EMPLOYMENT TRIBUNALS

Claimant: Ms D Leigh

Respondent: Lancashire County Council

Heard at: Manchester On: 20 – 24 November 2023

Before: Employment Judge Slater
Mr D Wilson
Mr M Stemp

REPRESENTATION:

Claimant: Ms C Widdett, Counsel
Respondent: Mr E Stenson, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. It is just and equitable to consider the complaints which would succeed on their merits out of time.

2. The complaint of harassment related to disability concerning the suspension on medical grounds on 14 April 2021 is well founded.

3. The other complaints of harassment related to disability are not well founded.

4. The complaint of failure to make reasonable adjustments in relation to the provision, criteria or practices of requiring restraints and sleep ins is well founded.

5. The complaint of discrimination arising from disability in relation to initiating the respondent's attendance capability policy on 16 or 17 December 2021 is well founded.

6. The complaint of age discrimination is dismissed on withdrawal by the claimant.

7. The complaints of victimisation and direct disability discrimination are dismissed on withdrawal by the claimant.

8. There will be a remedy hearing on 2 February 2024.

REASONS

Claims and Issues

1. The claimant claimed disability discrimination: discrimination arising from disability, failure to make reasonable adjustments and harassment. The claimant had included a complaint of age discrimination in her claim form and also complaints of victimisation and direct disability discrimination. The claimant withdrew these complaints.

2. Just before the start of the hearing, the parties agreed a list of issues. With a few amendments, this was adopted by the Tribunal. The final version is included in the Annex to these reasons.

Evidence

3. The Tribunal heard evidence for the claimant from the claimant and from Caroline Holmes, former Registered Manager of the respondent's Warwick Avenue home and from the following witnesses for the respondent: John Simpson, Residential Senior Manager within the Fostering Adoption Lancashire Blackpool and Residential Services at the respondent; Gwen Monk, Residential Senior Manager within the same service; and Mhairi Meek (previously Brown), HR business partner within the respondent's Human Resources department. The Tribunal had a bundle of documents of 1153 pages.

Facts

4. The respondent is a County Council. Its statutory responsibilities include running some children's care homes.

5. The claimant began working in a permanent role for the respondent as a Residential Child Care Worker in around 2003. She had already, some time before this, been diagnosed with Arthritis and Spondylitis of the spine.

6. Around 2005, the claimant became an Assistant Manager at the respondent's Warwick Avenue Children's Home. This home generally had six children in residence. There would be two or three residential care workers on duty plus an Assistant Manager at any time. The claimant's line manager at relevant times was Caroline Holmes, Registered Manager of the respondent's Warwick Avenue home. John Simpson was the line manager of Caroline Holmes. Both Caroline Holmes and John Simpson had statutory responsibilities to young people and those employed at the Warwick Avenue Home. Gwen Monk was assistant Senior Residential Manager from February 2019 and became a Residential Senior Manager in December 2020. Caroline Holmes reported to Gwen Monk when John Simpson was not available. John Simpson and Gwen Monk have overall oversight of a number of residential homes within East and Central Lancashire, including Warwick Avenue in Clayton le moors.

Caroline Holmes was regarded by her line manager as a strong manager and generally left to run the Warwick Avenue home as she considered fit.

7. The claimant agreed in cross examination that it was part of her role to do sleep-ins and to engage in physical restraints if needed. For at least three years prior to relevant events, the claimant had been exempted by risk assessment from doing physical restraints. Physical restraints were rare and they were a last resort and would only be done where it was safe to do so. Mr Simpson castigated Ms Holmes n one occasion for having tackled a child with a knife, telling her that she should have called the police. There were seven physical restraints in the Warwick Avenue home in a period of just under a year ending in February 2019. There were also emergency calls to the police.

8. Mr Simpson gave evidence that he had been aware, at the time, of the claimant's risk assessments and that temporary adjustments had been made for a period of at least three years that she did not have to do physical restraints. He said the situation changed when the claimant's line manager Caroline Holmes raised concerns with him about the claimant's decreased mobility. We do not accept Mr Simpson's evidence in this respect. We prefer the evidence of Caroline Holmes that Mr Simpson was not involved at this level of detail with the running of the children's homes. Caroline Holmes was left to manage the home as best she thought fit. Mr Simpson would attend the home once or twice a week and have a high-level discussion with Caroline Holmes. Mr Simpson himself gave evidence that he was not aware of the risk assessments of another employee who we were told had been temporarily exempted from doing physical restraint. We preferred the evidence of Caroline Holmes over that of Mr Simpson about the conversation which they had in June 2020. We found this to be more plausible having regard to what followed. For example, the claimant's text to Gwen Monk at the beginning of September 2020 in which the claimant wrote: She also wrote "I know your stance is you now know the situation so you have to do something about it but Caroline has been aware of the situation for many years and has managed it well and has had no concerns regarding me fulfilling my role as an Assistant Manager" (see paragraph 24). The claimant had had one week's sick leave. Caroline Holmes mentioned in passing, during one of her meetings with Mr Simpson, that she had a lot of sympathy for the claimant as she was her own age and suffering from Arthritis. She spoke about the claimant having had difficulty standing queuing outside a bank during the Covid pandemic. Mr Simpson asked Ms Holmes if the claimant carried out physical interventions and Ms Holmes informed him that she had a risk assessment in place which prevented her from doing it and that that had been in place for three years. Ms Holmes said she had no issues with that arrangement. Mr Simpson responded by saying that, if Ms Leigh could not physically restrain, she could not work in the home. Mr Simpson instructed Ms Holmes to refer the claimant to occupational health which she did.

9. There were other employees who were temporarily exempted from doing restraints, such as the other Assistant Manager at Warwick Avenue, Amy Dale, who was pregnant.

10. The claimant had not been rostered to do sleep-ins at Warwick Avenue for about three years as a result of a management decision of Caroline Holmes not to put Assistant Managers on the rota for sleep-ins. However, the claimant had done sleep-ins at other properties. During the Covid pandemic, children were placed in other properties when spaces in other children's homes could not be found. The claimant had some difficulty in sleeping in some beds, where the mattresses were not suitable

and caused her back problems. She was given permission to purchase mattress toppers for the mattresses in one property rented by the respondent during the pandemic.

11. Mr Simpson gave no evidence in his witness statement of any difficulties that the claimant not being rostered to do sleep ins caused for the respondent or other staff. In oral evidence, he referred to this placing an additional burden on other members of staff. He said he was not saying staff were upset but said this had an "attritional impact". When asked to explain what he meant by this, he said that, when there were heightened level of aggression and more sleep ins, sickness goes up and there is difficulty getting cover, staff report fatigue and stress. He did not have any direct feedback from any members of staff about this and could not recall looking at sickness levels.

12. On 30 June 2020 the claimant had a telephone occupational health assessment. A report dated 30 June 2020 reported that the claimant was fit for work provided she was restricted from sleep duties and restraint procedures. The problems with sleep duties appeared to relate to the claimant having been sleeping on beds in children's homes which were bad for her back. The advisor expressed the view that the claimant's physical condition was likely to be a disability. The advisor wrote that the claimant could not stand and walk from more than five minutes currently without aggravating her pain and could sit comfortably for about thirty minutes only. Caroline Holmes sent the occupational health report to Mr Simpson. Mr Simpson replied by email, writing that the initial consideration would be disability retention/ill health retirement with workplace adjustments to facilitate the ability to complete core tasks also considered.

13. On 2 July 2020 Hayley Duckworth in HR wrote to Mr Simpson and Ms Holmes expressing amazement that occupational health had deemed the claimant fit to undertake her role even with adjustments since they said that she could not stand or walk for more than five minutes and could not sit comfortably for more than thirty minutes.

