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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr P S Appasamy

Kent and Medway
NHS And Social Care Partnership Trust

Held at Croydon

On 17 April, 10 and 11 July, 7 August
2023

BEFORE: Employment Judge Siddall
Ms R Butler
Mr N Shanks

Representation

For the Claimant: In person

For the Respondent: Mr A Gibson

RESERVED JUDGMENT

The decision of the tribunal is that none of the claims brought under the Equality Act 2010 succeed and they are all dismissed.

RESERVED REASONS

1. This is a claim for sex and disability discrimination brought by the Claimant following the termination of his employment by the Respondent on the grounds that he had failed to pass his probationary period.

2. The Claimant claims:
 - a. Direct sex and disability discrimination in relation to eight incidents between the commencement of his employment in November 2018 and his dismissal on 25 June 2019;
 - b. A failure to make reasonable adjustments;
 - c. Victimisation following the presentation of a grievance on 10 May 2019.
3. The Respondent denies the claims. They accept that the Claimant is a disabled person within the meaning of the Equality Act by reason of his type 2 diabetes and psoriatic arthritis, but do not accept that he is disabled as a result of what the Claimant describes as an acute stress reaction, or in relation to any other mental impairment.
4. We heard evidence from the Claimant; from his former line manager Ms Laurie Burleton; from Ms Rose Waters who dealt with his grievance; and from Ms Victoria French (who attended by video). A written witness statement was received from Ms Karen Dorey-Rees who had made the final decision to dismiss the Claimant. She is no longer employed by the Respondent. We advised the parties that less weight could be placed on her written statement as she had not attended the hearing in person to answer questions.
5. At the start of the hearing on 17 April the Claimant applied for an adjournment on the grounds of ill-health. After careful consideration the tribunal rejected that application. In summary, it was noted that the hearing had already been postponed on three separate occasions going back to July 2021, twice on the grounds of the Claimant's ill-health. Unlike previous occasions, the Claimant had not provided evidence suggesting that he was not fit to attend the hearing. The tribunal took the view that it was not in the interests of justice for the hearing to be postponed any longer. It was however agreed that the Claimant should be treated as a vulnerable witness in light of his mental health issues and his clear anxiety about the hearing.
6. On the first day of hearing, the tribunal spent the morning reading the witness statements and documents. The Claimant gave his evidence on the afternoon of the first day without any difficulty. He answered questions clearly. The case adjourned for the day at around 4.20pm. It was planned to call the

Respondent's witnesses on Tuesday 18 April. The procedure that would be followed for the remainder of the hearing was explained to the Claimant.

7. On the second day of hearing the Claimant emailed the tribunal at 6.24am to indicate that he had become unwell following the conclusion of the day and that he was not able to attend on the 18 and 19 April. He confirmed that he was seeking a postponement. This was granted and the case was re-listed for 10 and 11 July 2023.
8. It was intended that this hearing should take place in person, with one of the Respondent's witnesses giving evidence by video. Due to an error, the parties were informed that the whole hearing would take place by video. As a result, the Claimant did not attend the tribunal on 10 July. Instead, he connected to the hearing by phone. He indicated that his preference was to continue with the hearing rather than it being further postponed. The tribunal considered adjourning the hearing once again so that it could continue in person, but we took note of the Claimant's preference to continue and the fact that he had become unwell after attending the tribunal on the last occasion. A decision was therefore made to continue. The Claimant was able to complete his questioning of all the Respondent's witnesses on 10 July.
9. The tribunal adjourned on the afternoon of 10 July with the intention that both parties would have an opportunity to make any closing statements by phone or video on the 11 July. On the morning of 11 July the Claimant was not able to connect to the hearing. Having consulted the parties, the tribunal therefore ordered the parties to provide their closing statements in writing by 18 July. Both parties did so and we have noted that the Claimant was able to provide a six-page document in which he clearly sets out the key matters that he wanted the tribunal to consider. All submissions have been taken into account along with all the evidence and the documents referred to.
10. The tribunal reserved their decision and met in chambers on 7 August to deliberate on all the claims.

The evidence

11. The facts we have found are as follows:

12. The claimant worked for the Trust on a forensic medium security ward as a healthcare assistant. He started working as an agency worker but was appointed as a permanent employee of the Respondent on 12 November 2018, subject to satisfactory completion of a six-month probationary period.
13. The Claimant has provided copies of his GP records and a letter from his surgery covering the period prior to him starting work for the Respondent. We note from these that the Claimant had a previous history of depression, stress and anxiety dating back to 2004. He had previously been prescribed escitalopram. We note that on 16 June 2017 (prior to him starting work with the Respondent) he had reported issues at work to his doctor. He had been prescribed amitriptyline as he was not sleeping and had been referred to MIND. However, he described his mental health as 'controlled' at the time he started work for the Respondent (paragraph 15 of his witness statement).
14. On 16 November 2018 the Claimant advised his line manager, Ms Burleton, that he suffered from type 2 diabetes and psoriatic arthritis. He made no mention of any prior mental health problems. He indicated that he would prefer to work a 5-day week rather than a 6-day week in light of his physical health issues. Ms Burleton advised him to make a flexible work application. There is no evidence that he did so at this time. At the start of his employment the Claimant tended to work a shift pattern of four weeks of day shifts followed by two weeks of night shifts.
15. At the same meeting the Claimant drew to Ms Burleton's attention that there had been an altercation between him and other members of staff that had taken place while he was working on the ward as an agency worker. He alleged that a colleague, CT, had told him either to stop bullying or stop harassing another staff member. The Claimant objected to this. Ms Burleton arranged a meeting between herself, the Claimant and CT to resolve matters. She confirmed the outcome of the meeting to them both in an email. She then considered the matter to be closed.
16. On 13 November 2018 a member of staff whom we shall refer to as FT complained to Miss Burleton that the Claimant had been rude to her about her appearance and had used the words 'spotty' and 'ugly'. This incident appears to have taken place on 7 December 2018.

