had now reported they believed themselves to be in a high-risk group or were sick and therefore should be working from home. His email therefore clarified the position.
72. Those who were ill should not be working from home but should be off sick. Those who were in a high-risk group could work from home with agreement from their line manager, but only if they had received a letter stating that they had to self-isolate for the next 12 weeks. Otherwise, if they were not ill, and not self-isolating then they could and would be asked to go to Barnes to staff the site some days of the week. It was not closed. The email concluded that only those who had a letter stating that they must quarantine for 12 weeks would not be asked to work from the Barnes Hospital. The others, regardless of whether they saw themselves in a high-risk group or not, may well be asked to go to site.
73. Mr Coningsby explained that he had sent the email because he needed some staff to come in and could not operate the unit without some staff present. He was asked why he simply did not seek more staff. He was taken to the occupational health email of 26 March which stated that in these unprecedented times the Trust were creating new roles at the trust and bank roles and volunteer roles were available. He stated that he had not been briefed that there was more money available for staff. He didn't need more staff, he needed those that he had to attend.

74. We accept that Mr Coningsby was attempting the equitable distribution of work amongst staff which was a reasonable and legitimate aim. We accept that duty work did require staff on site and that a balance had to be found among all staff to both spread the work and the risk.
75. Mr Coningsby was asked about how he regarded the claimant's diabetes. He explained that he was using the definition of clinically extremely vulnerable as Public Health England had set out; it was individuals who received notification from the Department of Health who were classed in this way, and they should isolate for 12 weeks. The claimant accepted that she was not in this category, had not received such a letter nor had ever asked her GP provided with one. Mr Coningsby said that he accepted that the claimant did have an underlying health condition but there were different categories of this, and he placed her in the moderate/high vulnerable category because of her condition which she had told him it was well controlled. This meant that she should work from home where possible, but that did not remove the obligation for her to attend work where it was not possible for her to work from home. We find this is a reasonable position him to take, was in line with government guidance and the claimant's own assessment of her health as she had passed it on to her employer.
76. On 27 March (p162) Mr Coningsby emailed Ms Marshall and Ms French on the subject of the claimant's home working. He stated that he remained uncomfortable about what he characterised as her "*insistence on working remotely*". He asked" *how long will this Covid 19 situation continue and will she insist remote working for months and months?"*
77. He set out that the guidance of the Occupational Health Department was that while the claimant was vulnerable, she was not in the very high-risk group who were isolating for 12 weeks. They can give her priority within the team to work remotely, but she did not have an absolute right to do this and there would come a time when due to needing help from staff members on site she would be asked to come in. Six out of the 10 people who worked on RRST were in a high-risk group. He concluded that Ms Marshall was going to communicate the need to have at least two staff on site daily, if the claimant did not accept that he would have to revisit how tenable her services for them truly were. (Page 162)
78. On 30 March the claimant received a Skype message from Ms Marshall asking her what her full health conditions were. The claimant was uncertain why she needed to share the information again. Ms Marshall's exchange noted that the claimant was not coming to work at all, and it would be a challenge trying to run the team as the timetable needed backup on some days.
79. On 31 March Ms French also responded to Mr Coningsby's email of 27 March (page 161). It notes that she was really keen to support the claimant and would like to keep her, but equally heard that Mr Coningsby had lots of staff with underlying health needs and was juggling a lot of things. Ms French asked whether or not they were absolutely clear that the claimant's health condition was one that meant she could not come to work as she was struggling to understand the idea that people could self-isolate part-time. Ms Marshall responded on the same day. She referred to the Skype conversation that had happened the day before but said that she had lost her reply and could not therefore be clear on exactly what the issue was.
80. Following this exchange Ms Marshall contacted the claimant again asking her to categorise her condition (page 255) and sending her the

occupational health guidance so that she could determine where the claimant fitted in regard to her health condition. The email stated that she had to categorise the claimant's condition as either high-risk or very high risk. She apologised for asking and asked the claimant not to become stressed. They were very happy to have her on the team and were impressed with her work. She explained that it was simply that in the worst-case scenario she may have to call the claimant in to Barnes Hospital and if she was not able to do that, she needed to justify why. The information sought would help with that decision.

81. In her witness statement the claimant said that she did not understand why Ms Marshall was not able to determine this herself because that had multiple conversations regarding her disability and health history. This made her feel harassed and she suspected Ms Marshall knew that was the case because in the email she mentioned "do not feel stressed".
82. This interaction is not brought as a complaint of harassment within the issues list. However, in submissions the respondent suggested that the claimant complained both about being asked for information and that she was not asked for enough details. It was put that this evidenced that she was so anxious about the situation she felt harassed whatever the respondent did. We find that the claimant's concerns about being asked the nature of her condition when she had been honest and upfront with her employer from the start of her employment differed from a desire to have those details discussed in more depth as part of a risk assessment. We see no inconsistency in the claimant's conduct.
83. Also, on 31 March Mr Coningsby set out an email that it was Ms Marshall's decision as to whether the claimant came into the team base or not and also made it her responsibility to ensure that the unit was staffed with at least two people from the team each day.
84. The claimant reduced her working days from 5 to 4 from 6 April 2020 and did not attend work during this period.

<u>The position in May – the requirement to attend the first respondent's premises and to work in the community (issue 3.1.1 and 3.1.2)</u>

85. On 10 May the Prime Minister made a statement on coronavirus and set out the start of a roadmap to recovery. The first step was a change of emphasis that it was hoped people would act on that week. The guidance was now work from home if you can but go to work if you can't work from home. There was new guidance for employers to make workplaces Covid safe.
86. While the claimant continued to work from home throughout April, Ms Marshall said that the claimant was given a reduced caseload of 8 to 11 patients when care coordinators generally had 20 to 25. The claimant disagreed. She said she'd been told that the general number of patients was 20. She had 11 for general care coordination and 4 for the occupational therapy. We find that it is likely as a new member of staff the claimant had a lighter case load then more established staff, but it was for that reason and was not made as any adjustment to address her disability. Ms Marshall also explained that by May 2020 the needs of the service were under continuing pressure, and they were struggling because the staff numbers on site were low and therefore "duty" work was not being properly supported.

