EMPLOYMENT TRIBUNALS

Claimant: **Ms C O'Boyle**

Respondent: **St Helens & Knowsley Teaching Hospitals NHS Trust**

HELD AT: Liverpool in person hearing) **ON:** 3, 4, 5 & 6 April 2023

BEFORE: Employment Judge Shotter

Members: Mr A Murphy
Mr WK Partington

REPRESENTATION:

Claimant: Mr P Tomison, counsel
Respondent: Mr P Loftus, solicitor

REASONS

JUDGMENT having been sent to the parties on 13 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Preamble

The hearing

1. This has been an in person hearing. The Tribunal had before it the claimant's witness statement and impact statement together with 5 witness statements prepared by the respondent's witnesses and an agreed bundle consisting of 291- pages.

The pleadings

2. In a claim form received on 17 August 2020 following ACAS early conciliation between 8 July and 8 August 2020, the claimant who at the time was employed as staff nurse between

28 March 2017 to 28 July 2020 brings a complaint of disability discrimination under section 15 of the Equality Act 2010 ("the EqA"). The claimant relies on the medical condition of asthma for which she takes medication. The respondent accepts the claimant is disabled for the purpose of section 6 of the EqA.

Agreed issues

3. The parties agreed that the relevant period was the 8 April to 17 July 2020. The section 15 claim has been withdrawn and is dismissed. As there are no limitation issues time limits are no longer in issue.

4. The agreed issues as follows:

Failure to make reasonable adjustments – transfer to a non-Covid positive area

1. Was there a PCP of requiring employees to work in their normal workplace, i.e. the ward to which they are assigned?

2. Did that PCP place the Claimant at a substantial disadvantage – namely, being required to work with Covid positive patients on a Covid positive ward putting her own health at increased risk? The Respondent's position is that it is not a substantial disadvantage for an NHS Trust to expect a nurse with PPE to work on a ward with sick patients for three shifts during the early stages of the Covid-19 pandemic before moving to a different ward and then commencing shielding.

3. Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant was likely to be placed at the alleged substantial disadvantage?

4. If so, what was the date of actual or constructive knowledge?

5. Was an adjustment of a transfer to a non-Covid positive area reasonable? Among other questions, this involves answering:

5.1 Would a transfer to a non-Covid positive area have made a difference?

5.2 Did the Claimant request an adjustment of a transfer to a non-Covid positive area?

5.3 Did the Respondent take the step of transferring the Claimant to a non-covid positive area within a reasonable timeframe? The Claimant's position is that it should have been done immediately on 8 April 2020 or, failing that, on 9 or 10 April 2020. The Respondent's position is that a reasonable adjustment of reassigning the Claimant to Ward 3 Alpha – which was not dealing with Covid-19 patients – was made on 13 April 2020 and this adjustment was made when reasonable and practicable to do so.

Failure to make reasonable adjustments – shielding at home

5.4 Was there a PCP of requiring employees to work in their normal workplace, i.e. the ward to which they are assigned?

5.5 Did that PCP place the Claimant at a substantial disadvantage – namely, being required to work with Covid positive patients on a Covid positive ward and then being required to work on a non-covid positive ward putting her own health at increased risk? The Respondent's position is that it is not a substantial disadvantage for an NHS Trust to

expect a nurse with PPE to work on a ward with sick patients for three shifts during the early stages of the Covid-19 pandemic before moving to a different ward and then commencing shielding.

5.6 Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant was likely to be placed at the alleged substantial disadvantage?

2.12 If so, what was the date of actual or constructive knowledge?

5.7 Was an adjustment of shielding at home reasonable? Among other things, this involves answering:

5.8 Did the Claimant request an adjustment of shielding at home?

5.9 Would shielding at home have made a difference?

5.10 Did the Respondent take the step of authorising the Claimant to shield within a reasonable timeframe?

5.11 The Claimant's position is that this should have been done immediately on 10 April 2020.

5.12 The Respondent's position is that a reasonable adjustment of authorising the Claimant to shield at home made on 17 April 2020 and this adjustment of shielding at home was made when reasonable and practicable to do so.

Harassment

6 Did the following occur and did they amount to unwanted conduct?

5.1 Did Lyndsay Hamlet say to the Claimant "the thing is, we know you go out for cigs" on 10 April 2020?

5.2 Did Lyndsay Hamlet say to the Claimant "we need you to step up for the team" on 10 April 2020? If so, was this in the context of Lyndsay Hamlet attempting to have a supportive and positive conversation about the Claimant's ability to support other senior staff?

5.3 Did Lyndsay Hamlet request that the Claimant sign a disclaimer on 10 April 2020?

5.4 The Respondent's position on the above is as follows:

5.4.1 The comment "the thing is, we know you go out for cigs", if it was made, was in the context of Lyndsay Hamlet making a genuine attempt to have a reasonable conversation with the Claimant about her smoking and asthma.

5.4.2 The comment "we need you to step up for the team", if it was made, was in the context of Lyndsay Hamlet attempting to have a supportive and positive conversation about the Claimant's ability to support other senior staff.

5.4.3 The Claimant herself mentioned a disclaimer.

5.5 If so, were any such comments related to the Claimant's disability of asthma?

5.56 if so, did the unwanted conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? When deciding whether conduct has the effect above, each of the following must be taken into account:

The perception of the Claimant;
The other circumstances of the case; and
Whether it was reasonable for the Claimant to regard it as having that effect?

Remedy

6 If the Claimant has been unlawfully discriminated against as alleged, did she suffer to injury to feelings as a result of the Respondent's actions?

7 If so, what injury to feelings award in the low Vento band is appropriate?

Evidence

8 The Tribunal heard evidence under oath from the claimant, and took into account her impact statement and the witness statement dealing with liability and knowledge. It found the claimant to have been a credible witness who gave honest evidence supported by contemporaneous documentation, and when it came to conflicts in the evidence preferred that given by the claimant.

9 On behalf of the respondent the Tribunal heard from Emma Lubertino, Lynn Ashurst, Gill Molloy and Lyndsey Hamlet. Laura Stafford did not give evidence on the basis that the contents of her witness statement was agreed. Conflicts in the evidence has been resolved on the balance of probabilities as recorded in the Findings of Fact below.