17. The Claimant denies that he had been rude to FT although he agreed that a discussion had taken place with her on 7 December 2018 when he told her to 'stop being dirty'.
18. It is the Claimant's case that on 13 December 2018 he had been assaulted by FT. An email dated 14 December 2018 confirms that the Claimant reported this on the day to a supervisor (CT). He told her that previously he had a good relationship with FT. On the day in question though FT had asked him if he wanted any dinner. He said no. She asked him again and had punched him in the side at the bottom of his ribs. He showed CT the place where it had happened. He said it had not been done in a jokey way but that it was 'not like a man's punch'. CT reported that later that day the Claimant had complained of chest pains but had not suggested that these were due to the assault by FT. The supervisor spoke to FT who agreed that she had 'jokingly jabbed Parama in the side' when asking him if he wanted food.
19. The following day the Claimant asked a doctor on the ward to examine him as he was still having chest pain. The doctor noted that he had pain on the left side of his chest and there was a 'definite swelling' in keeping with an impact injury. In an email the doctor reported that the Claimant had said a member of staff had hit him in the chest the day before. He reported that the Claimant felt this had been done as a joke but considered it to be inappropriate and distasteful. The doctor reported that it was not possible to say whether the injury he had observed had been caused by the alleged punch.
20. In an emailed statement supplied on the 14 December 2018 the Claimant gives a slightly different version of the incident to that he gave CT and says that FT 'punched me above my chest area'.
21. The incident was reported to Miss Burleton who commenced an investigation.
22. The Claimant attended A&E on 17 December. Their letter states that his complaint was 'treated as chest wall injury'. They noted that he had chest pain and the area was tender. An x-ray was done. He was advised to take analgesics.
23. The Claimant remained off work until 27 December 2018. He was referred to Occupational Health and a report was issued dated 20 December 2018. This recommended that he avoid heavy manual handling tasks until the pain had

improved. It was noted that the Claimant was having flashbacks about the incident with FT and he was advised to contact the staff support service.

24. On 21 December Ms Burleton wrote to the Claimant to say that in light of the OH advice, he should carry out non-clinical tasks only upon his return to work until fit again. She arranged for FT to work on a different ward.
25. The Claimant alleged that during this period FT came onto the ward as an agency worker at times. Ms Burleton agreed that FT had sometimes been sent to the unit when working as bank staff, but stressed that handover notes had made it clear that the Claimant and FT should not be working on the same ward. The only exception might have been when additional staff were called to the ward in an emergency.
26. On 28 December 2018 a female colleague on the ward complained that the Claimant had been 'confrontational and intimidating' when she had asked him to put notes onto the computer. On the same day the Claimant complained to Ms Burleton that he had been asked to do notes and observations by another member of staff whilst not available for clinical work. Ms Burleton clarified the working arrangements that should apply to the Claimant in an email dated 31 December 2018. It was her view that although the Claimant was not carrying out clinical observations at the time, it was appropriate for the Claimant to transcribe notes onto the computer system where these had been written by other people. The Claimant made it clear in his evidence that he disagreed with this.
27. On the same day there was a discussion between Ms Burleton and the Claimant about what had happened. He said that he did not feel safe on the ward and that 'all the women are aggressive'. He was asked for details, and described the incident that had taken place with CT whilst he was still an agency worker. Ms Burleton said that this had been resolved. The Claimant asserts that Ms Burleton became angry. She states in evidence that he kept talking over her. Ms Burleton asked the Claimant to leave her office. We find that both parties became frustrated during this conversation which became somewhat heated.
28. Later that day Ms Burleton spoke to the Claimant again. She apologised if she had been perceived as being angry but stated that she had become frustrated

during the conversation. She advised the Claimant that if he had complaints about things that had happened on the ward, he should put these in writing. We cannot see any evidence that he ever did so.

29. Ms Burleton carried on with her investigation into what had happened on 13 December 2018. She obtained statements from the Claimant, the doctor, the supervisor, FT and another member of staff. She produced an investigation report dated 31 December 2018. She concluded that the accounts of what had happened differed and there had been no witnesses. FT agreed that she had touched the Claimant in a non-aggressive way. He said that he had been punched. There was conflicting evidence about the location of the injury. Both the Claimant and FT stated initially that she had 'jabbed him in the side' but the Claimant complaining the following day that he had been punched in the chest. Miss Burleton also noted that the Claimant had told the doctor that the contact had been 'joking'. She concluded that there was insufficient evidence about what had occurred but that there was a clear breakdown in the relationship between the Claimant and FT. She recommended that mediation took place.
30. Ms Burleton wrote to the Claimant on 2 January 2019. She did not provide full details of her conclusions about the incident. She stated that there was 'no case to answer' but that a referral for mediation had been made. The Claimant was not given a copy of her investigation report.
31. A psychologist employed by the hospital was asked to mediate. He spoke to both parties but concluded that their accounts of what had happened were so different that there was little point in a joint meeting.
32. At a staff meeting on 8 January 2019 the Claimant indicated that he felt his relationships with other staff were improving. He commented that Ms Burleton and others had been supportive. He asked if his days off in the week could be together.
33. On the same day the Claimant completed a flexible work application asking to work more nights than days, and to have a period of working nights only until OH had reviewed him. He said that he was having flashbacks about the incident on 13 December 2018 which were causing him insomnia.
34. On 15 January 2019 the Claimant was reviewed by OH. They reported that he was now physically fit to return to normal duties. He was continuing to have

flashbacks and disturbed sleep and it was noted that he had requested to work more nights than days. The report states that no further adjustments were recommended, and that any decision to adjust the Claimant's working pattern would be for management to decide.

