



EMPLOYMENT TRIBUNALS

Claimant: Ms J Lomas

Respondent: Cheadle Royal Healthcare Limited

Heard at: Manchester Employment
Tribunal

**On: 10, 11, 12 January 2024
and 22 January 2024 (in
Chambers)**

Before: Employment Judge Childe

Ms Dowling

Ms Owen

REPRESENTATION:

Claimant: In person (assisted by Mrs Appleton, claimant's sister)

Respondent: Ms Akers (counsel)

JUDGMENT

1. The complaint of harassment related to disability is not well-founded and is dismissed.
2. The complaint of direct disability discrimination is not well-founded and is dismissed.

REASONS

Summary of the case

1. The respondent is a provider of mental health services to patients. The claimant was employed as a health care assistant for the respondent. This claim is about the decision of the respondent to move the claimant from one of their wards; the Elmswood unit to another ward; the Featherstone ward, in November 2021, following an incident in which a patient self-harmed.
2. The claimant says this amounted to direct discrimination and harassment on the grounds of disability. The respondent says it did so for a non-discriminatory reason which was due to the need to protect the patients on Elmswood unit.

Introduction

3. We had access to an agreed tribunal bundle which ran to 417 pages.
4. Witness evidence was provided by the claimant herself. From the respondent, we heard evidence from Andrena Barber, ward manager of Elmswood unit, Rachel Jackson, Director of Nursing and Quality for the respondent and Katie Warren, HR lead.
5. The list of issues in this case had been clarified by employment Judge Johnson on 17 March 2023. The timeframe in issue 3.1.8 was amended to “14 October 2021 to 2 February 2022” as the claimant’s ET1 form was lodged on 2 February 2022. It had previously read 14 October 2021 to 26 June 2022, which had post-dated the ET1 form.

6. Subject to this one amendment, the parties agreed that this list of issues set out the issues for this tribunal to determine. We will refer to this document as the List of Issues in this judgment.
7. The claimant was very ably supported by her sister during the hearing. We are very grateful for the support the claimant's sister offered the claimant during the hearing. We have no doubt that the claimant feels genuinely aggrieved about the way she was treated by the respondent. The claimant presented as someone who cared about the patients she looked after.

Findings of fact

8. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we indicate how we have done so in the analysis section of our reasons.
9. The claimant commenced employment for the respondent on 4 May 2005.
10. The claimant was employed as a health care assistant.
11. Until November 2021 the claimant was employed on the Elmswood unit, for the respondent. The claimant did not work on another unit or ward during her employment with the respondent.
12. The Elmswood unit was a psychiatric unit which housed patients with mental health conditions. The Elmswood unit consisted of two wards. Elmswood ward was a locked secure ward which housed patients who were sectioned under the Mental Health Act. Elmswood view was an unlocked less secure ward which housed patients who had a mental health condition. The patients in Elmswood view remained there for a lengthy period of time, with the intention that they would ultimately be rehabilitated back into wider society.

13. The respondent became concerned about failure of the claimant to maintain professional boundaries with patients in the Elmswood Unit, in late 2020. Andrena Barber had a number of one-to-one supervision meetings with the claimant on 6 October 2020, 1 December 2020 and 1 February 2021 regarding those concerns. It was not usual for Andrena Barber to hold meeting such as this with a health care assistant. Andrena Barber did so because of the serious nature of those concerns.
14. Andrena Barber told the claimant she should move from Elmswood ward to Elmswood view, during their one-to-one supervision meeting on 1 February 2021. This was because of an issue the claimant had with a patient in Elmswood ward. On 1 February 2021 the claimant raised some general concerns about the attachment Patient I on Elmswood view had to her, during this meeting with Andrena Barber. Andrena Barber said the claimant should move to Elmswood view and she would be provided with support about how to deal with Patient I's attachment to her, by Beatrice Stubbs, psychologist.
15. On 16 February 2021 Beatrice Stubbs held a meeting with the claimant in Elmswood view. The claimant became upset during this meeting and left in tears. The claimant left her shift later that day.
16. The patients in Elmswood view noticed how upset the claimant was on 16 February 2021.
17. During the evening of 16 February 2021 Patient I self-harmed. He had to be sectioned under the Mental Health Act and admitted to the secure ward, Elmswood ward. Patient I told the respondent he had self-harmed because he had seen how upset the claimant had been earlier that day.