10 The Tribunal has considered the documents to which it was taken in the bundle including the further information provided by the claimant and the further amended response, witness statements, written and oral submissions to which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and made the following findings of the relevant facts having resolved the conflicts in the evidence on the balance of probabilities.

Facts

11 The claimant was employed as a band 5 staff nurse from 20 March 2017 until her resignation on 28 July 2020. She worked in orthopaedics Ward 3B before and during the start of the Covid-19 pandemic.

12 It is accepted by the parties that from March 2020 and beyond that date the respondent experienced a chaotic time which impacted on medical profession generally. The Tribunal can recall the effects of the Covid-19 Pandemic well, including the burden placed on hospital staff, the complexity of ever-changing Government policies, procedures and guidance and the worry of the population at large as thousands of people fell ill and a great number died. This case must be considered against the backdrop of the start of the Covid-19 Pandemic and the Tribunal recognise that staff such as Emma Lubertino, Lynn Ashurst, Gill Molloy, Lyndsey Hamlet. Laura Stafford and the claimant were all placed under severe

pressures both inside and outside work. It is easy to forget in April 2023 the huge impact of the Coronavirus pandemic ("the Covid Pandemic"), and the professional and personal sacrifices made by the medical and other professionals (for example health care workers) for the greater good of society as a whole.

13 The respondent was aware that steps had to be taken to protected their staff from the pandemic and a system was set up referred to as the "Gold Command" and "Silver Command" which consisted of higher level management and HR responsible for securing protection to staff and patients during the Pandemic. The respondent sent out a questionnaire via its managers to all employees with a view to establishing who was and was not at risk due to personal health issues.

21 March 2020 email

14 On the 21 March 2020 the claimant responded to an email sent to her by Emma Lubertino questioning staff about their own medical health conditions. The claimant confirmed "I have asthma" and set out all the medications she was taking including Salbutamol 200mcg prn, Seretide 500bd, (an inhaler), Monteleukast 10mg and prednisolone rescue. The questions asked of the claimant about her health arose as a result of the respondent seeking risk assessments from staff who fell into "high risk categories" and may need redeployment or self-isolation due to the Covid Pandemic. The Guidance confirmed the respondent had a **"enhanced duty of care to protect the health of any staff member with a declared medical condition.** The purpose of the assessment is to identify staff that, because of underlying medical conditions, **may be more vulnerable if exposed to Covid-19 in order to minimise as far as reasonably practicable their exposure to this virus**"(my emphasis).

15 The Guidance included a provision for action to be taken by managers that included a requirement that they were "to assess the suitability for staff to work in higher risk Covid-19 areas…**staff have a positive response to any of the questions on the risk assessment will inform you directly. Such staff should instead be considered for alternative work area**" "(my emphasis). A highlighted boxed area confirmed staff who responded positively were unsuitable to work in high risk areas and "suitable in areas where there will be no planned exposure to Covid-19."

16 All managers were aware that the staff were being assessed to see if they fell into the high risk categories or not, including Lynn Ashurst, Gill Molloy, Lyndsey Hamlet and Laura Stafford.

17 There is an issue as to whether Emma Lubertino and the claimant met on the 24 March 2020 to complete a risk assessment with the outcome that the claimant was not to be moved to a high Covid risk area but should continue to work in ward 3B. The risk assessment cannot be found and the meeting cannot be recalled by the claimant. On balance, the Tribunal found that there was a discussion as a result of the claimant's 21 March 2020 email, but nothing hangs on whether it was a risk assessment or not, the Tribunal accepting that the claimant's perception and recollection of Emma Lubertino may have been adversely affected by the events of 2020 and the passage of time.

18 The Tribunal found by 24 March 2020 at the latest Emma Lubertino was aware that the claimant had a chronic respiratory disease and should not be put at risk by working with Covid patients. In oral evidence Emma Lubertino confirmed that once Ward 3B was converted to a Covid ward it was "highly likely" the claimant would have been transferred out of the high risk area as she was at risk of severe illness and ultimately death. Had Emma

Lubertino remained on ward 3B continuing to manage the claimant in her capacity as ward manager the Tribunal found on the balance of probabilities that the reasonable adjustment of moving the claimant out of the ward to a safer ward where she was less at risk would have been made. However, Emma Lubertino was absent at home having tested positive for Covid where she remained for some 8-months suffering from long Covid-19 and post viral fatigue. As a result she was unable to "hand-over" to the staff, particularly Gill Molloy, the ward manager from 3E orthopaedic who provided cover initially and then took over managing ward 3B.

19 It was a difficult situation for all involved. The claimant felt bound to continue working despite her concerns due the severe asthma she had, and it was apparent that this was the general ethos of medical staff working in the NHS at the outset and during the Covid Pandemic. Medical staff including the claimant were keen to work and help the public despite making personal sacrifices in order to do so, and it was the respondent's responsibility to protect their employees much in the same way the medical profession felt it was their responsibility to protect patients. The upshot of this was that the respondent was required to make reasonable adjustments for those employees who were deemed to be at risk, such as moving a nurse to a low risk ward if she or he had confirmed they fell into the high risk category.

20 The claimant received no response to her email sent on 21 March 2020 and as her Mother and son had respiratory conditions and were classed as "extremely vulnerable" she moved to live with her sister who was also a nurse. Understandably, the claimant was very upset to be living away from her son and Mother. As staff members started to test positive the hospital was in crisis with managing the influx of patients and covering staff sickness absences. As indicated above, the 24 March 2020 was the last day Emma Lubertino worked before she went absent due to Covid and unable to handover the ward to another ward manager.

21 On the 30 March 2020 Gill Malloy initially expecting to provide cover only, was reassigned ward manager for ward 3B. Gill Molloy was firefighting, however, the Tribunal found that it was encumbering upon her to understand if any staff member working in Ward 3B fell into the high risk category, even if it meant looking for the responses to the questionnaire which were pinned to a notice board. Gill Molloy knew that this was a task that needed doing, and was as important if not more so, than managing the ward with a number of absent medical personnel. In short, the respondent was on notice that the claimant was disabled in accordance with section 6 of the EqA by the 24 March 2020 and that she was substantially disadvantaged given she was in the high risk category if she was not protected from Covid positive patients.