35. On 21 January 2019 the Claimant complained that a shift had been swapped without his consent. In an email to Ms Burleton he said he felt bullied by her and wanted to raise a grievance. Ms Burleton explained that an error had been made. She expressed that she was sorry about how the Claimant felt about her and hoped that they could resolve things.
36. On the same day the Claimant told Ms Burleton that he was not happy about how the investigation had been handled. He also said that he did not feel respected when he came into work. Ms Burleton recorded that she had asked the Claimant to put his concerns in writing by the end of the week. It does not appear that he did so.
37. On 28 January 2019 the Claimant's GP provided a fit note stating that the Claimant had PTSD. He requested that the Respondent consider flexible hours for the Claimant and no contact with FT as he was struggling to sleep and having flashbacks. In her oral evidence Ms Burleton stated that this was the first point at which she became aware that the Claimant was suffering from mental health problems.
38. On 7 February 2019 the Claimant had an absence review meeting with Ms Burleton. The Claimant talked about the problems he was having with other members of staff and his concerns about their conduct. Ms Burleton noted in her letter to him dated 15 February that his attendance was not satisfactory (he had ten days off following the incident on 13 December 2018) and that improvement was needed. She noted that he had made a request to work more night shifts. The Claimant was also told that at the three month point of his probationary period, his performance had not been satisfactory. Ms Burleton set out a proposed improvement plan including a referral to OH about the request to work more night shifts, flexibility to attend medical appointments and a review of the support that the Claimant needed in regular management supervisions.

39. On 13 February the Claimant went to raise his concerns about the actions of his colleagues with an HR officer who reiterated the advice to set these out in writing.
40. Another complaint about the Claimant's communication towards a member of staff was made to Ms Burleton on 20 February 2019. The Claimant had written an email to another member of staff in curt tones, asking her to 'refer to HCW code of conduct and trust policies on shame and blame culture'. Ms Burleton wrote to him on 21 February to ask him to be respectful to colleagues and not make accusations against them. The Claimant emailed her back stating that the member of staff's communication had been 'unacceptable and inappropriate'.
41. A further referral was made to OH to get their comments on the flexible work request. Their report dated 5 March 2019 recorded that the Claimant was suffering from symptoms of PTSD, having flashbacks and problems sleeping. Their recommendation was: 'as a means of support management could consider a temporary adjustment of hours until the symptoms ...have improved. If operationally feasible management could consider that he is temporarily assigned to night duty'.
42. The Claimant explained to us in his evidence that his medication was making him drowsy during the day but he could not sleep at night. He felt that he would be able to focus better at night. He also felt that working nights would present a quieter environment which would be easier for him to deal with.
43. It was the evidence of Ms Burleton and Miss Waters that the Respondent operated a written policy that prevented staff from working permanently on night shifts. This had been in place for several years, following a number of incidents at night. The Respondent had a concern that staff working permanent nights could not be effectively supervised and may become de-skilled.
44. An email dated 11 March 2019 from the service manager expresses the Respondent's concerns that if the Claimant worked on night shifts only he would not receive the necessary support, guidance or training to pass his probation, nor could they monitor his health.

45. On 6 March 2019 a letter was sent from the RCN, the Claimant's union, to the Respondent stating that they felt that the assault incident had not been taken seriously. They requested an urgent meeting.
46. In March it came to the Respondent's attention that the Claimant had been making excessive use of a work computer for personal matters. A detailed report was provided by the IT department.
47. On 11 April 2019 the Claimant was signed off as unfit for work with the comment 'undergoing counselling'.
48. A meeting between Ms Burleton, the Claimant and his trade union representative took place on 16 April 2019. The union expressed the view that the Trust's actions were discriminatory as they said that a woman would not be treated in the same way if she made an allegation of assault. They suggested that the Claimant work permanently on nights. Ms Burleton explained that there was a concern that the Claimant would miss the chance of receiving support, reflecting on his practice and supervision if he always worked nights. The union proposed an initial period of eight weeks on nights followed by a review. Ms Burleton proposed a period of four weeks on nights to be followed by two weeks of day shifts (a reversal of the usual shift pattern). A review of the arrangement would then take place.
49. The Claimant said that he was feeling low, unsupported and overstimulated at work, hence his recent sickness absence.
50. Following the meeting Ms Burleton wrote to the Claimant to say that she would seek further OH advice to see if a pattern of four weeks of nights followed by two weeks of days, with a review at six weeks, would represent a reasonable adjustment. It was noted however that the Claimant was currently not fit for work.
51. OH replied on 25 April to say that they would seek information from the Claimant's GP and that in the meantime he should stay off work.
52. On 8 May 2019 Ms Burleton wrote to the Claimant to say that his performance continued to be unsatisfactory and that a probation hearing would be arranged to see if his employment should be terminated. She prepared a detailed report on why she had reached this view, which the tribunal has considered.