14. We accept the evidence of Caroline Holmes that her view at the time was that the current arrangement with the claimant being exempted from restraints had been working and that she expressed this view to Mr Simpson and later Gwen Monk. However, we do not consider it necessary to make findings of fact about how frequently and firmly she expressed this view. Although we accept that this remained her personal view, she expressed a different view in later correspondence which had been reached as a collective decision between senior managers, HR and Ms Holmes.

15. On 8 July 2020 the claimant had a meeting with Caroline Holmes. In accordance with the record of the meeting, we find that the claimant said that she was having issues with Arthritis and that the role was becoming harder to manage in terms of her health. Caroline Holmes advised her to put in for PIP (a personal independence payment) at least. Caroline Holmes had some experience advising on benefits and gave this advice because she knew an application for PIP could only be made before the age of 60. Caroline Holmes made a further referral to occupational health. We find that Caroline Holmes told the claimant that she had been instructed by Mr Simpson to make the occupational health referrals. The notes record that the claimant was advised that one outcome could be ill-health retirement. Since the only people at this meeting were the claimant and Caroline Holmes, and the claimant does not appear

to have had any conversations by this stage with Mr Simpson or HR or other senior managers about the matter, we conclude that it must have been Caroline Holmes who told the claimant that one outcome could be ill-health retirement.

16. In an email dated 16 July 2020, Hayley Duckworth from HR suggested to Mr Simpson and Caroline Holmes that they do a further occupational health plus referral, which would involve speaking to the occupational health advisor first and explaining that they could not sustain adjustments permanently, particularly given the unpredictability of the children the claimant was required to look after. The email did not explain why the claimant had been able to do her job with the adjustment of not engaging in physical restraint for at least three years and why the situation had now changed.

17. Occupational health did a further telephone assessment of the claimant and wrote a further report dated 27 July 2020. This again said that the claimant was fit to continue with restricted duties. However, it recommended referral to an occupational health physician to assess the claimant's fitness and capabilities for her full duties.

18. On 28 July 2020 Hayley Duckworth wrote to Mr Simpson and Ms Holmes asking whether they could keep the claimant off sleep-ins and protect her in terms of not requiring her to engage in "team teach" activities while they waited for the occupational physician report. We understand that team teach is a training programme which teaches de-escalation techniques and, as a last report, about physical restraint. There has been no suggestion that the claimant was not capable of dealing with de-escalation techniques. Caroline Holmes replied on 28 July that the claimant was not doing sleep-ins at the moment and had not been in a restraint for three years. She finished with what she described as a crucial question "do they have to do them to fulfil their role?" She wrote that that was something she did not think she could answer. Hayley Duckworth replied on 28 July that her understanding was that any Assistant Manager job description included the requirement to undertake both sleep-ins duties when required and to be involved in team teach. She wrote "consequently, if OH do determine D unfit to do both of these things, it is likely that we will ultimately be exploring ill health redeployment or retirement". She wrote that, in the meantime, they should ensure that they could keep the claimant safe, she should not do any sleep-ins and they should take measures to ensure that she was not going to need to engage in team teach.

19. An occupational health physician had a telephone consultation with the claimant and wrote a report dated 4 August 2020. In this report, the physician expressed the view that the claimant remained fit for work. They wrote that the claimant had informed them that undertaking sleep-in shifts was not routinely required in her role but she believed she could undertake that if required. She also informed the physician that the majority of team teach activity involved theoretical instructions which she could undertake and only 5% required practical demonstration which she would prefer to avoid if possible but she reported that she could get involved in restraint if needed.

20. In an email dated 5 August 2020, Caroline Holmes wrote to Hayley Duckworth and Mr Simpson commenting that the latest occupational health report basically said the same as the other two reports writing "it seems to me these reports just regurgitate what the claimant has said?". Hayley Duckworth then sought advice from an HR business partner, writing that she felt the advice from occupational health was contradictory: on one report indicating she could hardly move and on another it

indicated she would be fine undertaking lighter duties. She wrote that she was not assured of the claimant's safety when doing restraints. The HR business partner discussed the case with somebody from OH Assist and that person then wrote that their Head of Occupational Therapist had looked into the case and said it would be appropriate for a CAT Capability Assessment if management could not continue to accommodate the employee in their reduced duties and would like to understand the employee's capabilities to complete their original job demands.

21. On 2 September 2020 Hayley Duckworth wrote to Gwen Monk, who was going to be taking over from John Simpson. She wrote that occupational health had suggested a CAT Capability Assessment. She suggested that they explain to the claimant the reasons for this, including that they could use the report to either introduce reasonable adjustments or, if they could not facilitate this, to look at other roles she might do.

22. On 2 September 2020 John Simpson and Gwen Monk met with the claimant, without giving the claimant any prior warning of the meeting. We accept that the reason two managers attended was because Gwen Monk was going to be taking over from John Simpson. It appears from what follows that the managers did not give the claimant the explanation about the purpose of a CAT Capability Assessment suggested by HR. The claimant was confused about the situation afterwards and told Caroline Holmes that Gwen Monk said she did not know what this was. John Simpson mentioned at this meeting the possibility of a Grade 8 Outreach Post. There is some dispute as to exactly what was said but it is common ground that there was no suitable Grade 8 post available. We find that John Simpson mentioned the possibility of a Grade 6 post which would involve a reduction in pay with some pay protection. He accepted in cross examination that he had mentioned this, although his email of 22 September 2020 denied that he had said this. We find that he raised it as a possibility but no post was offered to the claimant. The claimant was not interested in this possibility. The claimant alleges that John Simpson said at this meeting that she could no longer work in residential care. We accept that the claimant may have formed that impression from the meeting. However, the claimant has not satisfied us that John Simpson spoke in those terms. The claimant's allegation is not supported by what is written on the notes made by Caroline Holmes of her conversation with the claimant shortly after that meeting (page 122). This note is the nearest we have to a contemporaneous record of what happened in the meeting, although Caroline Holmes wasn't present at that meeting. John Simpson and Gwen Monk did not take any notes of the meeting. The note written by Caroline Holmes does not support the claimant's allegation that John Simpson told her that she could no longer work in residential care. The note records that the claimant's view from the meeting was that she was either going to be finished on ill-health retirement or moved to another job which she did not want. The claimant asked Caroline Holmes if she thought she would be finished. Caroline Holmes advised that she did not know what the outcome would be but advised her to look at what her pensions would be and get herself a Financial Advisor about her financial position for any option and then, at least, she would know what she would get. Caroline Holmes advised her that the occupational health referral had led to the decision to get a CAT assessment as they had said the claimant could work with adjustments and the CAT assessment would decide if they could be made.

23. As recorded in Caroline Holmes' notes, the claimant was very upset after the meeting with John Simpson and Gwen Monk.

24. On 3 September 2020 the claimant sent a text to Gwen Monk. We do not have the text itself but the claimant set out the contents of the text in an email dated 5 September to Gwen Monk. The claimant wrote that the Assistant Manager's job specification she had did not say anything about sleeping in duties as part of a rota. She wrote that she had done sleep- ins when necessary to support Warwick Avenue on holidays, time out and very recently at HL (another property taken by the respondent during the Covid pandemic). She wrote "I would like to point out, me not physically restraining young people has not impacted on me being able to do shifts at HL and supporting the young person who has been restrained in the last twelve months. I have various risk assessment dating back to 2007 stating I do not get involved in restraints so nothing has changed". She also wrote "I know your stance is you now know the situation so you have to do something about it but Caroline has been aware of the situation for many years and has managed it well and has had no concerns regarding me fulfilling my role as an Assistant Manager". She wrote that this was life changing and devastating to her and she was absolutely heartbroken. She also expressed a suspicion that they were trying to get rid of her and there was a hidden agenda although she could not think what. We have found no evidence of any hidden agenda.