22 On the 8 April 2020 higher level management made the decision to covert two wards to a Covid ward that included patients who had tested positive for Covid or could test positive for Covid. No system was put in place to revisit the Guidance and risk assessments for staff who fell into "high risk categories" with the result that the claimant's email of 21 March 2020 was not taken into account and the claimant was not asked by management or anybody else from the respondent whether she fell into the high risk category which meant it was unsafe for her to work on a Covid Ward. Prior to Ward 3B's conversion to a Covid ward a discussion should have taken place between management and the claimant concerning the risk and her asthmatic condition, but it did not because nobody thought to do it. It was not for the claimant to suggest it, she did not know Ward 3B was going to be converted and by the time she did it was too late as she remained allocated to Ward 3B.

8 April 2020 Ward 3B was converted to a "Covid Cohort ward

23 On the 8 April 2020 Ward 3B was converted to a "Covid Cohort ward." The claimant's role changed from dealing with orthopaedic patients to Covid 19 patients. As the claimant was already working in Ward 3B she was expected to continue working in the Ward, and there was a PCP that nurses were expected to work in the ward they were allocated to. Nurses could be allocated to different wards, either as reasonable adjustments or due to the needs of the business, but the fact remained that once allocated they were expected to turn up on the next shift and work in that ward. Nurses could not decide what ward they wanted to work in.

24 The claimant continued to work in Ward 3B without question because that is what she was expected to do. The claimant was worried about the effect of working on Ward 3B on her health, she wanted to remain at work but in a safe environment. It was the respondent's duty to ensure she was working in a safe environment and by moving the claimant to a non-Covid ward, it is undisputed between the parties that the claimant would have been safer despite all the PPE equipment available at Ward 3B. It is also undisputed that a number of patients who were non-Covid and transferred to Ward Alpha were originally from ward 3B, and the Tribunal did not accept, on the evidence before it, that given the high risk to the claimant, she could not have been transferred to Ward Alpha on or before the 8 April 2020 at the latest had the respondent managers addressed their minds to this, which they did not . The evidence before the Tribunal pointed to the main concern for managers, such as Gill Malloy and Lynn Ashurst, the matron, was to ensure there was correct mix of qualified staff to support the ward and care of patients. The Tribunal concluded that whether a member of staff was at high risk or not was not a consideration when it should have been despite the unique situation and difficulties faced by managers including matron who appeared to have forgotten the Guidance issued with the risk assessment. It was reasonable and achievable for the claimant, a three-year qualified nurse, to have been transferred to a non-Covid ward at this stage.

25 On the 9 April the claimant, who was in work, asked Gill Malloy for a risk assessment referring to her asthma and the fact she had been in intensive care when young. The claimant was concerned because she was in a Covid ward, and yet she did not specifically ask to be transferred to another ward. Gill Malloy did not think of transferring her despite being in possession of knowledge concerning the seriousness of the claimant disability and consequences including possible death.

26 In oral submissions Mr Loftus argued that as the claimant did not request a transfer to a non-Covid ward or say she only wanted to care for non-covid patients and that such an adjustment was not reasonable in the early stages of the covid-19 pandemic when Guidance on who was at risk and guidance for employers was ever changing. The Tribunal did not agree. There was no evidence before it that the Guidance issued in March 2020 dealing with high risk employees had changed. Gill Malloy was aware of the Guidance and the early risk assessment that should have been completed by employees, and yet she did not ask the claimant about her response and under the Guidance she was aware as at the 9 April 2020 that the claimant should not be working in a Covid ward. By the 9 April 2020 Gill Malloy should have known, following the respondent's own Guidance, that the claimant should be transferred out to non-Covid ward and that it was possible given the size and resources of the respondent for her to do so. Gill Malloy, as ward manager and Lynn Ashurst as the matron did not need to be told by the claimant that she should be transferred out of Ward 3B, the reasonable adjustment should have been carried out and the respondent comply

with its duty to the claimant. In contrast to submissions made by Mr Loftus, transferring the claimant out of Ward 3B was practicable and reasonable given the existence of the Guidance, risk assessments and claimant's email confirming her serious asthma condition weeks before Ward 3B was converted to one of two Covid wards when other non-Covid wards were available with nurses working in them who were not at a similar high risk.

27 As at the 9 April 2020 there was a duty on the respondent to send the claimant home shielding and the Tribunal finds on the balance of probabilities that it had breached that duty to make reasonable adjustments despite possessing knowledge of the claimant's disability and substantial disadvantage.

10 April 2020

28 On the 10 April 2020 the claimant, who was at work in Ward 3B, produced to Gillian Molloy an email from her GP confirming "You have been identified as someone at risk of severe illness if you catch coronavirus…you are advised to stay at home and avoid all face-to-face contact for at least 12 weeks from today…" The claimant's diary titled "Nursing in a Pandemic" has a number of incorrect dates, but nothing hangs on this as the dates are not in dispute. At no stage did Gillian Molloy or any manager from the respondent suggest it was a fraudulent email and the Tribunal found that it was genuine advice relevant to the claimant's employment.

29 The barrier to the respondent actioning the email appeared to be that the GP's advice was contained in a text and not a Public Health England letter signed by Matt Hancock coupled with the fact that it was struggling to find the "correct mix" of medical personnel to work in the wards. The possibility of the claimant no longer being able to work on Ward 3B or any other ward caused Gillian Molloy difficulties in that she needed to proactively manage the claimant's absence and at the same time ensure patient safety by arranging for another nurse to replace her. Gillian Molloy did not think to send the claimant home immediately, despite the respondent's procedures providing for such an eventuality and the medical information provided by the claimant's GP, which was ignored in favour of the claimant remaining on duty.

30 Gillian Molloy's evidence that because it was a text and not a letter she did not know what to do with it, was not found to be credible by the Tribunal. Had Gillian Molloy any issues with the validity of the GP advice she could have rang the claimant's GP, but she was not questioning the authenticity at the time and did not check with the GP. Gillian Molloy had the option of referring it to the HR department for advice, but she chose to refer it to Lynn Ashurst, the matron, and unreasonably expected the claimant to remain working at Ward 3B when the respondent was under a duty to make a reasonable adjustment by instructing the claimant to stay at home whether or not she wanted to. The fact that the claimant clearly indicated on numerous occasions that she did not want to be sent home shielding does not mean that it was unreasonable for the respondent to comply with its duty to make adjustments and send her home on the basis that had the respondent done so, as evidenced in the factual matrix, the claimant would have gone home when instructed. The claimant's attitude may however sound in the quantification of her damages for injury to feelings given the fact she had made it clear she did not want to shield and wanted to continue to look after patients with a view to supporting the NHS and her colleagues.