53. On 10 May 2019 the Claimant lodged a grievance complaining about the way in which his allegation of assault had been handled, which he said was discriminatory and would not have happened to a woman. He asserted that his sickness absence had been poorly managed. He also complained about the Respondent's failure to adjust his working pattern although he acknowledged that a temporary change had been offered to him at the meeting on 16 April.
54. We have noted that the bundle contains a specialist psychiatric OH report dated 11 June 2019 which stated that the Claimant had some features of PTSD but that he did not fulfil the full diagnostic criteria. He did however meet the criteria for a mixed anxiety and depressive reaction. Psychological treatment was recommended. The evidence demonstrates that this report was not made available to the Respondent in advance of the probation hearing.
55. There is a fit note in the bundle (p616) which states that the Claimant had been signed off sick until 1 July.
56. The probation meeting took place on 25 June 2019. The Claimant attended with his trade union representative. Ms Burleton attended to present her report and answer questions but did not stay for the whole hearing, due to the Claimant's objections about her involvement. The meeting was conducted by Ms Dorey-Rees. The union proposed that the Claimant's probation be extended and that he be moved to a new environment and allowed to return to work with adjustments. They made it clear that the proposal for the Claimant to work four weeks of nights followed by two weeks of days was not agreed, and that they were looking for a period of eight weeks on night shift.
57. By letter dated 27 June 2019 Ms Dorey-Rees confirmed that her decision was that the Claimant's employment should be terminated. The main reason was his sickness absence but she also noted the concerns about his conduct expressed by his colleagues and evidence of his excessive computer use. The request for the Claimant to move to a different work location was refused.
58. The Claimant appealed. The appeal hearing on 12 September 2019 was conducted by Ms French. During the hearing the Claimant provided a copy of the psychiatric report dated 11 June 2019.
59. Ms French reviewed what had happened. She noted that the Claimant had been off sick for three months of his six-month probationary period. The

Respondent has a requirement that reasonable levels of absence are maintained during a probationary period. Ms French considered the psychiatric report but decided that this would not have made any difference to the decision to dismiss. There was no immediate indication of a return to work by the Claimant. The report suggested the Claimant had a mixed anxiety and depressive reaction, which would be helped by psychological treatment and possibly medication. The Claimant was receiving counselling. The Respondent had proposed an adjustment to his working pattern to allow him to work more nights and facilitate his return. This had not happened.

60. Ms French rejected the suggestion that the initial hearing had been biased. She noted that in his appeal the Claimant had raised concerns about the conduct of other colleagues on the ward. However these had never been specified.
61. In conclusion, Ms French upheld the decision to dismiss the Claimant.
62. The grievance was dealt with by Ms Waters who met with the Claimant and his trade union representative. She then met with Ms Burleton. She produced a detailed grievance investigation report dated 4 September 2019. She concluded that Ms Burleton had properly investigated the allegation of assault made on 13 December 2018. She considered that the Respondent had made and offered reasonable adjustments to accommodate the Claimant's health issues and that there was no evidence of discrimination.

Decision

63. The issues in this case are identified in a case management order made by Judge Bryant on 23 February 2020, and we deal with each of the claims in turn.
64. We go on to consider the complaints of disability and sex discrimination.

The complaints of Direct Discrimination

65. Section 13 of the Equality Act 2010 states that 'a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others'.
66. In this case the Claimant argues that he was directly discriminated against because of the protected characteristics of sex and/or disability. He relies upon

a hypothetical comparator. He says that if a woman had made a complaint of assault against a male member of staff her complaint would have been taken much more seriously.

67. We take note of the provisions on the burden of proof set out in section 136 of the Equality Act 2010 and how this has been interpreted by **Igen v Wong** [2005] EWCA Civ 142 and later cases. In relation to allegation of discrimination we first consider whether there are facts from which the tribunal could decide, in the absence of any other explanation that unlawful discrimination has occurred. In that case, we must decide that a contravention has occurred unless the Respondent provides an explanation that is wholly non-discriminatory.

Direct Sex Discrimination

Allegation of Assault on 13 December 2018

68. The Claimant asserts that if a woman had complained of a physical assault her grievance would have been dealt with much more seriously. He relies upon a hypothetical comparator.
69. We have noted from the evidence that FT accepted that she had jabbed the Claimant in the ribs, although she denied punching him. She said that she had done this in a jokey way. We find this to be an admission that there was physical contact between the two of them on 13 December 2018. We accept that this contact was unwanted by the Claimant. We further accept that he suffered a fairly severe reaction to the incident which led to a recurrence of his mental illness.
70. We have noted the medical evidence which suggests that the Claimant had an injury to his chest when he was examined by a colleague on 14 December 2018 and by A&E on 17 December 2018.
71. In light of this the tribunal were surprised that following the investigation, the Claimant was simply told that there was 'no case to answer'.
72. We have considered whether these are facts from which we could conclude that discrimination had occurred.