87. It was Ms Marshall's evidence that as the claimant did not come to work on site and only did emails and telephone calls while on "duty", staff who had their own case loads and who had done their "duty" for the week had to cover all of the claimant's walk ins as well. While that adjustment had been made, it was becoming harder to manage as more patients relapsed or were referred into the team. The claimant's case load therefore had to be increased from an operational and patient safety perspective.
88. Mr Coningsby also gave evidence that the claimant was required to attend the respondent's premises, and this became more pressing from mid May 2020. This was to ensure that there was sufficient cover to provide clinical care to patients and to do so this needed a certain number of band six staff present on site. Mr Coningsby explained that the RRST patients were particularly vulnerable. It was not possible to provide the standard of care required solely remotely.
89. While zoning criteria attempted to manage the risks, some patients still needed face-to-face contact. Many of the conventional support systems for the client group were closed due to pandemic and the RRST was vitally needed to support mentally ill patients It was accepted that the need to continue to see some patients in their own home continued throughout the pandemic and that there was a requirement for this to happen when a patient had been discharged from hospital. There was therefore a requirement to work in the community as part of the claimant's role. We accept the respondent's evidence as to the need.
90. Mr Coningsby expanded on this and explained that they had some members of staff who were required to shield and therefore they needed to equitably distribute work requiring attendance at the hospital. Staffing levels within the RRST team were impacted by people contracting Covid or having to isolate because one of their household had done so.
91. There were other members of staff who, while not clinically extremely vulnerable and therefore not asked to shield, also had underlying health conditions which meant they were in a similar risk category to the claimant. In order to ensure that all members of staff were as protected as possible and to distribute work appropriately it was necessary that those who were at lower risk did come into hospital on occasion.

<u>Covid safety and infection control measures</u>

92. In his written witness evidence Mr Coningsby set out a list of things that had been put in place. This included reducing the number of patients coming in in person, providing PPE, spacing or removing furniture to ensure 2m social distances can be maintained, and establishing a maximum occupancy for each room. He also described that staff were told to wear a mask unless clinically exempt, strongly encouraged to ventilate the rooms, having their own office-based working alone on site, officers being cleaned each evening by staff wearing PPE, been provided with packs of PPE for home visits and when completing home visits call ahead to establish no obvious coronavirus symptoms that PPE was used in case of patients being asymptomatic.
93. In answer to questions about these adaptations to the working environment at Barnes Hospital he told us that he had done most of the measuring himself and was able to identify that where patients were to be seen the distance was greater than 2m. He told us that Estate Services had done a

detailed risk assessment of the environment and had produced a document setting this out.

94. Mr Coningsby confirmed that this document by estate services was never provided to the claimant although he acknowledged that she had requested it many times. He explained that he decided it was not helpful to provide her with this document since they were not communicating well, and he thought it better to tell her in person what had been put in place within the building and discuss the other material changes that had been made. He also never shared with the claimant that where patients were seen the distance was greater than 2 m. We accept that Mr Coningsby's intentions were well-meaning although had he taken a different decision it is possible that there could have been a very different outcome for the claimant.

<u>The risk assessment on 14 May 2020 (issue 4.1.4)</u>

95. On 14 May Ms French began a risk assessment process. The claimant accepted that Ms French began the assessment process because her line manager, Ms Marshall was on leave for five days. However, she considered that it could have been left until her line manager was back and questioned why it needed two people to deal with this. If it was so urgent and Ms Marshall was on leave, then Mr Coningsby could have done it as he worked at the Barnes site whereas Ms French did not.
96. The claimant explained that she felt it was harassment to be made to go through the process twice. It was humiliating. The process made her feel stressed and harassed. The claimant did, however, agree that Ms French's approach in the meeting was supportive.
97. Ms French did not agree that holding a two-stage meeting amounted to harassment. She explained that Mr Coningsby had asked that all staff have risk assessments by a deadline. While he did some of them, it was not possible for him to do with everyone and where staff, such as the claimant, had clinical supervisors they did this. She was happy to do it, provided it was understood that there were some limitations in her approach because she was not based on site.
98. The claimant does not raise an express complaint about two meetings amounting to harassment. While we understand her feelings, we find that the timing was set for all staff and was not therefore related to the claimant's disability. We accept the respondent's position and agree it was not unreasonable to ask Ms French to begin the process. It was not the respondent's intention to cause more distress in this way but was a pragmatic approach to a deadline and the claimant has agreed that Ms French was supportive.
99. The claimant questioned why all staff were given a risk assessment when the title on the document issued by occupational health to line managers specified that it was for staff with underlying health conditions. We accept, that whatever the title on the form, risk assessments were done for all band six staff, whether they fell within the increased risk group or not. We also find that because the form identifies that it can cover those at low risk, it was intended that this be done for all staff despite the wording in the title and introductory paragraph. We find that all band 6 staff were required to meet and go through an assessment in this way. The practice was not limited to those identified in the middle or top risk categories.
100. Two complaints are made about the meeting. Firstly, that Ms French said

that she was unable to record the risks at the claimant's base as she did not work there, and secondly, if she did not return to work it was likely that Mr Coningsby would let her go.

101. Ms French confirmed that the conversation explained that while she would start the risk assessment it would need a meeting with Ms Marshall to complete it on her return. It is agreed by Ms French that the claimant explained to her that she wanted to see both an individual and a general risk assessment covering the team base.
102. We find the claimant was told that Ms French could not record the risks at the claimant's base. This is in part why the claimant considers that the risk assessment process was not carried out properly. Ms French could not assess the environmental risks.
103. Ms French in her written evidence stated that the claimant repeatedly asked her if she would be asked to leave if she did not return to work and pushed her for an answer. In that context she thinks she may have indicated that one possibility was that her placement may come to an end. In her oral evidence she explained that she felt under pressure in the meeting and with hindsight she perhaps should not answered the question. It was a difficult situation she did not make a note of her response at the time, but her recollection was that Mr Coningsby had not said anything explicit about this to her. She was making her comment in the context of how we support those who don't wish to be on site against the need for patients to be seen in person. She did not state that it was likely that he would let it go as a threat, but it was a possibility.
104. The claimant disagrees. It was her recollection that Ms French said that Mr Coningsby would let her go and he understands that she means this was a definite statement. The claimant also believed this would be the outcome based on his management style. She feels that, while she was not aware of these at the time, the email exchanges in the bundle show that this was the case.
105. On the balance of probabilities and taking into account the sentiments expressed by Mr Coningsby in his emails about the claimant on 27 March, we find that Ms French did believe that the claimant's assignment would be ended if she did not return to work at the hospital and that she did convey this to the claimant. Despite this being said, the claimant described Ms French as supportive in the meeting. We find that any employee would be distressed at the thought that their assignment could be ended, but this was simply given as a potential outcome if the tension between the claimant's desire to work from home and respondent's need to have people on site could not be resolved. It was a genuine and honest response to a difficult situation and did not in itself make the meeting a hostile one.
106. Both agree that during this meeting the claimant's diagnosis of type I diabetes was discussed. Ms French explained that at the time she did not believe type I diabetes was on the list of conditions which precluded individuals attending work in person. The claimant had confirmed that she had not been instructed to shield. They discussed how type I diabetes impacted her and saw that diabetes fell under both columns within the risk assessment but agreed that the claimant's condition came under the middle column because her diabetes was well controlled. We accept that Ms French did discuss with the claimant that her diabetes was well controlled, and the claimant was, therefore, asked about her condition. We also find the claimant agreed at the time that it was well controlled as she had already explained to Mr Coningsby. We find it was reasonable of the

respondent to believe that was the case and to identify the claimant as within a group whose diabetes was well controlled.