25. Mr Simpson replied to this email, which had been copied to him, on 7 September 2020 offering to meet the claimant for a discussion. He wrote that they needed to refer to occupational health given the concerns they had around the claimant's ability to carry out sleep in duties and be involved in restraints.

26. The claimant attended work at the start of 7 September but went home sick with stress during the course of the day. She could not recall whether she had read Mr Simpson's email before going off work. The claimant remained on sick leave until she returned to work in April 2021.

27. Hayley Duckworth wrote to Gwen Monk and John Simpson on 8 September 2020, giving advice on making the referral for a CAT capability assessment. She wrote that the claimant was adamant that she was well enough to be in work and had struggled to accept the requirement for them to take steps to ensure that it was safe for her to be undertaking her duties.

28. The claimant started to seek advice from her trade union and sent questions to the respondent which she said the trade union wanted to have answered. The responses to these questions, on 22 September 2020, included Mr Simpson denying that he had ever stated or implied that the claimant could not work in residential and that he had not suggested she take a Grade 6 on outreach. As previously noted, we have found, and Mr Simpson agreed in oral evidence, that he had suggested the possibility of a Grade 6 post at the meeting on 2 September 2020. Although we have not been satisfied that he said to the claimant on 2 September 2020 that she could no longer work in residential, we have found that he did say to Caroline Holmes, in June 2020, that if the claimant could not do physical restraints, then she could not work in a children's home.

29. Caroline Holmes drafted a case management report to be sent to the claimant. She asked John Simpson to provide a draft of the section "any other relevant information", which he did. She was not happy with what he wrote and so did an amended version. The amended version included the following:-

> "It needs to be established if Dee is able to work to the role requirements. Both because of the duty of care to Dee but also to her colleagues and to the young people we care for.
>
> "Dee has in recent times complained her mobility has worsened and she is in pain.
>
> "Dee has not done sleeps at Warwick for some time and restrictive physical interventions have been rare, however this may not always be the case and we need to ensure everyone's safety and that the requirements on the rota can be met within budget.
>
> "As such the first occupational health referral was made after a discussion with my manager John Simpson which touched on Dee's mobility issues on 4 August 2020.
>
> "This further raised concerns as it mentioned how Dee could barely sit or stand but yet could fulfil the role.
>
> "It was felt the role had not been fully understood by occupational health as this seemed contradictory so a further referral was put in to explore the issue, which did not say anything different to the first".

She also wrote:

> "The need for sleeping shift and RPI issues to be further explored, to meet the future needs of the rota, is apparent as the current situation of doing neither cannot be sustained indefinitely, due to our duty of care and the need for Assistant Managers to complete RPI's and sleeps as the service requires.
>
> "As the occupational health referrals were not very helpful in establishing the facts of how the role requirements could be met a full CCATS assessment was requested at their suggestion".

30. Although we accept that Caroline Holmes's person view was still that the risk could be managed with the claimant not doing physical restraints, we find that she was now taking the line agreed between her senior managers and HR in this document and other written communications.

31. On 5 November 2020 there was a case review meeting under the Attendance Management Procedure. The claimant met with John Simpson, Caroline Holmes and the claimant's trade union representative. The meeting had been re-arranged from 3 November so the trade union representative could attend. It was agreed at this meeting that a capability assessment would be carried out. The claimant alleges that, at this meeting, Mr Simpson stated that he had had to cover the claimant's sleep over shifts. We find that Mr Simpson said something about him covering sleep in duties but he was not saying that the claimant had been on the rota and he had covered for sleep-ins which she had been rotered to cover. However, he was suggesting that the claimant should be doing sleep-ins. The notes of the meeting include the following:

> "We await the outcome of the planned capability assessment. We discussed how this is independent and "off-line" and that we will follow its analysis. Until

this is completed and received it is difficult to scope out what adjustments will be needed and/or whether these will be reasonable.

"Discussion around Grade 8 Job Description – Confirm that both sleep-ins and ability to participate in restrictive physical interventions are both requirements of the role, and that all AUMs are expected to be able to carry these out.

"Dee maintains the view that she has been able and willing to carry out sleep-in duties at Warwick Avenue – though has not done so for around three years. Dee said this was because she had not been required to do so.

"Dee acknowledged that she would have difficulties in carrying out an RPI.

"JS explained that he and Caroline have a duty of care towards Dee to ensure that she will be safe – and that were she to be injured as a result of not being able to defend herself or a colleague/young person for the same reason became injured, that aside for the harm that could have been avoided, the Authority could be seen to be liable".

32. The trade union representative said that he thought there was a disconnect between the claimant and Mr Simpson and suggested mediation. The claimant herself had not requested this and no mediation was undertaken.

33. In an outcome letter dated 5 November 2020, John Simpson wrote to confirm that the capability assessment would proceed and that the claimant had said she was happy to take part in this.

34. On 7 December 2020 the claimant wrote to HR seeking clarification about the process for ill-health retirement. She wrote that she was aware this was dependent on the outcome of the CAT assessment. HR's reply was that the CAT assessment and referral to ill-health retirement were different. The claimant emailed again on 7 December asking HR to start the process for ill-health retirement. She wrote that Mr Simpson had already stated that she could not continue to work at Warwick Avenue if she was unable to physically restrain and that she was unable to physically restrain. She wrote that she felt unable to relocate due to ill health. HR replied, explaining about the CAT assessment and the next steps depending on the outcome of this. They wrote that, following this, the service would determine whether or not they could make adjustments to enable the claimant to work safely. If not, they would discuss next steps: disability retention or ill health retirement.

35. The claimant had first a telephone assessment and then an in person meeting with an Occupational Therapist who reviewed the CAT report on the 10 December 2020. The claimant is recorded as reporting that she did not feel she was able to undertake her role due to the increasing difficulties she had from her health condition and reported that, even with adjustments in place, she would continue to experience difficulties in undertaking her role. We accept that the claimant said this because she understood, from conversations with Mr Simpson and Ms Holmes, that the respondent's view was that she could not do her role because she could not do restraints.

36. The overall assessment was that the claimant demonstrated a reduced capability for the full duties of the role. The Occupational Therapist set out adjustments which

might assist the claimant in completing tasks with reduced pain and discomfort which included removing the need to undertake control and restraint interventions in the role. Under the heading "outlook", the Therapist wrote that there appeared to be a limited capability to facilitate a return to full duties and the current adjustments in place appeared to be suitable for the claimant's current needs with the additional adjustments as set out in the report. They wrote that it would be how the claimant was able to self-manage the symptoms and tolerate related pain, stiffness and discomfort which would be the main indicator of an increased capability for a return to work on adjusted duties.

37. The claimant was recorded as indicating that she did not feel she would be able to tolerate a redeployment to an alternate role due to her physical limitations and in being able to learn how to undertake the tasks to be required to be performed within a new role. The claimant was reported as indicating that ill-health retirement may be the only option available given her health conditions and the impact of these on day-to-day life. The report recorded that she might be eligible for ill-health retirement given her symptoms.

38. The claimant, accompanied by a friend, attended a case review meeting on 22 December 2020 with Mr Simpson and Ms Monk. We have a copy of notes which were made in preparation for this meeting. These notes included that, at the meeting, the managers were to talk the claimant though the CAT capability assessment and explain that they had reviewed the recommendations and did not feel that the role could be adjusted in line with these. The advice was to give examples going through the report and explaining why it could not be accommodated e.g. they could not guarantee she would not be required to restrain a youth and this would leave her vulnerable and unsafe and they could not limit her physical activity in a way that would leave her comfortably able to do her role.