73. We note that FT had herself made a complaint about being subjected to offensive comments by the Claimant on 7 December. We have not been presented with any evidence to suggest that this complaint was taken forward. To that extent therefore we find that the two of them were treated the same.
74. We accept however that unwanted physical contact of the type described by FT (whose account is consistent with the initial report made by the Claimant to CT) amounts to an assault. It may therefore be viewed as more serious in nature than FT's complaint (although that in itself raises some unpleasant allegations against the Claimant).
75. The Respondent asserts that in this situation a complaint by a female employee would have been treated in exactly the same way. They do not point to any specific examples.
76. The conclusion by the Respondent that there was 'no case to answer' has caused the tribunal concern. Having discussed the issue in some detail, we have reached the conclusion that a complaint by a woman that she had suffered a physical assault by a man, whatever its nature, would have been treated much more seriously by a public sector organisation such as the Respondent due to a sharp focus upon harassment of women in the workplace in recent years.
77. We conclude that at the first stage a case of possible discrimination has been made out and we turn to consider the Respondent's explanation for their actions.
78. We find that although Ms Burleton's short letter stating that there was 'no case to answer' appears dismissive of the Claimant's allegation, this does not do justice to the work she had actually done to investigate the incident.
79. We note that Ms Burleton interviewed all the relevant witnesses and produced a fairly detailed report as to her findings.
80. Her conclusion that as there were no witnesses, and that the reports of the incident were not consistent, the allegation was not proven, again appears surprising in light of the fact that FT had admitted jabbing the Claimant in the ribs and he had produced medical evidence of the injury.
81. Nevertheless having heard from Ms Burleton, we conclude that she simply did not accept that the medical evidence demonstrated that FT had caused the

Claimant a chest injury. This is supported by the initial account that the Claimant gave to CT about the location of the contact. Ms Burleton also made reference to both FT and the Claimant suggesting that FT's actions had been done in a 'jokey' way. We find that Ms Burleton concluded that even if something had happened she did not consider it serious enough to recommend a serious sanction against FT.

82. It is not as if Ms Burleton took no action in relation to what had happened. Although she clearly concluded that the matter did not warrant disciplinary proceedings, she arranged for FT to be moved and gave instructions that the two of them should not work together. She also recommended mediation to see if the working relationship could be repaired, but this was not successful.
83. It is very unfortunate that the message communicated to the Claimant was that there was 'no case to answer'. We can understand how upset he was about being told this. His reaction was no doubt exacerbated by the fact that he was not shown Ms Burleton's full report. Whilst this may be in accordance with the Respondent's policy we find that the Respondent's failure to provide him with the full reasons as to why his complaint was not being taken forward, and the short and curt outcome letter that was sent, led him to believe that his complaint had been rejected without any proper consideration.
84. Whilst recognising the effect upon the Claimant, we conclude that the Respondent has provided an explanation as to why they reached the conclusions that they did following the investigation and we are satisfied that the Claimant's sex played no part in that decision. In summary we find that the Respondent concluded that what had happened was not serious enough to warrant disciplinary action against FT. Had that conclusion been communicated to him in a different way, what followed might have been entirely different but we say that with the benefit of hindsight.

4.2 Aggression by two female members of staff on 28 December 2018.

85. We note that just before the Claimant emailed his manager to state that he did not think he should be transcribing clinical notes, another member of staff complained about his confrontational and intimidating behaviour. A second person that day described his attitude during this discussion as 'aggressive'.

We find that this incident arose out of a dispute about an admin issue: a question relating to the scope of the Claimant's duties while he was not able to do non-clinical work. The matter was then clarified by Ms Burleton on 31 December.

86. Although the two members of staff who complained about the Claimant were female, there is no evidence from which we can infer that the Claimant was less favourably treated by them than if he was a man. Importantly, we note that the Claimant's email to Ms Burleton dated 28 December does not contain an allegation that the other two HCAs had been aggressive and bullying to him. This allegation seems to have been made after they complained about him. We note that it was the two HCAs in fact who were complaining about the Claimant's attitude.
87. We conclude that there is no evidence from which we can conclude that the Claimant was subjected to sex discrimination in this regard.

4.3 Claimant's line manager became angry on 28 December 2019

88. We find that the Claimant and Ms Burleton had a discussion on 28 December 2019 during which both of them became frustrated. We find that there is no evidence to suggest that Ms Burleton would have treated a woman who had come into her office and started talking across her, in any different way. We consider that Ms Burleton dealt with this matter in a reasonable way by asking the Claimant to leave but going to see him later, apologising to him and saying that she had become frustrated when he was talking across her. She then asked him to set out any concerns in writing.
89. We find that there is no evidence from which we are able to draw an inference that discrimination had taken place.

4.4 Request for Flexible Working

90. The Claimant alleges that his request to work permanent night shifts was turned down. This allegation does not succeed. The Claimant has not established that he received less favourable treatment in relation to this application. He is incorrect to argue that the request to work nights was refused. He accepted in evidence that he was offered the opportunity to work

four weeks of nights followed by two weeks of days, a reversal of the normal shift pattern. We accept that he was looking for an initial period of eight weeks on nights, but the Claimant has not provided any evidence to suggest that any other member of staff on probation would have been treated any differently. We find that the Respondent was acting in accordance with its usual policy and would have treated a woman who had made a similar request in the same way.

91. We conclude that there is nothing from which we can infer that the Claimant was less favourably treated because he was a man.

Allegation 4.5: The failure to investigate the Claimant's concerns about culture and practices on the ward and the instruction to put his concerns in writing.