107. Ms French says that she also explained she knew that social distancing measures were in place at Barnes Hospital with a caveat that Ms Marshall would explain what further measures would be put in place. Ms French documented headline points for discussion on the risk assessment document at page 262 of the hearing bundle.

108. This identified the claimant as in the moderate/high risk category. It also identified her as vulnerable based on underlying health condition. The main part of the risk assessment which starts at page 265 has three columns, risks identified, control measures and actions agreed. Under category one, that is a colleague identified as personally within low risk, the control measures are social distancing practice and continue working with all patients. Ms French did not complete any actions in this column as she understood the claimant was within category two, that is identified as personally within moderate/high risk. That was based on her agreement that her diabetes was well controlled. We find this was an appropriate categorisation based on the information the claimant provided.

109. Within the form Ms French agreed that they discussed a number of points and reasonable actions should the claimant agreed to return to the office. This set out continue to have some homeworking where possible, when on team site to have working space in a separate office, it is about travel to work with a discussion of further local arrangements to be had as to how to manage this and a further discussion with her manager on local day-to-day arrangements at the team site relating to covid 19. The form confirmed that the reasonable adjustment the claimant was asking for was to continue working from home. It was agreed that would be a further discussion with the claimant's line manager.

<u>Risk assessment on 22 May 2020 (issues 2.1.1 and 4.1.5</u>)

110. On 22 May the claimant was invited to a discussion with both Ms Marshall and Ms French which was titled returning to work at Barnes Hospital. The invitation, which is at page 177, explained in the message that it was about returning to work at the Barnes Hospital base as they returned to business as usual with social distancing practices in place.

111. We were told that the decision had been taken that two staff were needed on site every day of the week in order to meet patient's clinical needs. The intention was, that if the claimant was to return, she would therefore be on site for two days out of a four-day working week. This would be primarily to be available to see "duty" patients and to assist at clinics. We understand that this would therefore have required contact with patients.

112. The meeting took place via a Skype call. The risk assessment document was not shared on the screen for this meeting and the claimant had not therefore seen the draft as completed by Ms French. During the meeting Ms Marshall updated the form with her comments. This is the version at page169-175. It is agreed that the claimant was not shown a general or individual risk assessment on 22 May.

113. The claimant also complains that there was no discussion of her type I diabetes during this meeting, nor was it recorded on her risk assessment. It was Ms Marshall's evidence that they had discussed the claimant's medical condition. It was accepted that this is not recorded on the form. It

was the claimant's position that as she had disclosed the nature of her medical condition there was a requirement to put it on the form. She accepted that there was no specific place for it but considered that it could have been noted as a comment in one of the boxes. She believed that Ms Marshall in not recording the nature of the condition had misunderstood the respondent's guidance.

114. We were referred to page 118, which is the updated guidance as at 18 May. That specifies that managers must not ask any questions about the nature of the medical condition that might lead to a disclosure. If there is a reason to identify the nature of the underlying condition, the manager can make a referral to occupational health. If the staff member does wish to disclose their condition the manager must keep it in absolute confidence and there is no need to record it on the risk assessment matrix. We find that there was no requirement to identify the specific medical condition that had been identified as a risk. Not doing so was in accordance with the advice given to managers. We find that the respondent was aware of the specific nature of the claimant's medical condition, this had been discussed between Ms French and the claimant at the first meeting when they had agreed what level of risk this created. Nothing further was then required.

115. Ms Marshall's evidence was that they did discuss actions and adjustments to be implemented to support a return to work. On the form that she completed against the risk identified at one, low risk, she set out agreed actions against the control measures. Against social distancing practice she stated that it was outlined to the claimant that there were social distancing practices in place at the worksite. Under the control measure continue working with all patients the actions agreed stated that it was made clear that when on "duty" there is an expectation to come into contact with patients and that there were measures in place for 2m social distancing practices.

116. Under the section for colleagues identified within moderate/high risk against the control measure "increased need for social distancing away from at-risk patients" a number of possible actions are noted as discussed. This included working to timetable with a limited number of people working on site and included days working from home; observing 2m social distancing; continue to have some homeworking where possible; the claimant had a separate office when working on site; have access to PPE when working on site; and when undertaking home visits call to confirm if the patient had any symptoms of Covid19 and wearing PPE in any event.

117. It was accepted by Ms French and Ms Marshall that the meeting did not address the question of how the claimant might travel to home visits which she would have to do using public transport. The form also stated that "given the claimant did not feel confident to come into the office until she was aware of the risk accountability that has been acknowledged the staff at moderate to high-risk conditions have been actions taken at present this risk assessment document has been completed. This would ned to be reviewed with HR and the RRST clinical manager". Ms Marshall was asked to explain this and confirmed that she did not discuss the position with HR despite this being the recorded action point.

118. The claimant did not accept that this conversation was adequate. She identified that page 172 of the risk assessment specified an increased need for social distancing away from patients for those in her at risk category. While the 2 m distancing was discussed, it should be increased. She did not agree that a 2m rule was appropriate for vulnerable staff as this was

the standard for those who were at less risk. As for the adjustments which were identified at page 173, these did not in the claimant's view, show how her role would be adapted to protect her as vulnerable. This was general guidance to all staff, and she was wanting something more to protect her as she was vulnerable.