39. We have notes made of the meeting (page 532). The claimant is recorded as saying she felt the CAT report offered a fair reflection of her physical abilities and limitations. Mr Simpson pointed to the part of the report where it recorded that, even with adjustments in place, the claimant considered she would continue to experience difficulties in undertaking her role. The claimant replied that she felt that Mr Simpson had been clear that, as she was unable to be involved in physical restraints, she could not work in a children's home. The report records:

> "John replied that in instances where a temporary or short-term limitation meant that a colleague could not take part in an RPI we could make a temporary adjustment – but in Dee's case the assessment was saying that this would be a permanent position. As such Dee was at risk as she would not be able to defend herself.
>
> "Also, Dee would not be able to support colleagues or to safeguard young people who were being attacked or otherwise placing themselves at risk, because of this John felt the adjustment needed – to permanently remove expectation that Dee carries out RPI's – was not reasonable and he could not support it".

40. What Mr Simpson is recorded as saying in that meeting does not explain why the respondent had been able to accommodate the adjustments for at least three years but could no longer accommodate them. In the evidence of Mr Simpson and the other

respondent's witnesses at this hearing, we received no satisfactory explanation as to why the respondent could accommodate the adjustment of the claimant not carrying out physical restraints for at least three years but could no longer accommodate this.

41. Mr Simpson said at the meeting that he saw two options but advised the claimant to take advice. The options were (i) disability retention service and (ii) ill-health retirement. The claimant said she was willing to go down the ill-health route as she felt she had no choice. The notes record that, at that time, an attendance panel was not considered as there was a plan in place to progress an ill-health retirement application.

42. It was at this review meeting that the claimant was formally told for the first time that the respondent would not make the adjustment of exempting the claimant from the need to take part in physical restraint.

43. In an email dated 23 December 2020 HR wrote to Gwen Monk that Mr Simpson had advised her that the case review meeting with the claimant had resulted in the claimant requesting consideration for ill-health retirement. Since the papers relating to the claimant's initial application for ill-health retirement were lost, we do not know the exact date of this application but it appears to be sometime between 22 December 2020 and 4 March 2021, when there was an occupational health report sought in connection with an ill-health retirement application. The 4 March 2021 report noted that the claimant was not fit for any work at that stage but wrote that they would do a further review after a GP report was available.

44. On 11 March 2021 the claimant sent a grievance to Barbara Bath, Head of Residential Services (page 1117). The letter began by identifying that it was a formal grievance regarding her treatment by John Simpson. The letter included an allegation that, at the meeting on 2 September 2020, John Simpson stated that, if the claimant could not physically hold a young person in a restraint, then she could not work in residential. The claimant wrote that the reason for her grievance was that, after this meeting, he denied saying that she could not work in residential but he had also had this conversation with Caroline Holmes at another time. She wrote that she felt that she was managing despite physical problems and was fulfilling her role and that occupational health referrals had expressed the view that she could, with reasonable adjustments, continue with the role.

45. On 30 March 2021 an occupational health report stated that, before considering referral to a pension scheme medical advisor, the feasibility of exploring reasonable adjustment should be exhausted; whether it could reasonably be accommodated for the claimant to undertake her work without the need to restrain.

46. On 6 April 2021 the claimant returned to work. In the period prior to her medical suspension on 14 April 2021, the claimant was not required to do restraints or sleep-ins. Caroline Holmes sought advice from HR on 7 April 2021 about doing a risk assessment for the claimant. She wrote that she could not say neither sleeps nor restraints would ever be required and there would be times when the claimant would normally be expected to cover a sleeping-in shift.

47. Mhairi Brown (now Meek) of HR replied on 9 April saying there was a need to refer back to occupational health. She wrote:

> "The adjustments recommended are not adjustments that can be made longer term for the reasons discussed (in that we can't ensure Dee's safety or the safety of the children if she is unable to carry out a restraint). The point about the frequency of these should be challenged as whilst they may not have occurred regularly to date, they do occur and there is no way to predict when they will occur and when they will happen when Dee is alone with nobody able to step in."

Ms Brown recommended meeting with the claimant to discuss her return and the temporary adjustments made to accommodate her return. She wrote:

> "Specifically that you are only able to accommodate a temporary adjustment regarding physical restraints and making temporary adjustments to the rota to ensure additional staff are on shift to ensure Dee doesn't need to carry out physical restraints".

We heard no evidence that additional staffing was provided and accept Caroline Holme's evidence that no additional staff were required.

48. On 12 April 2021 the claimant had a conversation with Gwen Monk in which Gwen Monk told the claimant that the service did not deem the adjustments to be reasonable.

49. Barbara Bath, Head of Service, made a decision that the claimant should be suspended on medical grounds. Barbara Bath has left the respondent's employment and was not called as a witness. Caroline Holmes was given instructions to tell the claimant that she was suspended from work with immediate effect and that the claimant should not talk to other staff and should leave the building immediately. Caroline Holmes took the claimant out of a team meeting to tell her of her suspension. The claimant was told that she would receive full pay during the suspension. The claimant was told that she had to leave the building immediately and not talk to other staff. Caroline Holmes was acting on the instructions of Mr Simpson. We accept that the claimant was shocked, humiliated and embarrassed by this treatment.

50. After the claimant had left the home, Caroline Holmes went to the claimant's house and gave her a copy of a letter she had been sent. The letter was from Gwen Monk and referred to her meeting with the claimant on Monday where she had explained that the service did not deem the adjustments to be reasonable and that they intended to go back to occupational health with supplementary information to support that position. She wrote:

> "The adjustments suggested, namely that you should refrain from carrying out any physical restraints is not an adjustment the service can make whilst ensuring your safety and the safety of the children in our care. This was confirmed in a recent risk assessment completed this week. This risk assessment highlighted a significant risk to yourself and to the children in our care if we were to agree to the above adjustment."

Ms Monk did not explain why the respondent had been able to make the adjustment for at least three years prior to the claimant going on sick leave but could no longer do so. Ms Monk informed the claimant that she was suspended from work on medical grounds with immediate effect and would receive full pay during her period of medical

suspension. She wrote that they would be in touch once they had received further information from occupational health.

51. Caroline Holmes was informed by Mr Simpson that the claimant would not be returning to the home and she informed the team at the home about this in April 2021. The claimant then received calls from other staff asking her if she was having a leaving do. We accept that this added to the claimant's upset but she said in evidence that she did not consider this to be harassment.

52. On 29 April 2021 Barbara Bath wrote to the claimant, following a discussion with HR. From the email from HR, it appears that Barbara Bath had suggested that matters raised by the claimant would fall under the Council's absence procedures and Mhairi Brown of HR agreed with her. Mhairi Brown wrote that the claimant had noted a couple of points in her letter that could be dealt with under the grievance procedure but then referred to only one: namely, not feeling sufficiently supported by John in Caroline's absence. We do not agree with the categorisation of the claimant's grievance as mostly raising matters falling under the Council's absence procedures.

53. Barbara Bath wrote to the claimant in the form of a draft letter written by HR. We do not have the actual letter sent but accept that the letter was sent was in the form posed in this draft (p.1131). She wrote:-

> "Having reviewed your concerns, the issues you have raised are predominantly in relation to the absence procedure and as such, this is not a matter that would fall under the grievance procedure as it related to your ongoing absence procedure.
>
> "However, in respect of the concerns you have outlined regarding John's lack of response in Caroline's absence, I propose to address this matter informally and suggest that I will provide feedback to John in respect of this. I would also be happy to facilitate a discussion or mediation with yourself and John if you feel this would be of benefit".