92. This allegation does not succeed. The Claimant's case is that he made a number of complaints about the actions of his colleagues during management review meetings with Ms Burleton. It appears that all his concerns were about the women working on the ward. He suggested that he did not feel safe working on the ward and that the women were aggressive towards him. From considering these notes we see that the Claimant raised numerous concerns, many of which were not specific. On another occasion he raised a matter that Ms Burleton considered had already been dealt with and resolved. The Claimant's position is that complaints he made verbally during supervision meetings should have been treated as grievances and investigated. We do not accept this. Given the nature of the complaints we find that Ms Burleton acted entirely reasonably in stating to the Claimant that if he wished to have his concerns investigated, he should set these out in writing. He did not do so. The Claimant has not produced any evidence to suggest that in being given this instruction, he was less favourably treated than a woman would have been. The mere fact that he was complaining about his female colleagues does not give rise to a suggestion that the Respondent was treating him less favourably in asking him to put his concerns in writing. We find that there is no evidence from which we could infer that discrimination had taken place.

4.6 The failure to deal with his appeal against the assault investigation in January 2019.

93. We have not been able to identify any 'appeal' as such by the Claimant in January 2019 relating to the investigation outcome. We note that the Claimant told Ms Burleton on 21 January 2019 that he was not happy with the outcome of his complaint about the assault. In the Claimant's witness statement where he refers to bringing an appeal, he refers to the document at page 257-267 of the bundle which is the notes from a supervision meeting on 8 January 2019. During that meeting the Claimant raised concerns about culture and practices on the ward and said that he felt unsafe. Ms Burleton asked him to put his concerns in writing by the Thursday of that week. He did not do so. We conclude that there is no evidence in front of us to suggest that an appeal was lodged under any of the Respondent's procedures. There is also no evidence from which we can conclude that less favourable treatment had taken place.

4.7 The failure to deal with his grievance in May 2019.

94. We take the Claimant's case to be that a woman would not have been treated in the same way in relation to his grievance. Again, we conclude that the Claimant has not been able to demonstrate facts from which we could conclude that there had been discrimination. Given that the Respondent had not dealt with his allegation of assault in the way that the Claimant wanted it is understandable that he would be unhappy about the outcome of his grievance in relation to the way in which that allegation had been handled. However, we find that Ms Waters carried out a full review of what had happened including all the relevant documentation. She interviewed the Claimant with his union representative and spoke to Ms Burleton and another manager (who appears to have reviewed the initial investigation, but whose findings were not made available to us). She produced a nine-page report setting out her findings and conclusions, and met with the Claimant to explain her decision not to uphold the grievance. There is no evidence to suggest that the grievance was not considered properly, nor that the Claimant had suffered less favourable treatment.

4.8 – The Dismissal

95. We note and accept the Respondent's evidence that they had a requirement that an employee must demonstrate a good level of attendance during their probationary period.
96. We note that since the commencement of the Claimant's employment, numerous issues had arisen between him and other members of staff which had required the involvement of his line manager. Despite repeated requests from Ms Burleton the Claimant had declined to be specific about his complaints about his colleagues and put these in writing. We note Ms Burleton's concern that the Claimant was not acting in accordance with what are described as 'trust values' of openness, accountability and respect.
97. Finally we note that the Claimant had been absent for three months of his six month probation period.
98. The Claimant argues that a woman would not have been dismissed in these circumstances. We find that there is no evidence to support this assertion, nor any evidence from which we can draw an inference that he received less favourable treatment in this regard. The Respondent decided to terminate the Claimant's employment on a number of grounds, none of which were in any way related to his sex. We find that it is more likely than not that the Respondent would have terminated the employment of a woman who had a poor attendance record during her probation period and against whom colleagues had made similar complaints. This claim does not succeed.

Disability Discrimination – was the Claimant a person with a disability?

99. The first question we address is whether the Claimant was, at the material time, a person with a disability as a result of (in his words) an acute stress reaction.
100. We must consider whether the Claimant has demonstrated that he had an impairment which had a long term, substantial effect upon normal day to day activities.

101. 'Long term' means that the impairment had lasted or was expected to last at least twelve months.
102. Under paragraph 2(2) of Schedule 1 of the Equality Act, an impairment that ceases to have a substantial adverse effect on normal day to day activities is to be treated as continuing to have that effect if it is 'likely to recur'.
103. The evidence about the Claimant's mental health problems is as follows.
104. There is evidence in the bundle showing that the Claimant suffered from mental health issues prior to his employment with the Respondent. A letter from Westbury Medical Centre dated 22 October 2020 states that he had mental health problems going back to 2004 and had been prescribed citalopram. The GP records show that in 2017 he had reported issues at work and had been prescribed amitriptyline due to sleep problems.
105. The Claimant's own evidence is that his mental health problems were under control when he started work with the Respondent but that he suffered serious symptoms after the alleged assault in December 2018.
106. The fit note from his GP dated 15 January 2019 describes him as having PTSD.
107. The OH report dated 25 April 2019 states that 'it is of note that C has not had any similar symptoms of anxiety and low mood prior to this event'. This may reflect that the Claimant had not reported any mental health problems to OH at this point.
108. The psychiatric report dated 11 June 2019 (but not made available to the Respondent until the appeal hearing) records that in the past the Claimant had been prescribed escitalopram which we note is medication designed to treat anxiety and depression. It is noted that this was prescribed following an earlier incident at work.
109. Taking all the evidence into account we are satisfied that the Claimant was a person with a disability due to a mental impairment such as anxiety and depression during the period of his employment with the Respondent. Although he does not appear to have disclosed his prior mental health problems, and OH recorded that he had no history of mental health problems, we find that there is significant evidence of an underlying illness. We note that he was on citalopram as far back as 2004, had reported feeling stress and

anxiety in 2017, and clearly suffered poor mental health following the incident with the Respondent in December 2018. We also take into account that prior to the commencement of the hearing of this claim in April 2023 the Claimant had obtained at least one adjournment on grounds of mental health problems; he had applied for an adjournment on the morning of the first day of the hearing before us; and that he had become very unwell at the end of that day and had been unable to continue on the following day causing a further postponement.