119. Ms Marshall said that the conversation was about how the claimant felt about coming to work on site, what were her concerns and what they could do to allay them. She understood from the meeting the claimant did not want to do anything other than undertaking work from home. The claimant agreed that the adjustment she wanted was to continue working from home.
120. We find that the meeting discussed the 2 m rule but did not provide the claimant with any information that greater distances had in fact been put in place. Ms Marshall told us in her evidence when she was asked about social distancing that at the time, they believed 2 m to be safe and were telling the claimant about this and that she would have her own room. However, she also told us that where patients were to be seen this would be in a meeting room which extended the distance to 3 m or maybe to 4. While Ms Marshall also said that she believed she discussed this with the claimant who felt reassured, this is not in the notes and the claimant does not recall this. We find that, while Ms Marshall may have been aware of this critical fact, this was not shared with the claimant despite the fact she had been asking for reassurance on this precise point.
121. The claimant felt that it was a very hostile meeting. Ms Marshall does not agree. It was her evidence that she was trying to find out what could be done to support the claimant. The claimant gave an example of Ms Marshall speaking to her in a belligerent way, asking her "what you want us to do". As at this point, she questioned whether the allocated rooms would be cleaned each day to which Ms Marshall replied they would.
122. Ms French was asked about her impression of the meeting. She categorised it as a very difficult meeting but would not use the word hostile. It was tense and she could see it was difficult for the claimant. However, she felt that Ms Marshall was trying to manage a very complex situation. Ms French confirmed that after the meeting she did give Ms Marshall some feedback about the communication style used. We accept the claimant's evidence on this point and find that the tone of the meeting was hostile. The meeting had been set up to discuss how the claimant would return to work and that was its purpose and thrust. Ms Marshall had a very difficult task to do, and we sympathise with her position and having to require staff who were vulnerable but not shielding to return to work. Nonetheless, we conclude that the tone of the meeting was not supportive but was hostile. We accept the claimant's account of the distress she was caused crying at her desk with anxiety by 9.15 most days.
123. The claimant's perspective was that there was a failure to properly complete the risk assessment. There was no proper environmental or personal risk assessment. She was not given specific information about how the environment would be adapted for her. What was completed was a generic risk assessment based on those who did not have heightened risk.
124. Mr Coningsby confirmed that there was environmental risk assessment that had taken place and as already noted, this was not shared with the claimant, and this was his decision.
125. We find that the claimant was not given an appropriate risk assessment

in that the details of the environmental assessment, which was available, was not shared with her as a matter of the respondent's choice. We also find that a key issue as to how she would travel on public transport was not addressed. While reference was made to the 2m rule, it was not made clear to the claimant that in fact when seeing patients, the distance was much greater, a fact that was known to both Ms Marshall and Mr Coningsby. They were of course both on site and were able to see the changes that had been made, the claimant was not. What the claimant was able to see was Mr Coningsby and Ms Marshall sharing a computer screen less than 2 m apart with no masks. The changes might have been set out in the environmental assessment but of course the claimant was not provided with that. We find that she had no information about this and no means of understanding this was the position in the absence of information from the respondent.

126. We find it was not made clear to the claimant that she would have sole occupancy of the room that was assigned to her and that this was different from other staff who would be provided with rooms as they were available but would not have a fixed one. We accept the claimant's position that this risk assessment did not adequately discuss some key adaptations that were in fact in place but were not shared with her.

127. The claimant was asked whether, if she had been given all the information that she wanted would she have come back as the main adjustment she was requiring was to work from home. She answered that it would have been very hard for her to do that, but she would want to have considered the position once she had seen the documents got the information she needed.

128. The respondent suggests that the claimant's conduct after she left the respondent is a more likely indicator of what would have happened. In her witness statement the claimant set out that her husband became her carer during the pandemic. He did the food shopping at 6 AM during NHS priority hours in order to protect her, and that they strictly obeyed the stay-at-home rules.

129. While we accept her evidence that the claimant took all steps to minimise her risks we do not find that this conduct means that there was no prospect of her returning to work with the respondent had they provided her with necessary information. We accept the claimant's evidence that she was open to the possibility of coming back had the respondent adequately dealt with the matters that she was concerned about which it could have done as it had that information.

<u>Receipt of the risk assessment by the claimant (issue 4.1.6)</u>

130. On 26 May the claimant then received an email from Ms Marshall which attached was said to be her individual risk assessment. It specified the expectation was that she was to return to work on timetabled days as the team needed. The claimant read the risk assessment and states that she was shocked to find that it was in her view a catalogue of conversation snippets between herself, Ms French and Ms Marshall. There was no mention of her condition, of reasonable adjustments/adaptations and, as set out above, information had been recorded in the box for colleagues identified as personally within low risk.

131. Ms Marshall was asked about the process of completing the assessment

and in particular why she had done it in the way she did. We accept her account that she did so to the best of her abilities and believe that she was filling in the form fully and accurately. We find that the deficiencies in the form we have identified were due to error only and, despite the fact it failed to provide information on the additional distancing which was in fact in place, there was no intention not to provide the claimant with reassurance. We also find that Ms Marshall was unaware of the existence of the environmental assessment to which Mr Coningsby referred.

132. On 27 May the claimant received an email from Ms Marshall in which Mr Coningsby and Ms French were copied, telling her that they needed her response to the risk assessment by 28 May. The claimant responded to let Ms Marshall know that she had contacted occupational health for a risk assessment as the information on the Internet invited employees to do if they needed to.

133. The claimant explained that she had a telephone call with the occupational health nurse, and this led to an email that was sent by the occupational health nurse (page 180). This referred to the conversation with the claimant and, as the claimant had informed her that she had an underlying health condition that placed her at high risk from covid, Ms Marshall was asked to ensure a comprehensive risk assessment was undertaken in order to identify the risk of exposure and put measures in place or eliminate those risks. This was copied to Mr Coningsby. He confirmed he did not act on it as this was Ms Marshall's responsibility as line manager. Further, he did not think about taking additional occupational health advice himself because he was confident that the process he was following was designed by occupational health.

134. Ms Marshall responded to the occupational health nurse who, in reply, attached occupational health guidance provided to the respondent. This was the risk assessment tool that was being used by management already. Ms Marshall therefore fully concluded that she was using the appropriate documentation.

135. The claimant also responded to the occupational health nurse's email regarding a comprehensive risk assessment and her email to Ms Marshall copied to Mr Coningsby and Mr French was at page 183. The email was sent on 28 May. It specified that she had spoken to the occupational health nurse and set out her advice. It also stated that in the claimant's opinion what she had been sent was not a proper risk assessment, instead it was a record of conversations and some of her opinions. She specified that she had the right to seek two risk assessments, a general risk assessment and the place of work individual risk assessment for her as a person with a protected disability. We find that the claimant was seeking a copy of the place of work environmental assessment and a properly completed risk assessment herself which would contain the details we've identified as missing. The claimant said that she had also spoken to the diversity manager who would be looking into this with HR.