18. On 17 February 2021 Andrena Barber had a telephone call with the claimant. During this call the claimant was told that she would be excluded from the Elmswood unit. During this call the claimant requested a two-week period of annual leave. This was agreed and the claimant was on annual leave until 3 March 2021.
19. On 25 February 2021 Andrena Barber had a telephone call with the claimant. During this telephone call Andrena Barber told the claimant that she was being transferred to the Featherstone unit. The claimant said she did not want to transfer to the Featherstone unit.
20. On 25 February 2021 the claimant sent Andrena Barber a text message in which she asked for a meeting with HR and Rachel Jackson before she was put on another ward
21. The claimant commenced a period of sickness absence from 3 March 2021 and she remained on sickness absence and did not return to work.
22. The claimant was invited to welfare meetings by Katie Warren on 10, 14 and 24 May 2021. The claimant did not attend these meetings.
23. On 28 May 2021 the claimant emailed Katie Warren and said she did not feel able to attend any welfare meetings at that time.
24. On 23 July 2021 the claimant emailed Katie Warren to say that she was ready to take part in a welfare meeting.
25. On 11 August 2021 the claimant emailed Katie Warren and said that she needed to walk away from the respondent for the sake of her mental health. The claimant said she would forward her written notice of resignation to the respondent.

26. In August 2021 the claimant wrote her letter of resignation and thought that she emailed it to the respondent. However, she had not done so.
27. The claimant did not maintain contact with the respondent between August 2021 and late September 2021.
28. On 29 September 2021 Katie Warren sent the claimant a letter to say she was absent without leave.
29. On 10 October 2021 the claimant responded to Katie Warren and asked for her resignation to be placed on hold.
30. On 14 October 2021 a meeting took place between Rachel Jackson, the claimant and Katie Warren.
31. Following this meeting emails were exchanged between Katie Warren and the claimant regarding her grievance, DSAR request and absence, including outstanding fit notes.
32. On 14 December 2021 Katie Warren emailed the claimant to try and set up a telephone call to discuss the concerns referred to in paragraph 31 above. The claimant did not respond to this request.
33. Katie Warren emailed the claimant on 31 January 2022 regarding an investigation and the claimant's sickness absence.
34. The claimant submitted her ET1 form on 2 February 2022.

Relevant Law

Burden of proof

35. Section 136 of the Equality Act 2010 ("EQA") provides as follows:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] 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”

36. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal’s judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**.
37. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that *“there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent’s act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage”*.
38. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them.

39. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, “could conclude” refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.
40. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.
41. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic.
42. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act.
43. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

Direct Disability Discrimination

44. Under s13(1) of the EQA read with s9, direct discrimination takes place where a person treats the claimant less favourably because of disability than that

person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. ‘

45. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the ‘reason why’ the claimant was treated as she was. (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11; [2003] IRLR 285)

Harassment

46. Section 26 of the EQA defines harassment as follows:

“(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”.

47. We are therefore required to reach conclusions on whether the conduct complained of was unwanted and if it did, whether it was related to disability. If so, we must consider whether it had the necessary purpose or effect.
48. If the claimant proves any of the conduct they complain about, it was unwanted. There is no need to say anything further about that.
49. The requirement for the conduct to be “related to” disability needs a broader enquiry than whether conduct is “because of disability” like direct discrimination **Bakkali v Greater Manchester Buses (South) Limited** UKEAT/0176/17.
50. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability, the form of the conduct in question is more important than why the respondent engaged in it or even how either party perceived it.
51. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If they do, then it is plain that the Respondent can have harassed them even if it was not its purpose to do so, though if

something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c).

Analysis and conclusion

52. We take the following approach to decide this case. We first determine, in connection with each issue identified by the claimant, whether the claimant has established whether there are facts which could lead us to conclude that the respondent has subjected the claimant to unlawful discrimination.
53. If so, we then apply the reverse burden of proof provisions to determine whether those acts amount firstly to direct discrimination on the grounds of disability and secondly whether those acts amount to harassment on the grounds of disability.
54. We then determine whether the issues identified by the claimant amount to a continuing act of discrimination such to bring the entirety of the claimant's claim in time.
55. If not, we then determine whether it was just and equitable to extend the time limit in respect of any allegations that are found to be out of time.
56. We refer to each allegation and issue that we determine by the number identified in the List of Issues.

Allegation

Issues 3.1.1 and 4.1.1 On 16 February 2021, the psychologist Beatrice Stubbs working in the Elmswood unit made comments to the claimant as described in the grounds of complaint.