31 There is an issue as to whether the claimant raised the matter of a disclaimer with Gillian Molloy or not. Gillian Molloy's evidence is that the claimant did when she made it clear that she wanted to continue working offering to sign a disclaimer document in order to do so. The claimant's evidence is that this was not mentioned by her, but by Lyndsay Hamlet in a

later conversation. The Tribunal after deconstructing the emails sent to by the claimant to Anthony Lockhart, concluded on the balance of probabilities the disclaimer document was mentioned for the first time in the conversation with Lyndsay Hamlet and Gillian Molloy is mistaken, which is unsurprising given the high pressure situation she was working in, the passage of time and lack of any contemporaneous documentation apart from the Anthony Lockhart email exchange.

32 The clamant alleges that Lyndsay Hamlet asked her to sign a disclaimer "… something for me to sign so I could keep working despite the text." Gillian Malloy's evidence was that the claimant stated to her that she did not want to shield and was prepared to sign a waiver. Anthony Lockhart, the claimant's union representative who worked with the claimant in her capacity as a union representative, was already aware of a rumour concerning a disclaimer form. In oral evidence the claimant repeated a number times that she did not want to shield, go home and step away from her nursing duties.

33 The claimant spoke with Lynn Ashurst about the text as instructed to do so by Gill Molloy. Lynn Ashurst said words to the effect that she would deal with it. The words used by the claimant and Lynn Ashurst are different, but the meaning is effectively the same and corroborated by the contemporaneous email sent to Anthony Lockhart. Lynn Ashurst asked Lyndsay Hamlet, ward manager at 3 Alpha, to speak to the claimant about the text message, which she did that day. Lynn Ashurst also made contact with HR but did not chase it up. She did not think of sending the claimant home to shield. The Tribunal worked through the emails line-by-line with observations made by the Tribunal taking into account the written and oral evidence.

34 There is a conflict in the evidence about exactly what was said between Lyndsay Hamlet and the claimant on the 10 April 2020. It is apparent to the Tribunal that the claimant's email sent to Anthony Lockhart on 15 April 2020 at 18.01 reflected the following as found by the Tribunal on the balance of probabilities:

34.1 The claimant was conflicted by the GP text instructing her to shield. The claimant wanted to work. The claimant was in a high risk category.

34.2 Lynn Ashurst had been shown the GP text and decided that it would be dealt with later. Lynn Ashurst had arranged for Lyndsay Hamlet to speak to the claimant.

34.3 Lyndsay Hamlet had spoken to the claimant. Lyndsay Hamlet had made a reference to the claimant smoking. It is notable that Lyndsay Hamlet made no mention of this in her written witness statement despite it being one of the claimant's allegations. There is an issue as to whether Lyndsay Hamlet would have used the exact words alleged by the claimant which are "the thing is, we know you go out for cigs" on 10 April 2020 and the Tribunal found on the balance of probabilities that whatever words were used they meant the same thing i.e. that managers knew the claimant smoked. It is notable that there is no reference in the email sent at 18.01 to the allegation in the email sent later at 18.34 to "no one has offered me redeployment, I have been told it's because I smoke…" and there was no evidence that any manager, including Lyndsay Hamlet, had told the claimant she would not be redeployed because she smoked cigarettes. The Tribunal concluded that the emails of 16.01 and 18.34 were a contemporaneous record but should be treated carefully as both reflected the claimant's interpretation of events and words rather than what was actually said.

34.4 Lyndsay Hamlet had referred to the reduced number of staff, and the evidence before the Tribunal was that Ward 3B was low on senior staff because staff were off sick with

Covid. At one time Lynn Ashurst was the only senior nurse on the ward, and 4 senior nurses were off sick and gaps were needing to "be plugged."

34.5 Lyndsay Hamlet confirmed in oral evidence she had "asked" the claimant to "support Gill, who had moved from a 12 bed to 32 bed ward, and as a senior nurse she would be great support." There is no mention of this evidence in Lyndsay Hamlet's written witness statement despite Lyndsay Hamlet confirming to the Tribunal on cross-examination that "I lived and breathed Covid and aware of every conversation I had during Covid." On being asked to clarify her evidence by the Judge, Lyndsay Hamlet confirmed she meant "I'm talking about every conversation with the claimant" and yet in her written statement she had omitted to record key elements of the conversation she can now recall in oral evidence. There is very little difference between Lyndsay Hamlet's oral evidence and the email to Anthony Lockhart from the claimant describing her conversation with a manger who we now know to be Lyndsay Hamlet (not named in the email) that references the following; "we had no senior staff on the department and I needed to step up for my team." The Tribunal accepted on balance that these works or words with a similar effect were used by Lyndsay Hamlet.

35 The Tribunal found that the email of 15 April 2020 sent to Anthony Lockhart largely reflects the factual matrix at the time, and all that fundamentally remains in dispute is whether the claimant was told she would need to sign a document/disclaimer form by Lindsley Hamlet or whether the claimant had raised it for the first time in the meeting with Gillian Molloy and Lyndsey Hamlet had been tasked with finding out exactly what the claimant meant. There is confusion concerning the disclaimer form partly caused by the passage of time, and the Tribunal concluded on the balance of probabilities that the existence of a disclaimer form was first introduced by Lindsey Hamlet as recorded by the claimant in her contemporaneous email to Anthony Lockhart dated 15 April 2020 as follows; "things that were said was that there is a trust form coming out, a disclaimer, that I could sign to say I will still work even though asked to isolate. As far as I am concerned signing any such document will negate my life insurance and I am worried that other members of staff will feel obliged to come into work, even at risk, coerced into signing a document & into work, guilt tripped into working." Giving the words used by the claimant their ordinary plain meaning, they point away from her offering to sign a disclaimer and emphasis her concerns at the prospect of doing so. The 15 April 2020 email corroborates the claimant's evidence, and there is no suggestion that it was produced on the 15 April 2020 for the purpose of this litigation. Taking into account Anthony Lockhart's response the email exchange appears genuine, and on the balance of probabilities the Tribunal found the claimant to have given more credible evidence in comparison to Lyndsay Hamlet, whose memory may not be so good as she thought it was, and Gillian Molloy whose recollection has been adversely affected by the passage of time.