136. On the morning of 29 May Ms Marshall contacted both the diversity manager and the occupational health nurse. This email was at page 190. It sets out that Ms Marshall was perplexed about what to do next. She had provided the claimant with the risk assessment which had been acceptable to other members of staff. She asked whether or not she was within her rights to give the claimant one week's notice so that she could employ somebody who would attend site.

The meeting on 29 May 2020 (issues 2.1.2, 2.1.3 and 4.1.7)

137. Mr Coningsby sent the claimant an email 28 May telling her they were seeking to hold a telephone conversation with her and Ms Marshall on the following day. That meeting was to be about whether the claimant was willing to abide by the terms of her placement with the RRST.
138. Mr Coningsby told us that he considered that a detailed and thorough risk assessment had been undertaken with both Ms Marshall and Ms French speaking to the claimant about her concerns. While the claimant said that she felt the risk assessment was insufficient she did not state what further documents or information was required.
139. We find that this is not the case, the claimant had specified that she wanted a detailed personal risk assessment and a general risk assessment for the place of work. As Mr Coningsby confirmed that the general environmental assessment existed and he made a decision not to share it with the claimant, we find that he did understand what she was asking for and that he did therefore know what additional document the claimant was seeking. We've also found that the risk assessment did not contain information that the respondent had about how it had tailored the mitigation in place to address the claimant's needs e.g., did not made it clear how the room was to be available and had not specified the additional distance to patients.
140. Mr Coningsby led the meeting which Ms Marshall also attended. It is agreed that the claimant read out a statement that her underlying health condition was covered by the Equality Act and that the respondent was failing to make reasonable adjustments. She set out that they had received instructions from the occupational health nurse to write a comprehensive risk assessment. She concluded that the occupational health nurse, having had sight of the one that had been completed felt it was inadequate. She had also not heard back from the Equality Manager and did not feel comfortable taking a decision until that occurred. She concluded by asking if they expected her under these circumstances to agree to return to work at the hospital.
141. It is accepted that Mr Coningsby and Ms Marshall answered that they did. Mr Coningsby said that they explained the need for patients to have in person care and he was explicit and clear that only those who received letters that they should shield would continue to work exclusively remotely. Those who were not required to shield and not sick would need to attend to staff the hospital in person.
142. Mr Coningsby accepted that he said that other clinicians with diabetes type I were attending trust premises. The claimant said that Ms Marshall added that what occupational health nurse said didn't apply and they had completed a trust risk assessment. Ms Marshall disputed this. Mr Coningsby in his written statement said that he was unaware that occupational health had been involved. In oral evidence he accepted that this was incorrect as he had been copied into the emails at the time.
143. On the balance of probabilities, given that Ms Marshall believed she had carried out a proper risk assessment using the form provided by occupational health, we find that she did make a comment that the email exchange with the occupational health nurse suggesting that a further assessment be carried out was not required.

144. Ms Marshall felt that they had reached an impasse and that the claimant was not engaging in the process, and she did not want to return to work in person. Accordingly, Mr Coningsby asked whether the claimant thought her placement could continue and the claimant essentially said that she guessed it could not. The claimant says that she was accepting defeat by stating that she would ask the agency to get her another job and it was in this light that she agreed her placement would end. She was given one week's notice.
145. The claimant stated that at 5 o'clock, after giving given her notice, the Diversity Manager called her to say she had spoken to HR who were in turn going to speak to Ms Marshall. The claimant told the Diversity Manager that she had been given notice and the Diversity Manager expressed surprise and concern that the situation had escalated so quickly.
146. The bundle contained, at page 196, an email from the Diversity Manager referring to this phone call setting out that the claimant had said she was not happy that a proper risk assessment had been carried out. She'll be raising it as a grievance. The bundle contained at page 189 an email dated 1 June to Mr Coningsby which was from HR asking him to give them a call to update on the claimant's situation.

<u>The termination of her placement on 5 June 2020 (issue 4.1.8)</u>

147. Mr Coningsby spoke to the HR adviser on 1 June and records in an email that he was advised to write a letter detailing things because HR believe the claimant would complain and raise discrimination therefore it would be wise to set the rationale out to assist any investigation about a complaint she might make.
148. The claimant was therefore sent an email by Ms Marshall, which had been agreed between her and Mr Coningsby, setting out the respondent's reasons for giving her notice. This confirmed that her placement would end on 5 June.
149. Mr Coningsby was asked whether it would have been possible, given the claimant would only have been on site for two days a week, to hire somebody to carry out the in-person part of her role if the claimant had been willing to reduce her hours further. This was not raised at the time. In fact, the respondent was able to engage an individual who was prepared to work on site almost immediately after the claimant's assignment was ended. However, Mr Coningsby explained that this would not have been a step he contemplated because they had experienced difficulties in recruiting from agencies during the pandemic due to most candidates wanting to work remotely.
150. Mr Coningsby also gave evidence about the need for the respondent to manage resources appropriately and at an appropriate cost. It is of course a public body funded by the public purse. Mr Coningsby explained that even before the pandemic the RRST was run under cost pressure, and he could not just add to staff numbers. In any event, he did not consider that recruiting more band six staff was an appropriate solution and that staff who were able to attend work based on occupational health guidance recommendations should do so.
151. We accept the cost pressures that the respondent was under and find that it was likely to have encountered difficulties in finding staff who would be on site. We also accept that it is a legitimate aim to require staff who

have no health reason not to be on site, based on government guidance, to attend with appropriate measures in place for covid safety.

Relevant Law and submissions

Limitation period -just and equitable

152. S123 Equality Act provides that.

> "…. 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.
>
> ………..
>
> (3) For the purposes of this section –
>
> (a) Conduct extending over a period to be treated as done at the end of the period.

153. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, the time only begins to run when the last act is completed. There is a distinction between a continuing act and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where however there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing even though the act has ramifications that extend over a period of time.

154. The Court of Appeal in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA. The Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. Thus, tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

155. In considering the just and equitable extension, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, that the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit. The exercise of the discretion is an exception.

156. Previously, the EAT (British Coal v Keeble) suggested that in determining whether to exercise their discretion to allow the late submission of a

discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the 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.

157. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, the checklist should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

158. In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 Equality Act that it would be wrong to interpret it as if it contains such a list.

S 15 discrimination arising from disability

159. Section 15 EqA, which is headed 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if:
A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

160. We were reminded that while there is no question of comparison, treatment that is advantageous will not be unfavourable merely because it might have been more advantageous (Williams v Trustees of Swansea University Pension and Assurance Scheme and anor 2019 ICR 230, SC).