The concerns raised by the claimant about Mr Simpson in her grievance were not limited to concerns about his lack of response in the absence of Ms Holmes. They included an allegation that he said that she could not work in residential but then denied saying this.

54. There was a dispute as to whether or not the claimant had responded to Ms Bath's letter but neither party was able to provide the correspondence. It appears there was no facilitated discussion or mediation following this email.

55. A further occupational health report dated 12 May 2021 recorded the claimant reporting that, when she returned to work, she was not able to continue with the adjustments due to the severity of her symptoms. The primary referring manager had told the Occupational Health Advisor that they could not accommodate the reasonable adjustments due to the nature of her role. The claimant reported her symptoms had been worsening over the previous six months and the Occupational Health Advisor said that the claimant required an Occupational Health Physician appointment for the ill-health retirement assessment.

56. In a report dated 13 May 2021, an Occupational Health Physician reported that the claimant was unfit for the full range of duties expected of the claimant's contractual role. They wrote that the claimant could do tasks seated with multiple rest breaks.

57. The claimant was informed that her original application for ill-health retirement had been lost so she resubmitted this on 30 September 2021.

58. On 12 December 2021, the claimant was informed by Caroline Holmes in a call that her medical suspension was coming to an end and she would be managed under the respondent's absence management procedure.

59. At a case review meeting which took place on 16 or 17 December 2021, the claimant was told that, following a CAT assessment, the adjustments required were not achievable. The claimant is recorded as agreeing that adjustments were not achievable. It was noted that the ill-health retirement application was in progress but was taking longer than anticipated. The claimant was informed that they would progress to an attendance hearing and that dismissal could be an outcome of this process. Gwen Monk wrote to the claimant confirming the content of the meeting. She wrote that the case review outcome was that the suggested adjustments were not achievable within the claimant's role in a children's home and that the claimant did not feel alternative employment was an option.

60. On 10 January 2022, the claimant was informed by Caroline Holmes that she had been granted Tier 3 ill health retirement. Tier 3 meant that the claimant had been assessed as being permanently incapable of discharging efficiently the duties of their employment and was not immediately capable of undertaking any gainful employment but was likely to be capable of gainful employment within 3 years of leaving or before normal pension age, if earlier. Ill health benefits were based on the pensions benefit built up to leaving with no enhancements and would be stopped after three years or earlier if the employee was in gainful employment or became capable of such employment, provided they had not reached their normal pension age by that time. The claimant had been led to expect that she would receive a Tier 1 award due to the degenerative nature of Arthritis. Tier 1 would involve an assessment that the claimant was unlikely to be capable of undertaking gainful employment before normal pension age and would bring with it 100% enhancement to normal pension age.

61. We have seen two versions of a letter to the claimant, one from Caroline Holmes and one from Gwen Monk, informing the claimant that a decision had been taken that the claimant was permanently incapable of discharging efficiently the duties of her current employment because of health and inviting the claimant to a meeting to discuss the outcome of the ill-health retirement and the implications of this for her employment. We think the letter from Caroline Holmes was a draft and was not sent, since it did not include a date for the meeting. We find that the letter sent was that from Gwen Monk since this included a date for the meeting of 21 January 2022.

62. On 21 January 2022 there was an attendance panel meeting attended by John Simpson, HR, the claimant and her trade union representative. They referred to the ill-health retirement decision and informed the claimant "with medical professionals determining that you are unfit to undertake your role, we are unable to continue to employ you". There was a discussion to try to agree a termination date. The claimant was informed that, if none was agreed, she would be invited to attend a meeting when dismissal would be considered. HR wrote to the claimant the same day giving her the

options to agree a mutual retirement date or for the respondent to set up a dismissal meeting to decide whether employment should be terminated on the basis of capability. The claimant agreed in evidence that no one was pressurising her at this meeting. The claimant said she had had enough and was ready to go. The claimant said in evidence that she felt pressured when the ill-health retirement process started some fourteen months earlier.

63. On 17 February 2022 Caroline Holmes took to the claimant a form which the claimant signed, agreeing to termination of employment by mutual consent on grounds of ill health with effect from 28 February 2022. The claimant agreed in evidence that Caroline Holmes did not pressure the claimant to sign this form.

64. On 23 February 2022 HR spoke to the claimant, correcting an error in information they had given to the claimant about appealing the ill-health retirement process and then confirmed this in writing. They asked if she wanted to leave her mutual termination paperwork in and the claimant said she did.

65. The claimant's employment terminated by mutual agreement on 28 February 2022. The claimant was paid notice pay.

66. The claimant appealed against the Tier 3 finding.

67. The claimant notified ACAS under the early conciliation procedure on 9 May 2022 and the ACAS early conciliation certificate was issued on 19 June 2022.

68. The claimant received a decision on 5 July 2022 to award her ill-health retirement at Tier 1. Tier 1 was awarded on the basis that the claimant had no reasonable prospect of being capable of gainful employment before her normal pension age and ill-health benefits were to be based on the pension benefits she would have built up had she stayed in the scheme until she reached normal pension age.

69. The claimant presented her claim to the Tribunal two days later, on 7 July 2022.

70. There was no evidence in the claimant's witness statement as to why she had not presented her Tribunal claim earlier. However, in answer to questions from the Judge, the claimant gave the following information which we accept. She went to ACAS and had to wait. She was advised to finish the process and then see how she was feeling. She spoke to ACAS on a number of occasions. She had assistance from her trade union from September 2020 until her employment ended in February 2022.

71. We infer from the fact that the claimant presented her Tribunal claim two days after receiving the decision to award her ill-health retirement at Tier 1, that she was waiting for the outcome of the appeal in relation to her ill-health retirement application before presenting a claim.

Submissions

72. Mr Stenson, for the respondent, provided written submissions and made additional oral submissions. Ms Widdett, for the claimant, made oral submissions only.

73. In summary, the respondent's submissions were that all the claims were out of time and it would not be just and equitable to extend time. However, if the Tribunal

decided there was jurisdiction, then the respondent submitted that the claims were all without merit.

74. In relation to the reasonable adjustments complaints, Mr Stenson submitted that adjustments proposed would fail to address the claimant's substantial disadvantages when considering the role. The adjustments would not be practicable for the respondent who would need to reallocate a significant proportion of the claimant's tasks on a permanent basis and still leave the claimant exposed to risk. In relation to the complaints of harassment, the respondent submitted that the acts, if found to have occurred as described, may have been unwanted conduct but the claimant had not demonstrated that the actions violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her.

75. In relation to the Section 15 complaint, initiating the respondent's attendance/capability policy in December 2021 was a proportionate means of achieving a legitimate aim.

76. The claimant's submissions were, in summary, that the last complaint of harassment on 28 February 2022, pressuring the claimant to resign and accept ill-health retirement, was presented in time and that other allegations formed part of a continuing course of conduct.

77. In relation to the complaint of failure to make reasonable adjustments Ms Widdett accepted that time started to run with the decision on 16 December 2020. She submitted that it would be just and equitable to extend the time limit, there was evidence from the claimant for the reason for the delay, no lawyer was involved at the time and the claimant was suffering from stress. There was no specific example of prejudice to the respondent.

78. In relation to the complaint of failure to make reasonable adjustments, the key question was what had changed since July 2020. The claimant and Caroline Holmes were of the view that the claimant could continue with the same adjustments but Mr Simpson had a fixed mind. In relation to the Section 15 complaint, it all flowed from the findings about reasonableness of continuing work without restraining. This was not a proportionate means of achieving a legitimate aim. Adjustments could have taken place.

