



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs G Palmer

AND

Respondents

Miss Francesca Beer (1)

Royal Devon University Healthcare NHS Foundation Trust (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY
BY CVP VIDEO

ON

4, 5 and 6 December 2023

EMPLOYMENT JUDGE N J Roper

MEMBERS

Ms R Clarke
Mr N Thornback

Representation

For the Claimant:

In person

For the First Respondent:

Ms A Fadipe of Counsel

For the Second Respondent:

Mr M Green of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the Claimant's claims are dismissed.

RESERVED REASONS

1. In this case the claimant Mrs Gemma Palmer claims that she has been discriminated against because of a protected characteristic, namely disability. The claim is for discrimination arising from disability, harassment and victimisation. The respondent concedes that the claimant is disabled, but otherwise denies the claims.
2. This has been a remote hearing on the papers. The form of remote hearing was by Cloud Video Platform. An in-person hearing was not held because it was not practicable, and all issues could be determined in a remote hearing, and the parties consented to a remote hearing of this nature.
3. We have heard from the claimant. We were also asked to consider a statement from Ms Jane Amos on behalf of the claimant, but we can only attach limited weight to this

because she was not here to be questioned on this evidence. We have heard from the first respondent Miss Francesca Beer. For the second respondent we have heard from Mrs Michelle Perry. We also accepted the evidence of Mrs Zita Martinez and Mrs Helen Quinn on behalf of the second respondent, who adduced written witness statements on their behalf, and which were not challenged by the claimant.

4. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts
6. The second respondent is an NHS foundation Trust based in Exeter in Devon. The claimant, who is now Mrs Gemma Palmer, was employed by the second respondent as a Pre-assessment Nurse from 17 May 2021 until 21 July 2022. Her line manager was Miss Francesca Beer, from whom we have heard, who is the first respondent to these proceedings. The relevant department was the second respondent's Centre of Women's Health, working with gynaecology outpatients. The first respondent's line manager is Mrs Michelle Perry, from whom we have heard. Her line manager is Mrs Zita Martinez, from whose statement of evidence is not challenged by the claimant which we have accepted.
7. The second respondent has an Attendance Management Policy. Clause 15.1 provides: "It should be clearly understood that whilst on sick leave, employees must not undertake paid or unpaid work, unless the Occupational Health Service or their GP have advised in writing that to do so would be therapeutically beneficial to recovery ...". Clause 15.2 provides: "Express written permission must be granted by Line Managers in advance of any work being undertaken. If employees are found to be undertaking other work whilst on sickness absence, without such prior written consent they will be subject to disciplinary, criminal and/or civil action. This could result in the involvement of the NHS Counter Fraud Service and may ultimately lead to dismissal and/or criminal prosecution."
8. The claimant was dismissed on one week's notice during her probationary period following an investigation which determined that she had been carrying out secondary paid work during a period when she had been signed off by her GP as unfit to work and during which she was therefore receiving NHS sick pay. This was found to have been a breach of the second respondent's Attendance Management Policy and a breach of the Nursing and Midwifery Council (NMC) Code of Conduct. The background to these events is as follows.
9. The claimant had a number of bouts of sickness absence during her employment. From 9 September 2021 she was signed off for seven days with "chest infection". She was absent again because of a chest infection on 8 October 2021, and was signed off a further seven days on 19 October 2021 with "ongoing chest infection". On 30 October 2021 the claimant was signed off for three weeks with "infection, low folate causing extreme fatigue". The claimant was referred to the second respondent's Occupational Health Department and her probationary period was suspended because of ongoing ill-health. On 9 November 2021 the claimant was signed off for a further four weeks with "lower respiratory tract infection, fatigue low/folate".
10. On 25 November 2021 the second respondent received an anonymous call to its HR helpdesk to the effect that the claimant was running her own aesthetics business from home, including the provision of Botox and filler treatments, despite the fact that she was signed off sick. On 6 December 2021 the second respondent was then provided with screenshots of text messages which had been taken by member of the public who had booked a Botox procedure with the claimant while she was signed off sick. The claimant has raised a number of complaints against her line manager Miss Beer the first respondent whom she suspects of having deliberately "set her up", by arranging for a friend, (later alleged to have been Mrs Amanda Findlay), to set up the appointment, and then passing the details to the second respondent. The involvement of the first respondent and the allegations against her are dealt with further below.