36 The Tribunal concluded that Lyndsey Hamlet's purpose was to ensure the claimant remained working in Ward 3B in the knowledge that the claimant was conflicted and did not want to go off work. The fact that the claimant had asthma, was at risk and in no uncertain terms the medical advice that she should be shielding, was in Lyndsey Hamlet's mind when she brought up the claimant smoking whatever words were used, and the reason why she brought this up was to make the claimant feel guilty so she remained working on the Ward. There was no reason for the claimant's smoking to be brought up, this was not a conversation dealing with what the respondent could do to help the claimant and nor did Lyndsey Hamlet make any suggestions to assist the claimant with her smoking habit. Her evidence that she was concerned for the claimant was not credible; had she been genuinely concerned the GP's recommendation would have been complied with and actioned immediately. The reference to the claimant supporting her ward manager Gillian Molloy, and "stepping up for the team" was likewise intended to put pressure on the claimant, who had already moved in

with her sister away from her child and Mother. The claimant was upset and concerned as evidenced in the second email sent on 15 April 2020 at 18.34 to Tony Lockhart "I'm really upset, I want to work but I want to be safe, my sisters trust have told her they cannot let her work as they would be negligent in their duty of care to staff and I feel like I'm worthless, cannon fodder, I've not even had a risk assessment done, no one has offered me re-deployment, I have been told it's because I smoke which I know is a ridiculous crap habit, to be basically told I'm putting myself at risk so I don't matter I'm just gutted. I've cried for days. Sorry to put this on you." There is no question that this email was not genuine, and it reflects the claimant's upset at the time.

37 On the 12 April 2020 the claimant worked another shift during which either 2 or 4 patients died of Covid. There is an issue as to the number of patients who died, which the Tribunal does not intend to resolve accepting the claimant genuinely believed 4 people died that day. It is sufficient that Ward 3B designated a Covid Cohort Ward received extremely unwell patients and a number of them died. It is agreed the claimant worked three shifts looking after the Covid patients until she was transferred to a non-Covid ward as recorded below, and that other medical professionals were going off ill with Covid at the time. The respondent did nothing to action the 10 April 2020 email from the claimant's GP practice and the claimant did not shield.

15 April 2020 email referred to above

38 On the 15 April 2020 the claimant emailed Anthony Lockhart her union representative referring to the fact that she was in a high risk category, "on showing the text to my matron she decided that we would deal with it later on. She asked another manager to speak to me, who told me that we had no senior staff on the department & I needed to 'step up for my team' among other things that were said was that there is a trust form coming out, a disclaimer, that I could sign to say I will still work even though asked to isolate…signing any such document would negate my life insurance" and referenced her fear of coercion and "guilt tripped into working. I was just wondering if you had heard anything about this form or how it was to be used?"

39 The claimant on 16 April 2020 was informed by Gillian Molloy that she was to be reallocated to Ward 3 Alpha on her next shift. The claimant worked 3 shifts before she was transferred to Ward 3 alpha during which she was at high risk of catching Covid. The claimant emailed Anthony Lockhart that day at 15.18 pleased with the outcome including the fact a risk assessment was going to be completed. The claimant remained concerned in her capacity as a union representative that other nurses were being treated the same she as she had been.

40 From the 16 April 2020 the claimant worked on Ward 3 Alpha.

41 Laura Stafford was absent having tested for covid in early April 2020, returning to work on the 14 April 2020. It is undisputed she sat down with the claimant on the 17 April 2020 with a partly completed risk assessment prepared by Gill Molloy earlier. The claimant produced a copy of the 10 April 2020 text she had received from her GP. The claimant made it very clear that she did not want to shield, as confirmed by her to the Tribunal in oral evidence. The risk assessment was forwarded to HR.

42 The 17 April 2020 risk assessment with the claimant confirmed she had a "chronic long respiratory disease and weakened immune system." In an email sent on 17 April 2022 HR advised Laura Stafford and Gillian Malloy that she understood "adjustments had been made to move Carmel from 3B which is a high risk area to 3 Alpha…classed as a low risk

area." HR reviewed the advice on receipt of the GP email advising "this means she should not be in work as the advice is no face to face contact for 12 weeks…"

43 The claimant's last shift was the 16 April 2020 following which she stayed at home shielding until her resignation on the 2 June 2020. It is clear from the claimant's Nursing in a Pandemic diary, albeit the date is incorrect, records after the GP text was shown "to my senior staff…the decision was taken out of my hands…I feel awful and like I've really let my team down. I feel guilty about not being there in this awful time to help my patients and my team…"

Grievance

44 On the 7 July 2020 the claimant raised a grievance complaining about the failure to make reasonable adjustments and harassment after resigning on the 2 June 2020 which took effect on the 28 July 2020. In the resignation letter to Lynn Ashurst the claimant referred to her new job, indicated she would be shielding until 3 July 2020, requested that she return to work with the team in her notice period and to remain on the bank.

Law

Disability discrimination – failure to make reasonable adjustments

45 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA.

46 The following matters are key for the Tribunal to decide and I have set out some of the law under the headings.

The PCP

47 In the well-known case **Secretary of State for Work and Pensions (Job Centre Plus) v Higgins** [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

48 The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal

rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee. In the claimant's case the Tribunal found a PCP existed to the effect that employees were required to work in their normal workplace, i.e. the ward to which they were assigned taking into account the decision in **Lamb v The Business Academy Bexley EAT 0226/15 in which** the EAT commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

49 The purpose of the comparison exercise is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. It must be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20 –**Sheikholeslami v University of Edinburgh [2018] IRLR 1090***:* "The purpose of the comparison exercise with people who are not disabled…is not a causation question. For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances…The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability." In the claimant's case the Tribunal found that she has met this test given the nature of her disability during the Coronavirus Pandemic.

50 A substantial disadvantage is one which is more than minor or trivial – s.212(1) EqA 2010. The ET must be satisfied that the PCP has placed the disabled person not simply at some disadvantage viewed generally, but at a disadvantage which is substantial - **Royal Bank of Scotland v Ashton [2011] ICR 632.** The Tribunal found that Ms O'Boyle was substantially disadvantaged in that her health could have been severely affected including possible death.