110. We have noted the Claimant's evidence that his mental health was well-controlled when he started his employment with the Respondent. We find on balance that even if his illness had ceased to have a substantial effect upon him at that point, his medical history shows that he had a condition that was 'likely to recur'. We note that the Claimant had experienced anxiety and insomnia after encountering problems with a previous employer, which had resulted in him needing medication. We conclude that the evidence shows a pattern of the Claimant experiencing symptoms of mental illness in response to adverse situations over time. We agree with him that he suffered an acute reaction to the incident on 13 December 2018. We find that he was a person with a disability at the material time, namely the period of his employment with the Respondent from November 2018 to June 2019.
111. We go onto find however that the Respondent had no knowledge of a mental health condition prior to the GP certificate dated 15 January 2019 which stated he was suffering from PTSD. Ms Burleton agreed that she was on notice of such a disability from this point onwards.

Direct Disability Discrimination.

112. Under this heading, allegations 4.1-4.3 of the list of issues do not fall to be considered because we have found that the Respondent had no knowledge of, and could not be expected to know about, the Claimant's mental health problems at the time they took place.
113. The Claimant relies upon a hypothetical comparator whom we take to be an employee working out their probationary period who did not have a mental illness such as an acute stress reaction, or a history of anxiety and depression.

Allegation 4.4: Flexible working application.

114. The Claimant alleges that his request to work permanent night shifts was turned down. This allegation does not succeed. The Claimant has not established that he received less favourable treatment in relation to this application. He is incorrect to argue that the request to work nights was refused. He accepted in evidence that he was offered the opportunity to work four weeks of nights followed by two weeks of days, a reversal of the normal shift pattern. In any event, the Claimant has not provided any evidence to suggest that any other member of staff on probation would have been treated any differently. The Respondent was acting in accordance with its usual policy. There is no evidence from which we could infer that discrimination has taken place.

Allegation 4.5: The failure to investigate the Claimant's concerns about culture and practices on the ward and the instruction to put his concerns in writing.

115. This allegation does not succeed. The Claimant's case is that he made a number of complaints about the actions of his colleagues during management review meetings with Ms Burleton. From considering these notes we see that the Claimant raised numerous concerns, many of which were not specific. On other occasions he raised matters that Ms Burleton considered that she had already dealt with and had been resolved. We believe that Ms Burleton acted entirely reasonably in stating to the Claimant that if he wished to have his concerns investigated, he should set these out in writing. The Claimant has not produced any evidence to suggest that he was less favourably treated in this regard than anyone else. We find that a person who did not have a mental illness who had made similar complaints would have been treated in exactly the same way. There is no evidence from which we could conclude that discrimination had taken place.

4.6 The failure to deal with his appeal against the assault investigation in January 2019.

116. We have not been able to identify any 'appeal' as such by the Claimant in January 2019 relating to the investigation outcome. We note that the Claimant told Ms Burleton on 21 January 2019 that he was not happy with the outcome of his complaint about the assault. The Claimant's witness statement refers to the document at page 257-267 of the bundle which is the notes from a supervision meeting on 8 January 2019. During that meeting the Claimant raised concerns about culture and practices on the ward and said that he felt unsafe. Ms Burleton asked him to put his concerns in writing by the Thursday of that week. He did not do so. We conclude that there is no evidence in front of us to suggest that an appeal was lodged under any of the Respondent's procedures. There is no evidence from which we can conclude that less favourable treatment had taken place.

4.7 The failure to deal with his grievance in May 2019.

117. We take the Claimant's case to be that a person who did not have his disability would not have been treated in the same way in relation to his grievance. Again, we conclude that the Claimant has not been able to demonstrate facts from which we could conclude that there had been discrimination. We find that Ms Waters carried out a full review of what had happened including all the relevant documentation. She interviewed the Claimant with his union representative and spoke to Ms Burleton and another manager (who appears to have reviewed the initial investigation, but whose findings were not made available to us). She produced a nine-page report setting out her findings and conclusions, and met with the Claimant to explain her decision not to uphold the grievance. There is no evidence to suggest that the grievance was not considered properly, nor that the Claimant had suffered less favourable treatment.