11. On 1 December 2021 the second respondent's Occupational Health Department reported that the claimant was unfit to work because of "ongoing fatigue and associated symptoms". The report suggested that a work-related stress assessment was undertaken to ascertain any work-related stressors. The claimant submitted a further fit note on 8 December 2021 signing her off from work for being "unwell and under medical investigation" until 2 January 2022. An amended fit note for this period was subsequently presented by the claimant on 16 December 2021 (but dated 12 December 2021) which referred to the fact that the claimant was suffering from depression. On 4 January 2022 the claimant was signed off for a further four weeks with "depression, fatigue and stress related to work issues". On 28 January 2022 the claimant was signed off for a further month with "post-Covid fit, stress-related, depression".
12. The claimant then attended a further Occupational Health appointment, which reported on 7 February 2022 that the claimant had an underlying psychological condition which amounted to a disability under the Equality legislation. On 28 February 2022 the claimant was signed off for a further month with "post Covid, stress-related, depression". This was repeated for a further month on 25 March 2022, and on 4 April 2022 the claimant was signed off work for two months with "post Covid, stress-related symptoms, depression, new diagnosis of chronic fatigue syndrome."
13. On 6 May 2022 the claimant presented a further fit note which reported "post Covid symptoms, stress-related symptoms, depression, new diagnosis of chronic fatigue syndrome" but which recommended homeworking and a phased return to work for one month. This was confirmed by Occupational Health in a report dated 24 May 2022 which recommended homeworking and a phased return to work.
14. Meanwhile the claimant raised a formal grievance to the second respondent on 11 February 2022 in connection with the complaints against the first respondent and her behaviour. The claimant was interviewed in connection with this grievance on 28 February 2022. The first respondent Miss Beer was interviewed on 4 March 2022. On 22 March 2022 the HR Department of the second respondent notified the claimant that they intended to investigate the allegations about her working whilst off sick once the grievance process had been concluded. The first respondent Miss Beer was interviewed again under the grievance process on 27 April 2022. Shortly thereafter on 30 April 2022 an anonymous referral was made to the NMC reporting on the claimant's conduct. On 12 May 2022 the grievance investigation was concluded, and on 20 May 2022 an outcome letter was sent to the claimant, and it was largely upheld. The claimant appealed this grievance finding on 6 June 2022, but her appeal was not upheld and this was confirmed in a letter after the termination of the claimant's employment on 27 September 2022.
15. Following this process, the second respondent instituted disciplinary proceedings against the claimant. She attended a disciplinary interview on 20 June 2022 and on 14 July 2022 Mrs Martinez decided to terminate the claimant's employment at a Probationary Review Meeting. The claimant did not exercise her right of appeal against this decision to dismiss her.
16. Although the claimant has originally claimed that the decision to dismiss her was because of something arising in consequence of her disability, namely the fact that she was on extended sick leave and/or claiming sick pay, we reject that assertion for the following reasons. During her cross-examination the claimant accepted the following: (i) it was reasonable for Mrs Martinez to have conducted an investigation into her potential misconduct; (ii) the Attendance Management Policy restricts employees from working at all when they are signed off, and not just on days when the employee might be working for the second respondent; (iii) working in any capacity whilst signed off as unfit was a serious breach of the Attendance Management Policy; (iv) the claimant had arranged to carry out private work on days when she would otherwise have been working for the second respondent but for which she had been signed off sick; (v) the claimant had not disclosed this and did not have authority to do so; and (v) (crucially) that the reason Mrs Martinez dismissed her was because she felt that it was immoral

for the claimant to be working whilst in receipt of NHS to pay and that the reason for dismissal was her misconduct, namely this serious breach of the Attendance Management Policy.