Knowledge

51 With reference to the knowledge defence in paragraph 20 of Schedule 8 EqA the defence will succeed unless the Tribunal is satisfied that the employer had knowledge (either actual or constructive) of both the disability and the substantial disadvantage. In the case of Ms O'Boyle the Tribunal found the respondent had actual knowledge of the disability and substantial disadvantage as a result of the claimant's email sent on 21 March 2020, discussion with Emma Lubertino on the 24 March 2020, risk assessment and 10 April 2020 GP letter.

Reasonableness of adjustments

52 The statutory duty is for the respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" imports an objective standard **- Smith v Churchills Stairlifts plc [2005]** EWCA 1220*.* It is important to identify precisely the step which could remove the substantial disadvantage complained of - **General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43.**

53 The factors found in paragraph 6.28 of the Code is a reminder of some of the factors likely to be relevant to reasonableness. An important consideration is the extent to which the

step will prevent the disadvantage. In Ms O'Boyle's case transferring her to a non-covid ward or sending her home to shield for 12-weeks were reasonable adjustments. The mental processes of the claimant's mangers are irrelevant when determining whether adjustments were available and reasonable. When identifying what step(s) it was reasonable for the employer to take, the focus must be purely on the position at the time the relevant decision was taken (or not taken), and the Tribunal concluded the claimant should have been transferred to a non-Covid ward before the 8 April 2020 when Ward 3B was converted to a covid cohort ward, and then sent home for 12-weeks on the 10 April 2020 as reasonable adjustments.

Harassment

54 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

55 Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b).

56 The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

57 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

58 In order to decide whether any conduct has either of the proscribed effects under s.26 (1)(b) EA 2010, the ET must consider both (by reason of s. 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). All the other circumstances must also be taken into account (s.4(b)) - Pemberton v Inwood [2018] EWCA Civ 564.

59 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 - Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is submitted that a claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention.

Related to a protected characteristic

60 This is a very broad test, but some guidance about how the ET should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA Civ. 1203. The ET should make findings as to the mental processes of the alleged harassers.

61 Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 *EAT.* The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

Burden of proof

62 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

63 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts

Burden of Proof

64 The claimant has proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected her to the discrimination alleged and went on to consider the explanations given on behalf of the respondent as recorded below.

Agreed list of issues

Failure to make reasonable adjustments – transfer to a non-Covid positive area

65 With reference to the first issue, namely, was there a PCP of requiring employees to work in their normal workplace, i.e. the ward to which they are assigned, the Tribunal found as recorded above that staff were required to work in their normal workplace which was the ward to which they were assigned, preferring Mr Tomison's submissions on this point at paras 56 and 57 of the written submissions that nurses are assigned to wards, and expected to work on that ward when they have a shift. The fact that employees were reassigned when reasonable adjustments were made and staff were moved to different wards on occasion does not show that this PCP was not operated. The Tribunal agreed that when the respondent made reasonable adjustments by moving employees and/or moved employees

for business reasons was evidence of a policy that staff are assigned to wards, and then exceptions to that policy are made in certain situations. Further, when an employee is reassigned a ward he or she is expected to work in that ward and turn up for their shift at that ward.

66 With reference to the second issue, namely, did that PCP place the claimant at a substantial disadvantage the Tribunal found that it did. The respondent required the claimant to work with Covid positive patients on a Covid ward putting her own health at increased risk, It is notable that this point was in effect conceded by witness for the respondent and supported by claimant's response in the 21 March 2020 to Emma Lubertino, the 10 April 2020 email from the claimant's GP and the 17 April 2022 risk assessment that was eventually sent to HR who advised the claimant should not be at work.

67 The respondent's position is that it was not a substantial disadvantage for the NHS Trust to expect a nurse supplied with PPE to work on a ward with sick patients for three shifts during the early stages of the Covid-19 pandemic before being moved to a different ward and then commencing shielding at home. The Tribunal did not agree. The respondent's witnesses confirmed that the claimant was still at greater risk despite the PPE protection, which is unsurprising given the respondent's own Policy that it had an "enhanced duty of care" towards employees who fell into the "high risk categories" to minimise their exposure to Covid-19. As soon as the ward in which the claimant worked was converted to a ward requiring her to look after Covid positive patients the claimant was placed at a substantial disadvantage compared to other medical professionals who did not fall under the respondent's high risk category. It is notable that moving the claimant to a non-Covid ward and then sending her home to shield were steps taken by the respondent later, and at that stage it had complied with its duty recognising that the requirement for her to work on a Covid ward and then on a non-Covid ward where patients could end up testing positive for Covid substantially disadvantaged the claimant who was at greater risk of catching the virus, being at risk of a severe illness and possibly death compared to a nurse who had not been identified by the GP with the same risk factors.

68 Mr Tomison submitted that the circumstances in which that disadvantage arose was slightly different in relation to the two steps. The Tribunal agreed. In relation to transfer to a non-covid ward, the circumstances are that she was nursing patients who had tested positive for Covid. In relation to shielding, the circumstances are that she was initially nursing patients who had tested positive for Covid and then she was transferred to a non-Covid area nursing patients who may end up testing positive.

69 With reference to the third issue, namely, did the respondent know, or could the Respondent be reasonably expected to know, that the claimant was likely to be placed at the alleged substantial disadvantage, the Tribunal found that the respondent possessed knowledge on or around the 21 March 2020 after the claimant had responded to the email sent to her by Emma Lubertino. Mr Tomison submitted the claimant's case is that the relevant people had constructive knowledge of her disability and substantial disadvantage from 21 March 2020, and the Tribunal agreed.

70 With reference to the fourth issue, namely, what was the date of actual or constructive knowledge, Mr Loftus confirmed in written submissions at paragraph 13 that the Respondent did not know and/or could not be reasonably expected to know, that the Claimant would be placed at the alleged substantial disadvantage as a result of her asthma until late March 2020 and/or April 2020. The Tribunal concluded that the information provided by the claimant on the 21 March 2020 should have been available to all the managers on the ward, who should have proactively sought the information, especially when the claimant was asking for

a risk assessment to be carried out. The Tribunal agreed with Mr Tomison that failure to follow internal processes does not exculpate the Respondent from constructive knowledge.