4.8 The Claimant's dismissal.

118. We find that the correct comparator would be a person who had a poor attendance record, similar to that of the Claimant during a probationary period but who did not have a mental illness.
119. We remind ourselves that this is a claim of direct discrimination under section 13 of the Equality Act and not a claim of 'disability-related' discrimination under section 15.
120. First we note and accept the Respondent's evidence that they had a requirement that an employee must demonstrate a good level of attendance during their probationary period.
121. Second we note that since the commencement of the Claimant's employment, numerous issues had arisen between him and other members of staff which had required the involvement of his line manager. Despite repeated requests from Ms Burleton the Claimant had declined to be specific about his complaints about his colleagues and put these in writing. We note Ms Burleton's concern that the Claimant was not acting in accordance with what are described as 'trust values' of openness, accountability and respect.
122. Third we note that although the termination letter dated 27 June 2019 refers to these relationship issues and his use of a work computer for personal matters, a major reason for the decision to dismiss the Claimant related to his lengthy sickness absence during the probationary period.
123. We accept that this sickness absence was caused by the Claimant's acute stress reaction to the incident at work in December 2018.
124. The tribunal has noted that by the time of the probation meeting in June 2019 the Respondent was fully aware that the Claimant was suffering from mental health problems which, we have found, amounted to a disability. There was sufficient evidence about his symptoms even in the absence of the psychiatric report which was not made available until the appeal stage.
125. We have noted that the Claimant was off sick at the time of his dismissal, and that further OH advice was being sought.
126. In light of the emphasis upon the Claimant's ill-health absence, we have considered carefully whether the Claimant has demonstrated facts from which we could conclude that discrimination had taken place.

127. We note the Claimant's case that he should have been permitted to return to work with a revised working pattern in place. However the Respondent had put forward a reasonable proposal, namely that he could work a pattern of four weeks of nights followed by two weeks of days. During the probation hearing, his trade union representative made it clear that this proposal was not agreed. They continued to argue that he should be able to work eight weeks of continuous night shifts. This was not acceptable to the Respondent.
128. In any event, although it is the Claimant's case that he could have returned to work, there is no evidence in the bundle to suggest that he was able to do so. The most recent OH report dated 25 April 2019 recommended that the Claimant remained off work while he received medication and therapy and whilst further reports were awaited. At the time of the meeting he had been signed off until 1 July 2019 and no return date had been suggested. We find that as at the date of the probation meeting there was no prospect of the Claimant returning to work within a reasonable period.
129. We conclude that any other employee who had been off work for around three months out of a six-month probationary period and who was still off sick as at the date of the probation meeting, would have been dismissed, whatever the reason.

Allegation 4.4 - Failure to make reasonable adjustments.

130. We find that the Respondent had a practice of not allowing staff to work permanent nights.
131. We are not convinced that this practice placed the Claimant or indeed other disabled persons at a disadvantage. We note that OH and the GP said that the Respondent *could* consider this but gave no particular reason why this would assist the Claimant. We accept that this would have been the Claimant's preferred working pattern. We note his statement that he felt he would have more focus at night because he had been suffering from insomnia, and felt drowsy in the day. But we do not find the medical evidence on this particularly persuasive. We are unsure as to why a move to permanent night shifts would assist a person suffering from insomnia. We also take on board the

Respondent's concerns that the Claimant would not receive appropriate supervision, training or support if he worked permanent nights.

132. Although we have real doubts therefore about whether the practice placed him at a disadvantage, in light of the medical evidence and the Claimant's evidence we proceed on the basis that the policy was placing him at a disadvantage due to his insomnia.
133. We find however that the Respondent acted reasonably in offering the Claimant the chance to work four weeks of nights followed by two weeks of days, to be followed by a review. The Respondent had legitimate concerns that if the Claimant worked nights only it would be more difficult for them to monitor his health and support him towards successful completion of his probation. The proposal put forward was a reasonable compromise designed to accommodate the Claimant's wishes whilst making sure that he would get the support he needed.
134. We find that the Respondent offered to take reasonable steps to remove any possible disadvantage to the Claimant in requiring him to work some day shifts and that no breach of the duty under section 20 of the Equality Act 2010 has been established.

Victimisation following the grievance lodged on 10 May 2019.

135. It is accepted that the lodging of a grievance by the Claimant on 10 May 2019 amounted to a protected act. We must consider whether he was subjected to a detriment for lodging this grievance.

4.7: Failing to deal with his grievance

136. For all the reasons set out above, we reject the suggestion that the Claimant's grievance was not dealt with properly. The grievance was fully investigated and the outcome issued was a reasonable one in all the circumstances. We find that he was not subjected to a detriment in this regard. Even if we are wrong on that and the failure to uphold his grievance amounts to a detriment in this case, we find that the Claimant has not put forward any evidence to show that the reason that his grievance was rejected is because he had made allegations of discrimination. The Claimant may not like the outcome of his

grievance but we find that it was considered fairly and in detail. There is no suggestion that he was penalised in any way for bringing this complaint.

4.8 The Dismissal

137. We note that Ms Burleton's report recommending that the Claimant be dismissed was in fact prepared before he lodged his grievance. We find that by that point she had formed real concerns about his sickness absence record, his relationships with other team members and his use of the trust computer for work-related reasons. As a result, Ms Burleton formed the view that his probation had not been successful. Her recommendation that his probation be terminated was made prior to the grievance lodged and was not therefore an act of retaliation in response to the grievance.
138. The probation meeting itself did not take place until 25 June 2019. It was chaired not by Ms Burleton by Ms Dorney-Rees. We do not know whether or not Ms Dorney-Rees was aware of the grievance. She does not mention it in her written witness statement. The task of investigating the grievance was passed not to her but to another manager. In any event, we find that Ms Dorney-Rees decided to accept Ms Burleton's recommendation. Her reasons for the dismissal are set out in the outcome letter. There was a clear basis for her conclusions. There is no evidence to suggest that she was influenced in any way by the fact that the Claimant had lodged a grievance. This claim therefore fails.

Employment Judge Siddall
Date: 17 August 2023.