17. We have no hesitation in finding that the reason the second respondent through Mrs Martinez decided to dismiss the claimant was because of her misconduct, namely that she was in serious breach of the Attendance Management Policy, and not because she was on extended sick leave and/or claiming NHS sick pay.
18. We now return to the events which gave rise to the claimant's grievance against the first respondent Miss Beer. There was an exchange of text messages which related to certain third parties arranging and then cancelling appointments with the claimant's aesthetics business. These were forwarded to the second respondent by the first respondent Miss Beer because she was concerned that the claimant was taking paid sick leave from her department, thus putting pressure on other members of staff, whilst nonetheless being fit for work and carrying out appointments in her alternative business. The claimant feels that Miss Beer was acting in league with these third parties in order to "set her up".
19. Miss Beer became aware of the claimant's business in mid-December 2021 when some acquaintances of hers drew her attention to the claimant's website which was advertising her aesthetics services. Miss Beer had been aware that the claimant had previously offered eyebrow treatments to colleagues, but until then she was not aware that the claimant was providing Botox treatments in the course of her personal business. She appears to have mentioned to her acquaintance that this might have been some sort of fraud by the claimant.
20. In any event there was then an exchange of text messages from a third party, who was an acquaintance of Miss Beer. This woman had arranged, cancelled, and re-arranged her appointment, which the claimant agreed to undertake on what would have been one of her normal working days. She then cancelled that appointment again and sent the claimant a text to this effect: "Hi, I think I dropped you and your nurse in it to your manager Fran [the first respondent] she is best mate of mine, I was taking her through my new look and told her your name and showed her your site, she said she is not aware you have a business, I am confused as she mentioned fraud but didn't say any more, she also recognised the few people on your site. I hope you have a happy New Year". This was followed by another text to the claimant which is difficult to understand.
21. The claimant then forwarded the above text message to Miss Beer saying: "Fran, can you tell me what this is about please?" The second respondent Miss Beer then responded with this message: "Hi, yes she is mental, as now she wants surgery mid-life crisis. I am confused as I didn't realise you do have a business. She is stirring please ignore her". It is this text message, in reference to the word "mental", which forms the basis of the claimant's claim for harassment.
22. Miss Beer then contacted the other woman to complain to her for contacting the claimant in that manner. Miss Beer's intention with her text message to the claimant was to reassure the claimant that she should ignore the messages from this woman. The use of the word "mental" was not directed at the claimant.
23. At that stage Miss Beer did not know that the claimant was suffering from mental health issues, and she did not know that the claimant was disabled by reason of anxiety or depression. The claimant asserts that Miss Beer had been copied into various emails which were going to her personnel file and as her line manager she would have had access to her personnel file and would have known about her health. Miss Beer denies this. There is no evidence that Miss Beer was aware of the claimant's mental condition at that time, and we accept her evidence that she did not know about this. This appears to have been the view of the claimant at the time because during the investigation into her subsequent grievance the claimant commented: "she didn't know I had a mental health condition then".
24. In any event on 11 February 2022 the claimant submitted a formal grievance to the second respondent regarding the first respondent Miss Beer's behaviour. This initiated a grievance investigation which also considered indirectly the second respondent's

concerns about the claimant working when she was signed off sick. The claimant, Miss Beer, and a number of other members of staff were interviewed during this grievance process which was conducted by Mrs Martinez. The grievance outcome letter was sent to the claimant on 20 May 2022. The claimant effectively raised three complaints. The first was that Miss Beer had breached the claimant's confidentiality by discussing her sick leave out of work. This allegation was upheld. The second allegation was that Miss Beer had colluded with third parties in an attempt to "set up" the claimant, and this allegation was also upheld. The third allegation was that the claimant had received harassing messages from Miss Beer's acquaintances, and a derogatory harassing email from Miss Beer using the word "mental". This allegation was partially upheld in that Mrs Martinez determined that Miss Beer was not involved in the harassing messages from third parties, and she had used the word "mental", but had done so innocently and not in a derogatory manner aimed at the claimant. It is also clear from these conclusions that one finding was that one of the third parties and acquaintances of Miss Beer who was involved was Mrs Amanda Findlay.