71 With reference to the fifth issue, namely, was an adjustment of a transfer to a non-Covid positive area reasonable, the Tribunal found that it was. A transfer to a non-Covid area would have made a positive difference. The claimant's email on 21 March 2020 pointed to the fact that she should not be working with Covid-19 patients. Mr Lotus accepted the adjustment was reasonable and was made. The issue is in the timing and the fact that the claimant had made it clear she wanted to remain at work. At no stage did she expressly request an adjustment of a transfer to a non-Covid positive area because she felt that she was shirking her duty and letting colleagues down. As indicated by the Tribunal above, it was incumbent on the respondent to comply with its duty to make reasonable adjustments even if an express request had not been made taking into account the factual matrix of this case.

72 With reference to the sixth issue, namely, did the respondent take the step of transferring the claimant to a non-covid positive area within a reasonable timeframe, the Tribunal found it did not for the reasons stated above and preferred the claimant's position that it should have been done immediately on 8 April 2020 or failing that, on 9 or 10 April 2020 taking into account the respondent's Policy as recorded by the Tribunal in its findings of facts. The Tribunal, who had in mind at all times the difficulties faced during the Covid Pandemic, nevertheless found it incomprehensible that the respondent, who considered itself to be under an enhanced duty of care to protect the claimant who was more vulnerable to serious illness and possible death if exposed to Covid, decided to wait and see if it could manage the correct staff ratio in the ward before complying with its duty to make the reasonable adjustment.

73 Mr Loftus submitted that a reasonable adjustment of reassigning the claimant to Ward 3 Alpha (which was not dealing with Covid-19 patients) was made on 13 April 2020 and this adjustment was made when reasonable and practicable to do so, there was no unreasonable delay. He argued "if the Tribunal was to conclude that a period of approximately 3 days for something to be done is equivalent to failing to do something, then that would place an onerous burden on employers that cannot be what is intended by the law. Take the example of an adjustment of equipment procured via Access To Work – if it takes a few day and/or weeks for the equipment to be shipped and delivered, would that amount to it a failure to provide such equipment? Respectfully, it would not – and the same principle applies here."

74 The Tribunal discussed this analogy with Mr Loftus at the hearing. Mr Loftus accepted the procurement of equipment was not directly analogous to the claimant's situation, and the Tribunal took the same view. It is trite to say that each case is decided on its own facts. In Ms O'Boyle's case the respondent had control over what steps it could take to protect her, and if there were any issue, for example, the fact the GP advice came via an email, this could have been resolved by the claimant being immediately sent home shielding given the size of the undertaking and the enhanced duty of care the respondent considered it was under.

75 It is undeniable that the Covid-19 Pandemic placed an onerous burden on employers, including the respondent, however the duty of care owed to employees at risk of severe illness and possibly death could not be ignored and took priority. Mr Loftus made reference to the claimant clearly indicating that she wanted to continue working and to her not requesting a transfer out of Ward 3B. The Tribunal taking into account its findings of facts above found on the balance of probabilities as the claimant had brought her disability that put her in the high risk category to the respondent's attention, under its own procedures it was aware she was high risk and could not work with Covid positive patients. As the claimant's employer it was for the respondent to make the reasonable adjustments by

ordering the claimant to initially move wards, and then go home and shield, with the effect that if she failed to do so she would be disobeying a reasonable managerial instruction as she did after she handed in her resignation and was instructed not to come onto the ward to say goodbye. This case stands or falls on its own individual facts, and there is no question of a too onerous burden being placed on the respondent that cannot have been intended by law. The Tribunal is not advocating that the respondent should make all reasonable adjustments within a period of 3-days from start to finish. Objectively assessed, it should made the adjustment as soon as it became clear that (a) it was breaching its own health & safety Policy, and (b) the uncontroversial GP's indication was the claimant should no longer be at work. The points made by the Tribunal are also relevant to the shielding at home adjustment which it does not intend to repeat, other than confirm that the date of knowledge was 10 April 2020, later than the date of knowledge when the claimant should have been transferred to a non-Covid ward.

Failure to make reasonable adjustments – shielding at home

76 With reference to issue 5.4, namely, was there a PCP of requiring employees to work in their normal workplace, i.e. the ward to which they are assigned, as indicated above, the Tribunal found that there was and repeats its findings set out above in relation to the transfer to a non-Covid positive area in relation to issues 5.5. to 5.7.

77 With reference to 5.8, namely, issue did the claimant request an adjustment of shielding at home, the Tribunal found the claimant did not expressly make such a request, however she showed managers the GP's text which made the position absolutely clear. As submitted by Mr Tomison had the claimant not wanted to shield she would not have divulged the text sent to her by the GP. In any event it was for the respondent, once it had sight of the text, to make the necessity adjustments in line with its own Policy i.e. send the claimant home immediately because she was at greater risk with or without PPE.

78 With reference to issue 5.9, namely, would shielding at home have made a difference the medical evidence is that it would, and the Tribunal is not prepared to go behind this. It is notable that the respondent has adduced no supporting evidence that shielding at home would not have made a difference.

79 With reference to issue 5.10, namely, did the respondent take the step of authorising the claimant to shield within a reasonable timeframe, the Claimant's position is that this should have been done immediately on 10 April 2020.The Respondent's position is that a reasonable adjustment of authorising the Claimant to shield at home made on 17 April 2020 and this adjustment of shielding at home was made when reasonable and practicable to do so. The Tribunal concluded that once the GP shielding notice was received by the respondent steps should have been taken immediately to secure the claimant's safety by sending her home. If there were any doubts about the effectiveness of the GP's email and whether it should be accepted as an instruction to the employer to send an employee home, the respondent should have actioned it immediately and carried out an investigation. The evidence is that the GP's email was accepted as legitimate and there was no good reason for the delay given that other employees with letters were sent home straight away. The issue for management was pressure on them due to the understaffing of wards including Ward 3B and it wanted to retain the claimant attendance at work having the difficult balancing act of ensuring patient safety and the safety of its employees. Firefighting managers were looking at short term measures intentionally ignoring the possibility that the claimant could catch covid which had the possibility of serious consequences for her. This factual matrix set the scene for the harassment complaint.