79. In relation to the complaints of harassment, the issue was whether it was reasonable for the claimant to feel her dignity was violated, taking into account all the circumstances of the case Ms Widdett submitted that there was evidence that the claimant felt her dignity was violated and that she found the environment humiliating. There was a factual issue as to whether there was pressure to resign; the claimant said she felt she had no choice but to carry on.

The Law

80. The law is contained in the Equality Act 2010 (EqA).

<u>Harassment</u>

81. The relevant parts of section 26 EqA provide:

"(1) A person (A) harasses another (b) if –

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

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or

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

……

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

(a) the perception of B;

(b) the other circumstances of the case;

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

Subsection (5) lists relevant protected characteristics which include disability.

82. In **Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13,** the EAT considered whether certain treatment violated the claimant's dignity. It commented that the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. Some conduct, including a letter send to consultants referring to the deterioration in the claimant's health, could not justify a finding that it violated her dignity or created a degrading environment, even if the claimant found it upsetting. Neither did a referral to occupational health violate her dignity or create a degrading environment.

83. In **Weeks v Newham College of Further Education EAT 0630/11**, Mr Justice Langstaff, then President of the EAT, pointed out that "environment" means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration to come within the provisions of s.26(1)(b)(ii).

Failure to make reasonable adjustments

84. Section 20 EqA and Schedule 8 contain the relevant provisions relating to the duty to make adjustments. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising "a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

85. "Substantial" in this context means "more than minor or trivial": section 212(1) EqA.

86. An important consideration in whether it would be reasonable to make a particular adjustment is the extent to which the step will prevent the disadvantage. In **Griffiths v Secretary of State for Work and Pensions [2017] ICR 160,** the Court of Appeal said:

> "So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

87. Effectiveness must be assessed in the light of information available at the time, not subsequently: **Brightman v TIAA Ltd UKEAT/0318/19.**

88. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

Discrimination arising from disability

89. Section 15 EqA provides:

> (1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

90. Section 39 EqA provides, amongst other things, that an employer must not discriminate against an employee by subjecting them to a detriment. Discrimination includes s.15 discrimination.

Burden of proof

91. Section 136 EqA provides:

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Time limits

92. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of the period. Section 123(3)(b) provides that failure to do something is to be treated as occurring when the person in question decided on it.

93. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

94. The Tribunal has a wide discretion when considering whether it would be just and equitable to extend time. The Tribunal must consider all relevant factors, which will almost always include the length of and reasons for the delay and the prejudice caused to the parties of extending or not extending time.

95. The Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA** rejected the argument that, in the absence of an explanation from the claimant as to why she did not bring the claim in time and an evidential basis for that explanation, the employment tribunal could not properly conclude that it was just and equitable to extend time.

Conclusions

96. We addressed first the merits of the complaints since this could impact on the issue of jurisdiction.

Harassment

97. Before addressing the individual allegations of harassment, we make some general comments applicable to most of the complaints. We concluded, except where we have stated otherwise, that the complaints are not well founded on the merits, even if the facts were as asserted, because there was not evidence that the treatment in question had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (the "requisite purpose") or that it had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (the "requisite effect"). Even if there was evidence that the claimant was upset by the treatment, this is not enough for the claimant's dignity to have been violated or for an intimidating, hostile, degrading, humiliating or offensive environment to have been created. As the case law referred to in the section on the law above makes clear, violating is a strong word; offending against dignity, or hurting someone's dignity, is insufficient. The alternative of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant requires there to be a state of affairs created. Such an environment may be created by a one-off incident, but its effects must persist. It appeared to us that many of the allegations were things which upset the claimant but could not be properly characterised as harassment, because they did not violate the claimant's dignity or create the intimidating, hostile, degrading, humiliating or offensive environment which a finding of harassment requires. If it did have the requisite effect (and we find, except where indicated otherwise, that it did not), it was not reasonable for it to have this effect.

98. With this in mind, we now deal with the individual allegations of harassment.

On 2 September 2020 informing the claimant that she could no longer work due to her risk assessment and that the respondent would proceed with a CAT assessment

99. We were not satisfied on the facts that Mr Simpson had said at that meeting that the claimant could no longer work in residential. However, he did say that they would go forward to a CAT assessment. We conclude that going forward to a CAT assessment was unwanted conduct and this was related to disability. We conclude, however, that the complaint is not well founded because there was not evidence that saying the respondent would proceed with a CAT assessment had the requisite purpose or effect to satisfy the definition of harassment.

Offering ill-health retirement or redeployment at an Outreach grade 6

100. We understand this complaint also to relate to what was said at the 2 September 2020 meeting. We found that these were put forward as possibilities but not offered to the claimant at this meeting. We have doubts whether offering these as possibilities was unwanted conduct although we accept it was related to disability. The complaint is not well founded because there was no evidence that putting forward these possibilities was done with the requisite purpose or had the requisite effect.

On 5 November 2020 during a Zoom meeting Mr Simpson stated he had to cover the claimant's sleep over shifts

101. We did not find that Mr Simpson had specifically said that he had to cover the claimant's shifts although he did refer to covering shifts and that the claimant should be doing sleep over shifts. We conclude that this was unwanted conduct. Mr Simpson was suggesting that she should do something that the claimant's manager had agreed she should not do at Warwick Avenue and, in fact, the claimant had done some sleep overs at locations other than Warwick Avenue. We conclude that this was related to disability, albeit by an indirect route. The claimant not doing sleep-ins was not because of disability but to do with a managerial decision that she should not be put on the rota for this. The only reason Mr Simpson was raising this was because he was looking at the claimant's capability because of a concern about whether she could do the job due to her disability. However, we conclude that the complaint is not well founded because we have no evidence that Mr Simpson's comments were made with the requisite purpose or had the requisite effect.

On 29 April 2021 the claimant was informed that her grievance would not be investigated

102. We found this occurred as a matter of fact. We conclude that this was unwanted conduct; the claimant had submitted a grievance and wanted this to be dealt with properly. The claimants bears an initial burden of proof in relation to the various elements of harassment and has not satisfied us that there are facts from which we could conclude that this treatment related to the claimant's disability. For this reason, this complaint is not well founded. We consider that Barbara Bath and the HR advisor were wrong in their assessment that the grievance was mostly about absence. However, we have no reason to think that this was not their genuine view, as expressed in private correspondence between them at the time. The claimant's absence at the time was because of stress rather than because of her disability. We would also have concluded that the treatment was not done with the requisite purpose and did not have the requisite effect to satisfy the definition of disability.

On 14 April 2021 the claimant was suspended on medical grounds

103. We understand this to be a complaint which encompasses not only the fact of suspension but the way that this was done. We found that the claimant was very upset by this and we conclude that this was unwanted conduct. It was clearly related to disability. The manner of the suspension was that the claimant was taken out of a team meeting, told to leave the building immediately and not to speak to anyone. The impact of this was that, to an observer, it could look like a sort of suspension that would be given for alleged gross misconduct. The effect on the claimant went beyond mere upset. We accepted that she was shocked, humiliated and embarrassed by this treatment. We conclude that this conduct did have the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Subject to the time limit issue, we conclude that this complaint is well founded.

On or around 21 April 2021 informing the claimant's team that she would not be returning to work

104. This was something done by Caroline Holmes. We conclude that this was unwanted conduct in that it led to difficult conversations where staff members contacted the claimant asking if she was having a leaving do. This added to the claimant's upset about her suspension. It related to her disability in that her suspension was because of her disability. However, we conclude that Caroline Holmes telling the claimant's team that she would not be returning to work did not have the requisite purpose or effect to meet the definition of harassment. In cross examination, the claimant accepted herself that this did not constitute harassment although she said it added to her upset.