25. As a result of these findings Mrs Martinez recommended to Miss Beer that she should attend a Mental Health First Aid Course, and further Equality and Diversity Training, both of which she agreed to do in August 2022.
26. The claimant appealed the findings of the grievance in that she complained that her third allegation was only partially upheld. The appeal was heard by Mrs Quinn who has given a statement on behalf of the second respondent which we have accepted. She reviewed all the relevant evidence, including the claimant's personal file, and met with the claimant and Mrs Martinez. She concluded that there was nothing relevant on this file prior to the text message in question on 2 January 2022 which might have indicated that the claimant was suffering from mental ill-health. She concluded that the first fit note which referred to stress issues was dated 5 January 2022 which post-dated the text in question. It does not appear that the subsequently amended fit note dated 16 December 2021 was before her. She decided not to uphold the claimant's appeal.
27. Meanwhile on 30 April 2022 someone in the second respondent's organisation made an anonymous referral to the NMC regarding the claimant's conduct, presumably in the hope that the NMC would investigate and make adverse findings against the claimant. The referral included information about the claimant's working environment which we are told was realistically only known to about six people. One of these was Miss Beer. The claimant is convinced that it was Miss Beer who made this anonymous referral, and she asserts that the timing is suspicious because the referral was made within three days of Miss Beer's second investigatory interview in connection with the claimant's grievance (which took place on 27 April 2022). Miss Beer firmly denies that she had anything to do with the referral and in any event, she had been aware of the grievance against her for some weeks because she was notified of the same on 21 February 2022.
28. We have insufficient evidence before us to conclude on the balance of probabilities that it was Miss Beer who made this referral to the NMC, and for this reason, we cannot make that finding and we reject the assertion that the first respondent Miss Beer made this referral.
29. The claimant commenced the Early Conciliation process with ACAS on 23 May 2022 (Day A) in respect of each respondent. ACAS issued the Early Conciliation Certificate against each respondent on 6 June 2022 (Day B). The claimant presented these proceedings on 29 July 2022.
30. The claimant also makes the subsequent allegation that the first respondent Miss Beer discussed the circumstances of her grievance and her unfair dismissal claim with Mrs Findlay and/or her husband on or shortly before 18 November 2022. The claimant suggests that Mr and Mrs Findlay knew about her personal financial circumstances which they could only have done by speaking to someone who attended the preliminary hearing on 15 August 2023 at which the claimant discussed her financial means in the context of the application for Deposit Orders against her.

31. Be that as it may, the actual allegation is that Miss Beer discussed the claimant's protected acts (that is her grievance complaint) and/or her dismissal with Mr and/or Mrs Findlay on or shortly before 18 November 2022. We have no direct evidence as to whether or not this actually happened, other than Miss Beer's own evidence which is that she firmly denies ever having done so. We have no evidence to contradict Miss Beer's assertion in this respect and we cannot find on the balance of probabilities that she discussed these matters with Mr and/or Mrs Findlay as alleged. We therefore reject that allegation.
32. On 30 September 2022 the NMC notified the claimant that they did not intend to investigate the anonymous referral regarding her conduct. Just over a year later there was then further correspondence between the first respondent's solicitors and the NMC and by 24 October 2023 the NMC confirmed that it had no record of the first respondent reporting the claimant to the NMC, and the early report had indeed been anonymous.
33. Having established the above facts, we now apply the law.
34. The Law
35. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, harassment, and victimisation.
36. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
37. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this 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.
38. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
39. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
40. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
41. Under s109(4)(1) EqA anything done by a person (A) in the course of A's employment must be treated as also done by the employer ... s109(4) in proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of

- As employment it is a defence for B to show that B took all reasonable steps to prevent A – (a) from doing that thing; or (b) from doing anything of that description.
42. We have considered the cases of (s 15 EqA): Pnaiser v NHS England [2016] IRLR 170 EAT; Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14; City of York Council v Grosset [2018] IRLR 746 CA; Sheikholeslami v University of Edinburgh [2018] IRLR 1090; Robinson v Department for Work and Pensions [2020] IRLR 884; Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] IRLR 306 SC; Pilkington UK Ltd v Mr A Jones [2023] EAT 90 (Harassment) - Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT; Unite the Union v Nailard [2018] IRLR 730 CA; Hartley v Foreign and Commonwealth Office [2016] UKEAT/0033/15; Bakkali v Greater Manchester Buses [2018] IRLR 906 EAT; (Victimisation): Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925 EAT, applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL; Nagarajan v London Regional Transport [2000] 1 AC 501; Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425; (Time Limits) Robertson v Bexley Community Service [2003] IRLR 434 CA; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Borough of Southwark v Afolabi [2003] IRLR 220 CA; and Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23; We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
 43. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) (“the ACAS Code
 44. Decision
 45. The claimant’s claims to be determined by this Tribunal were originally agreed at a case management preliminary hearing and set out in the Case Management Order of Employment Judge Youngs dated 15 August 2023. Employment Judge Youngs also struck out some of the claimant’s claims as having no reasonable prospects of success. In addition, other claims were made subject to a deposit order as having little reasonable prospect of success. This was all confirmed by Employment Judge Youngs in a judgment dated the same day. The claimant failed to pay the deposit order as ordered, so those claims which were subject to the deposit order have also now been dismissed by reason of non-payment of the deposit.
 46. There was then a further case management preliminary hearing on 17 November 2023 before Employment Judge Ferguson. Her order dated 17 November 2023 had attached to it an Agreed List of Issues which took into consideration the above developments. By reference to the paragraph numbers in this Agreed List of Issues at the end of the Order, the remaining claims which fall to be determined by this tribunal are therefore limited to the following claims: 2.1 discrimination arising from disability under section 15 EqA, limited to the act of dismissal; 2.1.1 - one allegation of harassment under section 26 EqA; and two allegations of victimisation under section 27 EqA, namely paragraph 4.2.1 and paragraph 4.2.2. This List of Issues also included the issue as to whether any of the claimant’s claims had been presented out of time.
 47. There is one further important matter, which does not appear in the List of Issues. That is that the second respondent supports the first respondent in her denial of the claimant’s claims, but in the event that the first respondent is held to be liable (which the second respondent disputes), it reserves the right to rely upon the statutory defence in section 109(4) EqA to seek to avoid potential vicarious liability for the actions of the first respondent.
 48. We deal with each of these claims in turn.
 49. The Claimant’s Disability:

50. The disability relied upon by the claimant is anxiety and depression. For the reasons explained in findings of fact above, we find that at all material times the claimant suffered from this mental impairment which had a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities, in particular concentration and social interactivity. There was a substantial adverse effect because it was more than minor or trivial, and there was a long-term effect because it lasted for at least 12 months, or it was likely to last for at least 12 months. The respondent has conceded that the claimant was a disabled person by reason of the impairment relied upon at all material times. We agree with that concession, and we so find.
51. Discrimination Arising from Disability s15 EqA:
52. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links ... the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
53. In City of York v Grosset, the Court of Appeal made it clear that s15(1)(a) EqA requires investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did the "something" arise in consequence of B's disability?
54. When considering the first issue, the "something" needs to be merely a more than trivial part of the reason for the unfavourable treatment: Sheikholeslami v University of Edinburgh. In Robinson v Department for Work and Pensions the Court of Appeal emphasise the importance in a section 15 EqA claim of considering the thought processes of the putative discriminator, and also that "but for" causation does not suffice. The question of what amounts to "unfavourable" treatment was considered by the Supreme Court in Williams v Trustees of Swansea University Pension and Assurance Scheme. Lord Carnwath suggested that a relatively low threshold of disadvantage suffices to trigger the need for justification under section 15 EqA [at para 27].
55. In Basildon & Thurrock NHS Foundation Trust v Weerasinghe the EAT held that the fact that unfavourable treatment might be loosely related to a person's disability, or the context in which the disability was manifested, is not the same as showing that the treatment was the result of something arising out of the person's disability.
56. There is one allegation of discrimination arising from disability under section 15 EqA which is against the second respondent only, and which is set out in paragraph 2.1 of the Agreed List of Issues, and it is that the second respondent treated the claimant unfavourably by dismissing her. The second respondent accepts that it dismissed the claimant, and it accepts that this was less favourable treatment. We agree, and we so find.
57. The claimant asserts that both her sickness absence, and the fact that she was in receipt of sick pay, arose in consequence of her disability. She asserts that the unfavourable treatment of dismissal was because of those things which arose in consequence of her disability. The second respondent denies this and asserts that Mrs Martinez dismissed the claimant because she was found to have been carrying out other paid work whilst certified as unfit to work and in receipt of NHS sick pay.

58. During the course of her cross-examination the claimant conceded that she had not been dismissed because she was taking sickness absence and/or was in receipt of sick pay. The claimant also conceded that she had been dismissed because Mrs Martinez genuinely believed that she (the claimant) had committed misconduct, and that she was in serious breach of the Attendance Management Policy. We have seen no evidence to suggest that the claimant's acting in breach of the Attendance Management Policy was in any way related to her disability, or something arising from her disability. We unanimously conclude that the less favourable treatment complained of, namely her dismissal, was not in consequence of something arising because of the claimant's disability. We have no hesitation in dismissing this claim.
59. Harassment:
60. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct to have that effect (s26(4) EqA).
61. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
62. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."
63. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."