Harassment

80 With reference to the first issue, namely, did the following occur and did they amount to unwanted conduct?

80.1 Did Lyndsay Hamlet say to the Claimant "the thing is, we know you go out for cigs" on 10 April 2020, the Tribunal found that whilst the precise wording may not have been used, words to that effect were spoken for the reasons stated above having concluded that Lyndsay Hamlet was not an entirely credible witness on this point. The words were said as a precursor to persuading the claimant to remain in work and support the team. It is a matter of fact the claimant smoke. The claimant as a qualified nurse knew she should not be smoking and that it could make her health deteriorate in the Covid-19 pandemic. Lyndsay Hamlet's comment was unwanted, it related to the claimant's asthma and had the purpose and effect of violating her dignity and creating a hostile environment for her in order that she would remain working in the team. It was not said in a supportive or positive way.

80.2 Did Lyndsay Hamlet say to the Claimant "we need you to step up for the team" on 10 April 2020" the Tribunal found she said this or words to that effect. If so, was this in the context of Lyndsay Hamlet attempting to have a supportive and positive conversation about the Claimant's ability to support other senior staff. At the time there was no issue with the claimant supporting her colleagues and she made it very clear that she wanted to remain at work. The GP's email put a stop to this. Lyndsay Hamlet wanted the claimant to remain at work and support her colleagues and this is why she used those words i.e. the inference being the claimant would ignore GP advice and "step up for the team." It was not said in a supportive or positive way.

80.3 With reference to whether Lyndsay Hamlet requested that the Claimant sign a disclaimer on 10 April 2020, the Tribunal found that she did. The claimant was given an impression there was a form she could sign to circumvent the GP's email and continue working, the Tribunal preferring the claimant's evidence on this point supported by the contemporaneous emails in comparison to the less credible evidence of Lyndsay Hamlet who was unable to recall what was said due to the passage of time. The Tribunal accepts that the respondent had no such form, however this does not mean Lyndsay Hamlet did not raise it as a possibility because she was eager for the claimant to remain at work. The offer of a disclaimer was not supportive or positive but an attempt to put pressure on the claimant by giving her the impression that such disclaimers existed and taking the whole conversation into account, the intention of Lyndsay Hamlet was to put pressure on the claimant due to the effects of her disability, and this created an intimidating and hostile environment which resulted in the claimant crying "for days."

81 With reference to issue 5.5, the comments related to the claimant's asthmatic condition. Taking into account the words used by Lyndsay Hamlet and their cumulative effect, the reference to the claimant smoking, whilst correct in fact, was a reminder to her that she was not taking the necessary action to make herself safe during the Covid pandemic. Taking into account the remaining conversation concerning team work and the disclaimer form, with the statutory definition of harassment in mind, on the balance of probabilities the Tribunal conclude that the definition is met. It found on the balance of probabilities Lyndsay Hamlet was not attempting to have a supportive and positive conversation about the claimant's ability to support other senior staff and her intention was to pressure on her to remain at work despite the severe health risks, and in doing so such comments were related to the Claimant's disability of asthma, the GP's email and the

prospect of the claimant shielding at home. Had the claimant not shown managers the GP shielding text it is likely the conversation with Lyndsey Hamlet would never have taken place and the claimant would have been transferred to the non-covid ward managed Lyndsay Hamlet.

82 With reference to issue 5.6, namely, if so, did the unwanted conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, the Tribunal found it did for the reasons set out above. The perception of the Claimant at the time was reflected in the trail of emails to Anthony Lockhart, and whilst it is the case that the claimant was not expressly told the risk assessment had not carried out because she smoked, the claimant's understanding that her smoking was a factor in Lyndsey Hamlet's attempt to persuade her to continue working despite the risks. Mr Lotus submitted the claimant, who had indicated she wished to continue working, did not complaint about harassment until the grievance lodged on the 7 July 2020, makes her account less credible. On instructions he submitted that the claimant raised the grievance because she was not allowed to go back and work with her colleagues on the ward. Taking into account the all circumstances of the case including the claimant's 'Nursing in a Pandemic Diary' the Tribunal notes there is no reference to the conversation that gives rise to the alleged harassment. The only reference to it is in the emails to Mr Lockhart. The contemporaneous emails describe how upset the claimant was and the fact that there was no formal complaint brought either by the claimant or the union until the grievance was lodged does not mean that the harassment did not take place and or that the claimant was not upset by it. The claimant was at home shielding and had clearly taken the decision to do nothing until after her resignation, and the fact that part of her decision making process may have included being prevented from going back to work on the ward, does not undermine the fact that the harassment took place as defined by statute.

83 A discussion took place with the parties as to whether a one-off act can amount to harassment. The Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') makes the point that 'a serious one-off incident can also amount to harassment' — para 7.8. The question whether an act is sufficiently 'serious' to support a harassment claim is essentially a question of fact and degree — see Insitu Cleaning Co Ltd v Heads 1995 IRLR 4, EAT to which the Tribunal was referred. The Tribunal concluded the exchange that took place on the 10 April 2020 was sufficiently serious to amount to an act of harassment relating to the claimant's disability, it was humiliating and insulting given the claimant had moved away from her son and Mother in order to continue working, she had remained working on Ward 3B after it was converted to a covid ward despite her email sent as part of the risk assessment, she was eager to support her team and had indicated on numerous occasions that she did not want to shield at home, she wanted to work and be safe and the fact that she did not complain to the respondent about the remarks until after her resignation just shy of 3-months after the event, did not undermine the seriousness of what had been said taking into account the cumulative effect designed to persuade the claimant to remain working against the very clear advice of her GP. The remarks cumulatively had the effect of violating the claimant's dignity and created an offensive environment for her.

84 The unanimous judgment of the Tribunal is that: The claimant's claim brought under section 15 of the Equality Act 2010 is dismissed on withdrawal by the claimant. The respondent failed in its duty to make reasonable adjustments between the 8 April 2020 and 16 April 2020, and the claimant's claim brought under section 20 and 21 of the Equality Act 2010 succeeds .The claimant was subjected to an act of harassment on the 10 April 2020 and her complaint of disability discrimination brought under section 26 of the Equality Act 2010 succeeds. With the agreement of the parties the respondent is ordered to pay to the

claimant injury to feelings in the sum of £5000 (five thousand pounds) plus interest of £1202.30 (one thousand two hundred and two pounds thirty pence) for the period of 8 April 2020 to 6April 2023 within 28-days of today.

20.7.2023
Employment Judge Shotter

REASONS SENT TO THE PARTIES ON

28 July 2023

FOR THE SECRETARY OF THE TRIBUNALS