Inviting the claimant to an attendance management meeting on 17 December 2021 with a view to the claimant's dismissal

105. The claimant was told that she would be invited to an attendance hearing and that dismissal could be an outcome. We conclude that being informed of this when dismissal could be an outcome was unwanted conduct. This was related to her disability. However, we conclude that informing the claimant of this did not have the requisite purpose or effect to satisfy the definition of harassment. This was a standard part of the respondent's attendance management process. We conclude that the complaint is not well founded.

On 28 February 2022 pressurising the claimant to resign and accept ill health retirement

106. We have found as a matter of fact that there was no pressure on the 28 February 2022. The claimant also accepted in cross examination that there was no pressure at the meeting on 21 January 2022 and no pressure when, on 17 February 2022, she was asked to sign the form agreeing to mutual termination on the 28 February 2022. The claimant's evidence was that any pressure was when she started the ill health retirement process some fourteen months earlier. We found that the claimant made her original ill health retirement application between the end of December 2020 and the beginning of March 2021. Any pressure was before she put in her original application. We conclude that the pressure was due to pressure of circumstances and being required to make a difficult decision affecting her future against her desire to

remain employed at the children's home. We do not conclude that this was pressure by the respondent to resign and take ill health retirement. This allegation is not made out on its facts. Even if we had found that it was made out on its facts, we would have concluded that it did not have the requisite purpose or effect to meet the definition of harassment. The complaint is not well founded.

Failure to make reasonable adjustments

107. We interpret the first provision, criterion or practice (PCP) which was stated to be "requiring the claimant to implement the restraint" as one of being capable of physical restraint since, as we understand it, employees were only to carry out restraint when safe to do so. On the basis of this interpretation, we conclude that this was a PCP imposed by the respondent. We also conclude that the claimant was required as part of her duties to do sleep-ins, so this is also a PCP applied by the respondent. However, we have not found, based on the evidence, that the claimant was required to stand for long periods as part of her duties so we conclude that the respondent did not have this PCP.

108. In relation to the PCP of being capable of physical restraint, we conclude that this did put the claimant at a substantial disadvantage compared to someone without her disability. Substantial means more than minor or trivial. The claimant was unable, due to her disability, or much less able than someone without her disability would have been, to carry out physical restraint.

109. The claimant had done sleep ins at some locations in relatively recent times, but unsupportive beds had caused her pain. The claimant was less able than someone without her disability to sleep in any bed in any home where a particular mattress might exacerbate her condition. We conclude that the PCP relating to sleep-ins put the claimant at a substantial disadvantage compared to someone without her disability.

110. We conclude, and it is not disputed, that the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage by the two PCPs we have concluded were applied.

111. We conclude, therefore, that the duty to make reasonable adjustments was triggered in relation to the two PCPs.

112. The claimant had been exempted from physical restraint for at least three years prior to June 2020. Her immediate line manager, Caroline Holmes, had no issue with this adjustment being continued. The claimant's condition was worsening but we have no evidence to suggest it had reached a stage at which the claimant could not remove herself from a situation of danger if required. Repeated occupational health reports suggested the claimant could do the job with this adjustment. Employees are not to engage in physical restraint if not safe to do so, as illustrated by John Simpson castigating Caroline Holmes for having tackled a child with a knife rather than phoning the Police. Other employees were exempted on a temporary basis, for example when pregnant. John Simpson did not give a satisfactory explanation in evidence as to why there was a risk that could be managed on a temporary basis but not on a permanent basis and notes of the various meetings do not satisfactorily explain this. We rejected Mr Simpson's evidence that he had known for years of the claimant being exempted from restraint activities but changed his view as to whether this could continue because Caroline Holmes told him of the claimant's increased difficulties because of arthritis. It

appears to us that the only thing that had changed was Mr Simpson becoming aware that the claimant had been exempted from restraint activities. The manager of Warwick Avenue, who was considered a strong manager by Mr Simpson, thought that the adjustment could be made without detrimental effect on the running of the home. The respondent's evidence has not persuaded us that she was wrong.

113. It is not necessary, in accordance with case law, to be certain that the step proposed will be effective. Any uncertainty is a factor to weigh up, along with other factors, when assessing the question of reasonableness. The fact that the adjustment had been made successfully for years and the lack of evidence that anything, other than Mr Simpson's knowledge of the situation, had changed, leads us to conclude that it would have been reasonable to make the adjustment to exempt the claimant from physical restraint. We consider that, with the adjustment, the claimant would have been able to continue to work in her role at Warwick Avenue. There may have come a time when her disability had such an impact on her that she could no longer work, but that point had not been reached. It was only because the respondent insisted that the claimant had to be able to do physical restraint, and the claimant could not do that, that she could not continue in her role. We conclude that the respondent failed in its duty to make reasonable adjustments by not making the adjustment of continuing to exempt the claimant from carrying out physical restraint.

114. On a superficial view, our conclusion that the claimant could, with the adjustment of exempting her from the need to carry out physical restraint, have carried on in her role, may seem inconsistent with the claimant applying for, and being granted, ill health retirement. However, we have found that the claimant only made the application because she understood that the respondent took the view that she could not do her role if she was not capable of physical restraint. She accepted that she could not do physical restraint (or, at least, not without considerable cost to her). In these circumstances, she took what seemed to her the only feasible alternative option of applying for ill health retirement. She was assessed as not able to carry on in her role (which the respondent insisted must include being able to do physical restraint). She was eventually assessed as permanently incapable of any other work until normal retirement age. This is not necessarily incompatible with the claimant having managed to continue in her role at Warwick Avenue, albeit suffering pain. In any event, the actual assessment came some considerable time after the claimant had been told she could not carry on in her role if she could not do physical restraint. The fact that the claimant applied successfully for ill health retirement does not lead us to conclude that exempting her from the need to carry out physical restraint was not a reasonable adjustment that had a good chance of enabling her to carry on in her role as she had been doing.

115. The claimant had done sleep-ins in recent times at other locations but was not rostered to do them at Warwick Avenue as a result of managerial decisions taken by Caroline Holmes. We conclude that it would have been a reasonable adjustment to not require the claimant to do sleep-ins on a regular or rostered basis, as had been the case for some time. Mr Simpson talked about attrition as being the reason why the claimant would have to do regular sleep-ins but accepted that he did not act on the basis of any evidence about increased staff absence or turnover due to discontent about the claimant not doing regular sleep-ins.

116. In relation to the other adjustments suggested, we do not consider that utilising the staff rota to ensure the claimant would not be required to undertake restraints

would have been something that would have helped. The respondent could not anticipate when restraint might be needed. In relation to allowing the claimant to assist in restraint by utilising alternative de-escalation techniques rather than the physical restraint holds, such de-escalation was always something which should be used by all staff, with physical restraint as a very last resort. The claimant was never stopped from using such methods.

117. In relation to providing the claimant with a suitable bed for sleep-in duties, beds were not the issue at Warwick Avenue. The reason the claimant did not do regular sleep-ins at that property was because of managerial decisions taken by Caroline Holmes. In relation to beds at other properties not owned by the respondent, they did not have the ability to provide different beds although, when the claimant complained about some beds, she was allowed to obtain mattress toppers.

118. Not requiring the claimant to undertake sleep-ins at 4.4 (e) in the list of issues is a repeat of part of the adjustment at 4.4(a).

119. In relation to not requiring the claimant to undertake duties involving standing for long periods we concluded that there was no provision, criterion or practice requiring her to stand for long periods so that suggested adjustment does not need to be considered.

120. In relation to providing the claimant with a suitable alternative role, we have not heard that there was any suitable alternative role for the claimant. It was agreed there was no other grade 8 position and the claimant was not interested in grade 6 positions with pay protection.