64. On the question whether conduct is “related to” a protected characteristic, in Unite the Union v Nailard the Court of Appeal explained that the words “related to” in section 26 EqA encompass both actions which are “caused by” the protected characteristic, and those “associated with” the protected characteristic.
65. In Hartley v Foreign and Commonwealth Office, (in the context of a case concerned with the question of whether comments about ability to read a spreadsheet and about characteristics of rudeness and aggression were related to the claimant’s diagnosis of Asperger’s Syndrome) the EAT explained that to answer whether conduct is “related to” a protected characteristic, a Tribunal must consider the full picture of the evidence in the round, noting that the alleged perpetrator’s knowledge or perception of the claimant’s characteristic is relevant but not conclusive.
66. In Bakkali v Greater Manchester Buses the EAT (applying Warby v Wunda Group Plc [2012] EAT/034/11) approved of submissions that the mental processes of the alleged harasser will be relevant to the question whether the conduct complained about was a related to the protected characteristic of the claimant. In that case it was whether a colleague’s reference to ISIS was related to Mr Bakkardi’s religion, with the EAT upholding the Tribunal’s decision that in the context of that case, it was not.
67. There is one allegation of harassment (3.1.1 in the List of Issues), which is brought against the first respondent Miss Beer. This allegation is that the first respondent (knowing that the claimant was suffering with anxiety and depression) sent the claimant a text message on 2 January 2022 referring to another person as “mental”.
68. This was the text message which Miss Beer sent to the claimant on Sunday, 2 January 2022. The claimant had forwarded a text from the potential customer to the effect that she was a good friend of the second respondent Miss Beer, and that she had “dropped the claimant in it” by making reference to the claimant’s alternative business to Miss Beer, and also mentioned the subject of potential fraud. Miss Beer responded by text to the effect: “Hi, yes she is mental, as now she wants surgery mid-life crisis. I am confused as I didn’t realise you do have a business. She is stirring please ignore her”
69. For the reasons explained in our findings of fact above, we have found that at that time Miss Beer had no knowledge of the claimant’s mental health disability. The context was that Miss Beer was trying to help the claimant by persuading her to ignore the earlier text message, and she referred clumsily and rudely to the third party as being “mental”, meaning irrational. It was not a comment about the claimant’s mental health, and nor was it a comment aimed at the claimant.
70. We do not accept that this comment made by Miss Beer had the purpose of achieving the prescribed effect (violating the claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her). We have heard no evidence from the claimant to the effect that she believed that this comment did have this prescribed effect, or why it was reasonable for her to have done so. In any event we do not accept that it would have been reasonable in the circumstances prevailing at the time for the claimant to have reasonably believed that this comment had the prescribed effect. Accordingly we dismiss this allegation of harassment.
71. In any event, this claim of harassment was presented out of time. The claimant commenced the Early Conciliation process with ACAS on 23 May 2022 (Day A) in respect of each respondent. ACAS issued the Early Conciliation Certificate against each respondent on 6 June 2022 (Day B). The claimant presented these proceedings on 29 July 2022. Any claim arising before 16 April 2022 (which allows for an extension of time under the Early Conciliation provisions) is potentially out of time. This allegation relates to the text message sent on 2 January 2022. The normal time limit of three months therefore expired on 1 April 2022, nearly three months before these proceedings were presented.
72. The claimant gave no evidence to explain why these proceedings were not issued in time in respect of this allegation, nor why it would be just and equitable to extend time. The claimant did assert in her closing submissions that she had assumed that the respondent would have answered the allegation promptly in the course of her grievance process but that this took longer than expected.

73. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
74. This strictness of approach was approved by the Court of Appeal in Adedeji, a case in which the Court approved a refusal to extend time where the originating application was presented just three days out of time. Underhill LJ approved the assertion that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals.
75. In this case the claimant has not satisfied us that it would be just and equitable to extend time, and in the absence of any continuing act, we would have dismissed this claim in any event as having been presented out of time.
76. Victimisation s27 EqA:
77. Under section 27 EqA, a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The burden of proof will shift if the worker proves that the employer has done a protected act, and that the worker has been subject to a detriment.
78. What constitutes a detriment under the victimisation provisions was recently set out by the ET in Warburton v the Chief Constable of Northamptonshire Police. The key test is encapsulated in the question "is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" That precludes an unjustified sense of grievance from amounting to a detriment. The test is not a wholly objective one given the alternatives that the reasonable worker would or might take the prescribed view. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.
79. The test of causation is similar to that for direct discrimination. Whether a detriment is because of a protected act should be addressed by asking why A acted as they did, and not by applying a "but for" approach. The protected act must be a real reason for the treatment – see Chief Constable of Greater Manchester v Bailey. Put another way, the correct legal test to the causation or "reason why" question is whether the protected act had a significant influence on the outcome - see Warburton, applying Chief Constable of West Yorkshire v Khan; Nagarajan v London Regional Transport and Chief Constable of Greater Manchester v Bailey.
80. The allegations of victimisation are against the First Respondent, and they are set out in the List of Issues. The claimant relies upon three protected acts: 4.1.1 - raising a grievance in respect of discrimination on 20 February 2022; 4.1.2 - during an investigation meeting on 28 February 2022 regarding the claimant's grievance, disclosing that the First Respondent had committed acts of discriminatory harassment; and 4.1.3 - presenting this claim form of on 29 July 2022.
81. The first respondent concedes that the first and third protected acts relied upon, namely complaining of harassment in the grievance, and then presenting these proceedings