57. The claimant's complaint is that Beatrice Stubbs, clinical psychologist, is said to have told the claimant during the meeting on 16 February 2021 that:
- a. the claimant was mentally unwell;
 - b. the claimant had had a traumatic childhood; and
 - c. Beatrice Stubbs had made reference to the relationship between the claimant and her sister and had said that she could write a dissertation on their relationship.
58. These allegations are set out in the further information provided by the claimant to the tribunal on 1 March 2022 and was clarified by the claimant in evidence and referred to by the respondent in closing submissions.
59. We find the purpose of the meeting on 16 February 2021 was to assist the claimant to manage boundaries with the patients that she worked with ("the Boundary Issue"). We reach this finding for the following reasons.
60. It was common ground from the respondent's witnesses that the purpose of the meeting with Beatrice Stubbs was to provide support to the claimant about the Boundary Issue.
61. We find that this was an area of concern that Andrena Barber had specifically raised with the claimant during their supervision meeting on 1 February 2021. Whilst the claimant disputes that a supervision meeting took place on 1 February 2021, we find on balance that it did. Contemporaneous notes were

produced at that meeting and Andrena Barber gave witness evidence about what was discussed.

62. We have accepted that those notes form an accurate description of what was discussed during the supervision meeting between the claimant and Andrena Barber. We will describe those notes as the “1 February 2021 Supervision Minutes”.
63. The claimant has not produced another contemporaneous record of the discussions that took place on 1 February 2021 and indeed accepted in evidence that several the matters referred to in those notes were discussed with Andrena Barbara around that time.
64. The 1 February 2021 Supervision Minutes say “*Jane finds it difficult to enforce boundaries. Jane admits she struggles in this area. Particularly with personality disordered patients who she feels “hone in” on her.*”
65. During the 1 February 2021 supervision meeting, we find the claimant did raise the issue of her attachment to Patient I. We find that Andrena Barber said to the claimant that she would ask Beatrice Stubbs to support the claimant with this issue.
66. Andrena Barber’s oral evidence on this was that she could not recall the claimant having raised this during the meeting. However, it is recorded in the 1 February 2021 Supervision Minutes and we find it was discussed. We do not accept that Andrena Barber said the claimant should “grow a pair” (as alleged by the claimant) and go and work in Elmswood view. We find this is an example of the claimant misunderstanding what was said or paraphrasing what was said. Instead, we find Andrena Barber told the claimant she should go and work

in Elmswood view, with the support from Beatrice Stubbs in place to assist her in managing professional boundaries.

67. At this point in time, there wasn't a clear identified risk to patients of moving the claimant to work in Elmswood view, other than a general concern about attachments with patients, including Patient I. The respondent had a plan to address this with the claimant, which was the meeting between the claimant and Beatrice Stubbs on 16 February 2021.
68. We find that Andrena Barber told the claimant on 1 February 2021 that she would refer the claimant to Beatrice Stubbs to discuss the Boundary Issue. The 1 February 2021 Supervision Minutes record that Beatrice Stubbs will offer the claimant support and we find that this was intended to be support for the Boundary Issue.
69. We find that the contemporaneous notes of Beatrice Stubbs dated 16 February 2021 are an accurate reflection of what was discussed during that meeting. The claimant's evidence on what was discussed with Beatrice Stubbs was confused and inconsistent and for this reason we prefer the evidence set out in the contemporaneous notes produced by Beatrice Stubbs. We will refer to those notes as the 16 February 2021 Minutes.
70. We find that what was discussed during the meeting with Beatrice Stubbs was the Boundary Issue. This is recorded in the 16 February 2021 Minutes.
71. We find that the claimant's mental health was discussed during the meeting on 16 February 2021, in a supportive context, as follows. The claimant offered information about her state of mental well-being. The claimant described feeling cut off from emotions and generally feeling unhappy at work and home. The claimant also briefly described having had a difficult upbringing which she

felt contributed to those feelings. This is all recorded in the 16 February 2021 Minutes.

72. We do not find that Beatrice Stubbs said to the claimant that she was mentally unwell, nor did she tell the claimant she had had a traumatic childhood. Beatrice Stubbs did not tell the claimant that she would write a dissertation on the relationship between the claimant and her sister. Whilst we accept it is possible these matters were said, we think that on balance if they had been said, Beatrice Stubbs would have referred to them in the 16 February 2021 Minutes.
73. We find that the claimant has either jumped to conclusions or misremembered what was said during this meeting. There is no record in the 16 February 2021 Minutes of the matters set out in paragraph 57 being said.
74. During the tribunal hearing we witnessed the claimant jumping to conclusions, not listening to questions being put to her (both from the tribunal and from the respondent's counsel) and her misremembering answers given. No criticism of the claimant is made here. However, it does lead us to conclude, that the claimant's account of what was discussed on 16 February 2021 is less reliable and we have decided the contemporaneous notes of that meeting are a more accurate account of what was discussed.
75. We therefore conclude that the claimant has not established facts that support her claim that the comments, set out in paragraph 57 above, were said.
76. The claims for direct discrimination and harassment therefore fail in connection with these allegations.