121. For these reasons, subject to the time limit issue, the complaints of failure to make reasonable adjustments in relation to the PCPs of restraints and sleep ins are well founded.

Discrimination arising from disability

122. We conclude that it was unfavourable treatment to embark on a process which could potentially lead to the claimant's dismissal by initiating the respondent's attendance/capability policy. This arose in consequence of the claimant's disability, she was on medical suspension because of disability and her inability to carry out restraints. We do not consider that the matter of sleep-ins or standing up had any real bearing on this situation.

123. The live issue, therefore, is whether starting this process was a proportionate means of achieving a legitimate aim. The aim relied on by the respondent is the efficient running of the respondent's business and/or the health and safety of staff and those in its care. The aim is legitimate. However, given our conclusion in relation to the merits of the reasonable adjustments complaint, we conclude that this was not a proportionate means of achieving that legitimate aim. Had the respondent made the reasonable adjustments, the claimant would have been able to remain at work, doing her normal role, so the respondent would not have been in a position of starting the process which could result in dismissal.

Jurisdiction – time limits

124. We found three complaints well founded subject to Tribunal having jurisdiction. These were as follows:-

124.1. The complaint of harassment about suspension on medical grounds.

124.2. The complaint of failure to make reasonable adjustments relating to continuing an exemption from restraints and sleep-ins.

124.3. The Section 15 complaint which was about being informed on 16 or 17 December 2021 that the attendance management process was being taken forward with a possible outcome of dismissal.

125. In relation to the complaint of harassment about suspension on medical grounds, time started to run on the date of the act of discrimination, which was 14 April 2021. Leaving aside the impact of early conciliation, the primary time limit expired on 13 July 2021.

126. In relation to the complaint of failure to make reasonable adjustments, time will start to run when the respondent decided not to make the adjustment. The first time the decision not to make adjustments was formally conveyed to the claimant was 22 December 2020 so the decision was made no later than 22 December 2020. This was a decision about restraints, without mentioning sleep ins. However, this decision meant that the claimant would not be able to continue in the role so it does not matter that this did not mention sleep ins. Time started to run for the complaint of failure to make reasonable adjustments on 22 December 2020 at the latest. Leaving aside the impact of early conciliation, the primary time limit expired no later than 21 March 2021.

127. In relation to the section 15 complaint, time started to run on the date of the act of discrimination, which was 16 or 17 December 2021. Leaving aside the impact of early conciliation, the primary time limit expired no later than 16 March 2022.

128. The claimant began conciliation with ACAS on 9 May 2022. This was not within the primary time limit for any of the three complaints referred to above so early conciliation has no effect on the time limit. The claimant presented her claim on 7 July 2022 so all the complaints were presented out of time. The issue for us, therefore, is whether it is just and equitable to consider these complaints out of time.

129. We must consider all relevant factors which include the reason and length of delay and any prejudice to the respondent if we allow the complaints to proceed out of time. The complaints we have upheld subject to the time limit issue are not complaints where there is a dispute of fact as to what happened. This is not a case where fading memories are likely to cause difficulties for the respondent in defending the claims. We do not consider, therefore, that there is any material prejudice to the respondent if the claimant is allowed to proceed with the complaints out of time. The claimant's reasons for not putting in her claim earlier relate, we have found, to waiting until the end of the ill-health retirement appeal process. She presented her claim two days after being notified that her appeal was successful and she was awarded ill-health retirement under Tier 1. The claimant only made her ill health application because she understood that the respondent would not allow her to continue in her role if she could not carry out physical restraint. The delay in the application being determined was caused in part by the respondent losing her original application. Considering these factors, we conclude that it is just and equitable to consider the

complaints out of time. The Tribunal has jurisdiction to consider the complaints which we have concluded would succeed on their merits and those complaints, therefore, succeed.

_____

Employment Judge Slater

Date: 14 December 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date: 18 December 2023

FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX

LIST OF COMPLAINTS AND ISSUES

1. The Respondent concedes that the Claimant is disabled, pursuant to s.6 of the Equality Act 2010, by reason of Arthritis.

2. Jurisdiction

2.1. Were all the claims for discrimination presented within the relevant time limit of 3 months less one day of the last act complained of?

2.2. If not, do the allegations of discrimination form part of a continuing course of conduct? Anything before 10 February 2022 was presented out of time unless part of a continuing act ending with an act of discrimination on or after 10 February 2022.

2.3. If the complaint was presented out of time, is it just and equitable to extend the time limit?

3. DISCRIMINATION ARISING FROM DISABILITY (s15 EqA 2010)

3.1. Did the Respondent treat the Claimant unfavourably by:

(a) On 17 December 2021 initiating the Respondent's Attendance/Capability policy?

2.2 Did the following ("the somethings") arise in consequence of the Claimant's disability: The inability to carry out restraints and sleep ins and to stand for long periods?

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

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says the aim was the efficient running of the respondent's business and/or the health and safety of staff and those in its care.

2.5 The tribunal will decide in particular:

(a) Was the treatment an appropriate and reasonably necessary way to achieve those aims?

(b) Could something less discriminatory have been done instead?

(c) How should the needs of the Claimant and the Respondent be balanced?

4. s.20/21 FAILURE TO MAKE REASONABLE ADJUSTMENTS

4.1. Did the Respondent have the following PCPs

(a) Requiring the Claimant to implement the restraint?

(b) Requiring the Claimant to do sleep-ins?

(c) Requiring the Claimant to stand for long periods?

4.2. Did the above PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

4.3. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

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

(a) Allowing the Claimant to continue in her role without requiring her to utilise restraints/holds or undertake sleep ins or standing for long periods of time

(b) Utilising the staff rota to ensure C would not be required to undertake restraints.

(c) Allowing the Claimant to assist in restraint by utilise alternative de-escalation techniques rather than physical restraints/holds.

(d) Providing the Claimant with a suitable bed for sleep-in duties.

(e) Not requiring the Claimant to undertake sleep-ins.

(f) Not requiring the Claimant to undertake duties that involve standing for long periods.

(g) Providing the Claimant with a suitable alternative role.

4.5. Was it reasonable for the Respondent to have to take those steps [and when]?

4.6. Did the Respondent fail to take those steps?

5. s.26 HARASSMENT

5.1. Did the Respondent do the following things:

(a) On 2 September 2020 informing the Claimant that she could no longer work due to her risk assessment and that the Respondent would proceed with a CAT assessment.

(b) Offering ill-health retirement or redeployment at Outreach Grade 6.

(c) On 5 November 2020 during a Zoom meeting did JS state he had to cover the Claimant's sleepover shifts.

(d) On 29 April 2021 the Claimant was informed that her grievance would not be investigated.

(e) On 14 April 2021 the Claimant being suspended on medical grounds.

(f) On or around 21 April 2021 informing the Claimant's team that she would not be returning to work.

(g) Inviting the Claimant to an attendance management meeting on 17 December 2021 with a view to the Claimant's dismissal.

(h) On 28 February 2022 pressuring the Claimant to resign and accept ill-health retirement.

5.2. If so, was that unwanted conduct.

5.3. Did it relate to the Claimant's disability?

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

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

6. REMEDY

6.1. What financial losses has the discrimination caused the Claimant?

6.2. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.3. If not, for what period of loss should the Claimant be compensated?

6.4. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

6.5. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

6.6. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.8. Did the respondent or the Claimant unreasonably fail to comply with it.

6.9. If so is it just and equitable to increase or decrease any award payable to the Claimant?

6.10. By what proportion, up to 25%?

6.11. Should interest be awarded? How much?