- on 29 July 2022, are both protected acts for the purposes of section 27 EqA. We agree with that concession, and we so find.
82. The second protected act relied upon is that during her grievance investigation meeting on 28 February 2022, the claimant repeated her allegation that the first respondent had committed acts of harassment. This is not conceded as a protected act.
 83. We find that the claimant did make passing reference to the earlier allegation of harassment, and that on balance this second alleged protected act was a protected act for the purposes of section 27 EqA. In any event this does not really matter, because the claimant has already engaged the protection of the harassment provisions under section 27 EqA by reason of the first protected act.
 84. There are two allegations of less favourable treatment which are brought against the first respondent Miss Beer. The first (4.2.1) is that the first respondent (acting anonymously) referred the claimant to the NMC on 30 April 2022. This obviously relies on the first two protected acts, because the third protected act (presenting these proceedings) had not yet occurred at that stage.
 85. The first question to be addressed is whether or not the first respondent Miss Beer made that anonymous referral to the NMC or not. The claimant is suspicious of Miss Beer and she is convinced that she did do this, not least because of Miss Beer's involvement in earlier "setting her up" in connection with the investigation into the sick pay allegations. However, we have heard no direct evidence to the effect that Miss Beer made that referral. The only direct evidence which we have heard on the matter is that from Miss Beer herself, who very strongly denies that she made that anonymous referral to the NMC.
 86. There were at least five other people apart from Miss Beer who knew the claimant's circumstances which had been referred to in the report made to the NMC. Clearly the anonymous referral could have been made by Miss Beer, but equally it could have been any one of the others. The only confirmation received from the NMC was that the referral was indeed anonymous.
 87. In conclusion we cannot find on the balance of probabilities that the first respondent Miss Beer made this anonymous referral to the NMC, and we therefore reject this allegation of victimisation.
 88. The second allegation against the first respondent is that on or shortly before 18 November 2022, she openly discussed the claimant's protected acts and/or her dismissal with Mrs Amanda Findlay and/or Mrs Findlay's husband. This alleged act of victimisation relies on the second protected act, namely the earlier presentation of these proceedings in July 2022.
 89. The claimant has asserted that Mr and Mrs Findlay knew of her financial circumstances and details of the benefits which she had been claiming, and that she had only disclosed this information at the preliminary hearing at which she discussed her financial means when asked to do so for the purposes of the Deposit Order which was then made by Employment Judge Youngs. The first respondent Miss Beer was present at that hearing, and the claimant has assumed therefore that they can only have discovered this information through discussions with Miss Beer.
 90. However, that is not the allegation before us. The allegation is that on or shortly before 18 November 2022 Miss Beer discussed the claimant's protected acts (the grievance allegations referred to above) and/or her dismissal with Mrs Findlay and/or her husband. Miss Beer strongly denies this. Once the claimant issued these proceedings, the details of the claimant's claim became a public document. We have heard no evidence to substantiate the allegation that Miss Beer discussed these matters with Mr and/or Mrs Findlay. Miss Beer strongly denies that she ever did so. We cannot find on the balance of probabilities that Miss Beer did have these discussions with Mr and/or Mrs Findlay and we therefore reject this allegation.
 91. The claimant's claims for victimisation under section 27 EqA are also therefore dismissed.
 92. In conclusion therefore the claimant's claims are all dismissed.

93. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 32; a concise identification of the relevant law is at paragraphs 35 to 43; how that law has been applied to those findings in order to decide the issues is at paragraphs 44 to 92.

Employment Judge N J Roper
Dated 6 December 2023

Judgment sent to Parties on
22 December 2023 By Mr J McCormick

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