161. We were also reminded of Pnaisner v NHS England and anor 2016 IRLR 170, EAT, in which Mrs Justice Simler summarised the proper approach to causation under s.15 (at para 31). The following questions should be addressed, although it does not matter in which order:

a. The tribunal is required to identify whether the claimant was treated unfavourably and by whom;
b. The tribunal must determine what caused the unfavourable treatment, focussing on the mind of the alleged discriminator, and likely requiring an examination of the conscious or unconscious thought processes of that person, but keeping in mind that motive is irrelevant. There may be more than one reason or cause of the treatment. The "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause of it;

c. The tribunal must determine whether the reason was "something arising in consequence" of the claimant's disability, which could describe a range of causal links and involves an objective test, not dependent on the thought processes of the alleged discriminator.

162. The respondent also submitted that a legitimate aim should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. We were referred to the EHRC Code para 4.28, 4.30 – 4.32.

Reasonable adjustments

163. In general, the duty to make reasonable adjustments requires the taking of "such steps as it is reasonable to have to take" to avoid a disabled person being put at a "substantial disadvantage" which includes a "provision, criterion or practice".
164. The tribunal must consider the PCP applied by or on behalf of the employer, the identity of non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant.
165. The "duty" is 'reactive', it requires there to be an identified applicant or employee, and for the employer to know, or be reasonably expected to know, that that person is disabled, and that they are likely to be at the substantial disadvantage without the adjustment.
166. We were reminded that we must identify with some particularity what 'step' the employer is said to have failed to take in relation to the disabled employee (Mr Justice Underhill in HM Prison Service v Johnson 2007 IRLR 951, EAT).
167. We were directed to Smith v Churchills Stairlifts plc 2006 ICR 534, CA and reminded that the test of whether a particular step is 'reasonable' is objective (and will depend on all the circumstances of the case (EHRC Code para 6.29). The process of reasoning by which an adjustment was considered is irrelevant (General Dynamics Information Technology Ltd v Carranza 2015 ICR 169, EAT and Royal Bank of Scotland v Ashton 2011 ICR 632, EAT).
168. The Tribunal must consider whether a particular adjustment would or could have removed the disadvantage experienced by the Claimant (Romec Ltd v Rudham EAT 0069/07, EAT). It is sufficient for the tribunal to find that there would have been a prospect of the disadvantage being alleviated (Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10, EAT). If there is such a chance, this is one of the range of factors to be evaluated by the Tribunal, it does not necessarily mean that the adjustment would have been reasonable (South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley EAT 0341/15).
169. It is insufficient for a claimant simply to point to a substantial disadvantage caused by a PCP and then place the onus on the employer to think of what possible adjustments could be put in place to ameliorate the disadvantage (HM Prison Service v Johnson, EAT).
170. We were also directed to Mr Justice Elias (then President of the EAT) in Project Management Institute v Latif 2007 IRLR 579, EAT,

"*…the claimant must not only establish that the "duty" has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the "duty", but it provides no basis*

on which it could properly be inferred that there is a breach of that "duty". There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not." (para 54-55)

Harassment

171. A harasses B if A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (Section 26(1), EqA 2010.)
172. In deciding whether conduct shall be regarded as having the required effect, the following must be taken into account B's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. (Section 26(4), EqA 2010.)
173. The respondent's counsel submitted as follows and we accept these submissions as an accurate account of the relevant case law.

"Guidance as to the approach to be adopted in harassment cases in the light of that definition was laid down in ***Richmond Pharmacology v Dhaliwal*** **[2009] ICR 724 EAT**, which identified three elements: there must be (1) unwanted conduct, (2) which had the purpose or effect of either (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for her, and (3) that must be related to the relevant prohibited ground (here, disability).In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor*** **[2020] IRLR 495,** HHJ Auerbach said,

"24… the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. …

25. Nevertheless, there must be still, in any given case, some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

Context is important to the decision as to whether the conduct complained of was related to the relevant protected characteristic (see Warby v Wunda Group plc EAT 0434/11; and Bakkali v Greater Manchester Buses (South) Ltd t/a Stage Coach Manchester 2018 ICR 1481, EAT).

In cases such as Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT, and Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13, EAT, the Appeal Tribunal has repeatedly stressed that the purpose/effect threshold set by s.26 is a high one. For example,

"*Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended"* (***Dhaliwal***)

And,

"the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be

said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence." (***Hughes***)

For the prohibited effect to be made out, the relevant word in s.26(1)(b)(ii) EqA is "environment", which means a state of affairs. Such an environment may be created by a one-off incident but its effects must be of longer duration (***Weeks v Newham College of Further Education EAT* 0630/11, EAT**)."

Burden of proof

174. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.
175. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.
176. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage: there still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground. Therefore 'something more' than a difference of treatment is required.

Conclusion.

177. We have applied the relevant law as set out above to the findings of fact that we have made and have reached the following conclusions on the issues that we were asked to determine.

Jurisdiction

178. Given the relevant dates of the first three allegations of harassment which occurred on the 16 and 17 March 2020 are brought out of time if they are single acts and not part of the conduct extending over a period or, unless we consider it just and equitable to extend time.
179. We have first considered whether or not these actions amount to one-off occurrences or form part of a continuing act. We are mindful that we should look at the substance of the complaints when reaching this view.
180. We accept that the first three allegations relate to one-off events that occurred earlier, whereas all of the other complaints relate to the process of the risk assessment and the ending of the claimant's employment and

are therefore linked and follow-on from each other. We have found that there is no continuity of personnel involved in the 16 March incident and the risk assessment process. While Mr Coningsby was involved in the ending of the claimant's placement, we are satisfied that this was a response to the matters in the risk assessment process and there is no link between that and the events. The claimant would no doubt identify what she considers as a similar attitude towards her disability, dismissing it and failing to take appropriate steps. We consider this, if it were the case, is insufficient to amount to a discriminatory regime, rule, practice or principle.

181. We consider that being asked to attend a clinic, the comments made by Mr Coningsby on the 17 March and being put in touch with a colleague against her will are each discrete events and not connected with the latter events arising from the risk assessment. On this basis, we conclude that these are not ongoing acts.

182. We then turned to the question of whether it would be just and equitable to exercise discretion and extend time. The onus is on the claimant to convince us that it be just and equitable to do so. Her explanation was this did not believe it was a step she could take at the time. It was only the repeated incidents led her to believe she had no option but take it further. We accept the respondent's submissions that the claimant chose to take no action initially and also find that once she did determine to act, she was able to contact ACAS understand the time limits and present her claim in time.

183. We find that the claimant has not given a good reason for not presenting complaints within time. The delay was one month and three weeks. Counsel for the respondent submitted that extending our discretion would be prejudicial to the respondent since for example on the first allegation the respondent was unable to respond as they were unclear who was involved. It was also submitted that these allegations were weak, and we should take into account in our balancing act this point. It was further submitted that the thrust of the claimant's case was about the assessment and therefore there will be less prejudice to the claimant if these matters were not addressed. Her complaint is about having to come back to work on site.

184. Having taken all these matters into account and looking at it in the round, on balance we consider that the prejudice would be greater for the respondent on this occasion and, bearing in mind that the claimant has not given a good explanation for delay, we conclude that it would not be an appropriate occasion on which to exercise our discretion. We conclude therefore that the allegations related the event on 16 and 17 of March 2020 brought out of time the tribunal therefore has no jurisdiction to address them.

<u>Discrimination arising from disability.</u>

185. There are three distinct allegations which are said to amount to discrimination arising from disability. The something arising relied on is the claimant's increased risk of covid 19. The allegations are: -

> 2.1.1 Undertaking an insufficient risk assessment on 22 May 2020 in that the First Respondent failed to undertake an individual risk assessment of the Claimant and there was a failure to discuss the Claimant's type 1 diabetes and how her role would be adapted to

minimise risk

2.1.2 Requiring the Claimant to attend the First Respondent's premises on 29 May 2020

2.1.3 Terminating the Claimant's placement with the First Respondent on 29 May 2020 by means of one week's notice.

186. We must consider if the respondent treated the Claimant unfavourably in any respect, as opposed to less advantageously than it could have done, what was the cause of that treatment in the mind of the alleged discriminator and whether the reason was something arising in consequence of disability. There must be a causal link which is an objective test.

187. . We have found that all band six staff were the subject of a risk assessment This was not something put in place just for the claimant or for those who were in the middle risk category. We do not speculate as to what would happen if occupational health had been involved, we do not need to do this. We have found that the risk assessment carried out by management was done in an insufficient manner and we made this finding from the evidence we have heard. The risk assessment was not properly individual to the claimant, while type I diabetes was discussed, sufficient information about how her role would be adapted to minimise her particular risk was not discussed. There were clear deficiencies in it, and it did not address key concerns such as how the claimant's personal room was to be dealt with, distance from patients and how she was to travel to patient's homes. The general environmental risk assessment which had been carried out was not provided. We have found the respondent could have remedied these defects if it had chosen to do so. It had the necessary information, other than travel to patient's homes which was left as an open question to be further discussed and yet it was not. They had flagged up they would take OH advice and then did not do so.

188. We conclude that a defective risk assessment does amount to less favourable treatment. It was submitted by the respondent that even if a more thorough risk assessment had been carried out it is clear from the claimant's evidence that the outcome would have been the same. We do not agree.

189. While we accept that the claimant did want to continue to work from home, we have found that that when she was asked whether she would have gone back to work with extra measures she was honest in saying that it might be bearable of that would been really hard she confirmed she could not have waited up until she had those two documents. We conclude that had the risk assessment been done properly, and had the claimant been made aware of the extra distancing when seeing patients, the exclusivity of her room and the general measures taken around the site, which she would have seen from the estate services assessment had Mr Coningsby decided to provide it to her, it is possible the claimant would have felt able to return to work having been given the necessary assurances. We have found that the failure to provide the information she asked for deprive the claimant of the proper opportunity to consider her position and, had she done so, she could have returned. If that were the case, then her placement would have continued.

190. It is not disputed that the claimant was required to attend the premises

on 29 May and that her placement was ended on that date by means of one week's notice. We also find that this is less favourable treatment as the decision was taken based on the claimant's reaction in the absence of full and proper information that she had requested, and which was available.

191. We then turn to the question of causation. The something arising, that is the increased risk of serious illness from Covid 19 is established. We have to determine whether it was that increased risk that was the reason for the less favourable treatment for all 3 complaints.
192. Considering the reason for the defective risk assessment, we conclude that the deficiencies were not because the claimant had an increased risk of infection. Ms Marshall genuinely believed she had dealt with all the claimant's issues. We conclude that there is no causal link between the claimant's increased risk of infection and this defective process. We conclude that this allegation fails on causation.
193. We reach the same conclusion in respect of the other two allegations. We are satisfied that the respondent did not require the claimant to return to work because of her increased risk of Covid, but because it was essential for the service to continue. The decision to terminate her placement was arrived at because there was an impasse, the respondent needed the claimant to return to work in person two days a week the claimant was not satisfied that it was safe for her to do so on the information provided.
194. As we conclude that the claims for because of causation, we would have found that in choosing to terminate the claimant's placement at this point was not a proportionate response. We do not doubt that the respondent had a legitimate aim, but its response was disproportionate at this point since the claimant's refusal to comply was based on lack of information which was within the respondent's own control.
195. The claim under section 15 of the Equality Act does not succeed.

<u>Adjustments</u>

196. It is accepted that the respondent had a requirement that the claimant attend their premises from May 2020 and work in the community. The claimant relies on what she says was a substantial disadvantage of being required to attend in person compared to someone without a disability in that she had an increased risk of serious illness due to Covid 19.
197. We have therefore considered what steps the respondent could have taken to alleviate this substantial disadvantage and, on an objective basis, whether such a step would be objectively reasonable and whether there was a chance that the disadvantage would have been alleviated. If there was such a prospect, we must consider that as one of the factors we evaluate in identifying whether that action would have been a reasonable adjustment.
198. The reasonable adjustment proposed by the claimant is that the respondent should have undertaken a thorough and detailed individual risk assessment in conjunction with occupational health. We cannot speculate as to what any occupational health involvement would have identified, but we have found that the respondent did not undertake an appropriate risk assessment. It had the information within its own knowledge without reference to occupational health to have been able to do so and we have found that provision of the information the respondent had could have made the difference without any OH referral.

199. . The claimant did not need another risk assessment but for the one that was carried out to have been done in a way that provided the information the respondent had but did not share. We conclude that had such an assessment be undertaken the result could have been different. There is a prospect that this would have alleviated the disadvantage. We also conclude that it would have been a reasonable step to have shared the environmental risk assessment with her, and to provide her with more information about the room she was to have and distancing from patients, information the respondent had at the time but did not pass on.
200. For these reasons we find that there was a failure to make a reasonable adjustment and the claim succeeds.

Harassment related to disability (Equality Act 2010 section 26)

201. While we have found that the first three allegations are out of time, for the sake of completeness we have nonetheless considered these and address each issue in turn using the numbering from the issues list.

4.1.1 On or about 16 March 2020 coerce the Claimant to covering a depot clinic without any PPE.

202. We have found that the claimant did undertake to cover a clinic against her better judgement and without PPE. We have found that this did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We have therefore gone on to consider whether this conduct, which was clearly unwanted, had that effect and if so whether it was reasonable for the conduct to have that effect. The claimant describes the effect as making her feel inadequate and uncaring. We conclude that this falls short of the creation of a hostile environment.
203. We also conclude that it was not reasonable for it to have this effect, the claimant was being requested to carry out her duties at a very early stage in the pandemic.
204. Even were it not brought out of time; this claim of harassment would not succeed.

4.1.2 On or about 17 March 2020 did Mr Simon Coningsby tell the Claimant, when she raised Covid 19 and her diabetes, that she was being "over anxious about my condition/risk wasn't serious" and the Prime Ministers response as " draconian" in suggesting people such as the Claimant should work from home

205. We have found that the comments were made and were unwelcome. It also found that in making these comments Mr Coningsby was not doing so for the prohibited purpose. Again, we have gone on to consider whether this conduct, which was clearly unwanted, had that effect and if so whether it was reasonable for the conduct to have that effect.
206. In our findings of fact, we noted that the claimant was sufficiently upset by this comment not to attend work any further that day. Again, however, bearing in mind the high threshold required to establish the effect set by section 26 we find that this threshold is not met. The claim fails on the same

basis.

207. 4.1.3 On or about 17 March 2020 did Mr Coningsby tell the Claimant that he would put her in touch with another type I diabetes colleague so she could discuss her condition and despite the claimant expressly declining that offer then proceed to send an email to Ms Melissa Ellison

208. We have found that Mr Coningsby did do this. Again, we have found that he did so in a mistaken belief that it was supportive and therefore it did not have the prohibited purpose. We also find that it did not have the prohibited effect.

209. We have found that the claimant entered into the correspondence and provide a level of detail which is inconsistent with her, at that time, finding this to be an act of harassment. The conduct did not have the prohibited effect and so does not succeed.

4.1.4 Ms Sally French on or about 14 May 2020 in the conduct of a risk assessment state to the Claimant that she was unable to record the risks at the Claimant's base as she did not work there and if she did not return to work it was likely Mr Coningsby would let her go.

210. It was agreed that Ms French was unable to record the risks at the claimant's base. However, we have found that was an objective statement which was clearly explained to the claimant, and she was able to attend a second meeting with her manager who was able to address these issues. We conclude that this neither had the prohibited purpose or effect. It was not an act of harassment.

211. We have found that she did tell the claimant that if she did not return to work it was likely that Mr Coningsby would let her go. We accept that in making this statement Ms French was reflecting her understanding of the position from Mr Coningsby and that this related to the need for the team to be on site. We conclude that it did not have a harassing purpose.

212. We conclude that any such comment was bound to be unwelcome, however it was a reasonable statement about a possible outcome and therefore we conclude it was not objectively reasonable for such a comment to have the prohibited effect. If it were the case, then warning any employee of the possible consequences of their actions would amount to harassment. For these reasons this claim does not succeed.

4.1.5 The conduct of Ms Arlene Marshall on or about 22 May 2020 in discussing the risk assessment with the Claimant in that the Claimant was not shown a general or individual risk assessment and there was a failure to discuss the Claimant's type 1 diabetes or how her role would be adapted to minimise risk

213. While the claimant was not shown a risk assessment at the meeting 22 May she was shown one later. We've also found that there was a discussion about a type I diabetes. These parts of the claim do not succeed.

214. We have found that there was insufficient discussion on how to adapt the claimant's role to minimise risk and that she was not provided with all the information the respondent had and that she required. We have found there were insufficiencies in what was discussed and recorded. We conclude that

this was error and misunderstanding on Ms Marshall's part and the decision not to provide the claimant with informational document by Mr Coningsby were also intended to be supported. We conclude that there was no harassing purpose behind these failures.

215. We conclude that this conduct did create a hostile environment and, given the significant nature of the discussion it was reasonable for the conduct to have that effect. The claimant was bringing up legitimate concerns about significant risks to her safety which the respondent chose not to answer. This was related to her disability.

216. For these reasons the claim of harassment succeeds on this ground

4.1.6 The contents of a risk assessment received by the Claimant on or about 26 May 2020 and in particular the failure to record the Claimant's type 1 diabetes or of any reasonable adjustments

217. We have found that there was no requirement to record the claimant's type I diabetes. We have found that there were some adjustments set out in the form. However, we have already found that the contents of the risk assessment were inadequate. The conduct is related to the claimant's disability. We therefore reach the same conclusion as for issue 4.1.5.

218. For these reasons this claim of harassment succeeds.

4.1.7 The comments of Mr Simon Coningsby and Ms Arlene Marshall on or about 29 May 2020 regarding the Claimant's concerns as to Covid 19 and in particular that the Claimant should return to working at Barnes hospital and the advice received by the Claimant from an occupational health nurse did not apply and the Claimant needed to be placed elsewhere. It was then suggested the Claimant's placement be terminated

219. We have found that Ms Marshall did make the comment that occupational health advice did not apply. We have found that she believed she had a good reason for saying what she did and therefore there was no prohibited purpose.

220. We have also found that the context in which the claimant was required to attend work on site and for her placement be terminated were based on the respondent's understanding the claimant was not in a risk category which meant she could not attend site. These comments and action to end her placement did not have a prohibited purpose.

221. We have made findings that this meeting and the proposal took place in the context of an inadequate risk assessment. We have also that had this been corrected there was a prospect that the claimant may have returned to work. The respondent's failure to do this properly led to this outcome and we find that it had a prohibited effect, suggesting that the claimant's placement be terminated when the respondent had failed to carry out an adequate risk assessment created a hostile environment, and it was reasonable for the conduct to have that effect.

222. This claim succeeds.

4.1.8 The termination of the Claimant's placement at the Second Respondent on 05 June 2020.

223. This claim succeeds on the same basis as set out for issue 4.1.7

Next steps

224. In the light of our conclusions are separate remedy hearing will be required to consider appropriate compensation for the claim for failure to make reasonable adjustments and for some of the claims of harassment. A separate notice for a one-day hearing to take place remotely by CVP will be on 13 June 2023 will be sent out in due course.
225. This was the earliest available date. The parties are reminded that they should let the tribunal know a soon as possible if the issue of remedy is settled between them.

Employment Judge Mclaren

Date 2 March 2023