Issue 3.1.2 and 4.1.2 On 17 February 2021, the claimant's line manager Andrena Barber told the claimant that she should have informed her that she was unwell.

77. We find that Andrena Barber had a quick conversation with the claimant on 17 February 2021. Andrena Barber was focussed during this conversation on ensuring the safety of Patient I. She was told that Patient I had self-harmed because they had seen the claimant very upset, the day before, on 16 February 2021. The impact on Patient I was significant. They threatened to run away and kill themselves because of seeing the claimant upset. They had to be sectioned under the Mental Health Act and transferred from Elmswood view to Elmswood ward.
78. Andrena Barber formed the view that Patient I's decision to self-harm was in part driven by what she considered to be the claimant's failure to observe appropriate professional boundaries with Patient I (and other patients), which meant Patient I had a close attachment to the claimant. We found the account Andrena Barber gave of this discussion and of her concerns to be straightforward and honest.
79. The claimant asked for annual leave during this conversation and was given two weeks' annual leave. This is agreed evidence. This had the impact of removing the risk to Patient I as the claimant would not be working on Elmswood unit for this period.
80. We also accept Andrena Barber's evidence that she was unaware at this time that the claimant was unwell. At this stage all Andrena Barber knew was that the claimant had become upset and left the ward after meeting with Beatrice Stubbs, the day before, on 16 February 2021.

81. We conclude that Andrena Barber did not say to the claimant on 17 February 2021 that *“she should have informed her that she was unwell”*. We found Andrena Barber to be straightforward and honest in her answer on this point and we find at this time Andrena Barber was focused on removing the claimant from Elmswood unit, rather than on the reason the claimant became upset on 16 February 2021.
82. Again, we find that the claimant has either jumped to conclusions or misremembered what was said during this meeting. We prefer the evidence of Andrena Barber about what was discussed on 17 February 2021.
83. We therefore conclude that the claimant has not established facts that support her claim that this comment was said.
84. The claims for direct discrimination and harassment therefore fail in connection with these allegations.

Issues 3.1.3 and 4.1.3 On 17 February 2021, Andrena Barber excluded the claimant from the Elmswood unit which was her usual place of work.

85. It is accepted by Andrena Barber that the claimant was excluded from the Elmswood unit, which was her usual place of work.
86. We find that this took place on 25 February 2021. It is consistent with Andrena Barber's evidence that this discussion took place before the claimant's next shift. The claimant's next shift was 3 March 2021, after she returned from leave. It is also consistent with a text message the claimant sent to Andrena Barber on 25 February 2021 in which she asked for a meeting with HR and Rachel Jackson before she is put on another ward.
87. The claimant had worked on the Elmswood unit for 15 years.

88. The reason for the claimant's exclusion was said to be twofold. Firstly, the failure on the claimant's part to observe appropriate boundaries with patients on the Elmswood unit, but also the claimant's emotional outburst on 16 February 2021, after the meeting with Beatrice Stubbs, which the respondent said led to Patient I self-harming.
89. We conclude that the claimant has established facts that support her claim that she was excluded from the Elmswood Unit. This is potentially unlawful discriminatory treatment as such an exclusion may have been made on the grounds of the claimant's disability, given that the reason for the claimant's outburst on 16 February 2021 was connected to a discussion about her mental health. We conclude the burden of proof has shifted to the respondent to provide a non-discriminatory reason for this treatment.

Direct Discrimination

90. We turn now to look at:
- a. whether the claimant reasonably saw this treatment as a detriment (issue 4.2); and if so,
 - b. what non-discriminatory reason for the treatment is advanced by the respondent (4.5).
91. The claimant identifies a hypothetical comparator only. We consider, following the guidance in *Shamoon v Chief Constable of the Royal Ulster Constabulary*, that in connection with this allegation the question of less favourable treatment on the grounds of disability cannot be answered without first considering the 'reason why' the claimant was treated as she was.

Detrimental treatment (issue 4.2)

92. The respondent's case is that it was not detrimental treatment to exclude the claimant from the Elmswood Unit. We have no hesitation in rejecting this submission. The claimant clearly valued working on the Elmswood Unit. The patients in the Elmswood Unit were not as challenging as on some of the other wards at Cheadle Royal. The claimant valued the relationship she had with the residents on Elmswood Unit and enjoyed caring for them. The claimant gave evidence about some of the leisure activities that she enjoyed carrying out with the residents, such as accompanying them on a walk or playing board games with them. Andrena Barber gave evidence that everyone loved working on Elmswood View because there were lovely patients on the ward who were "*not that needy*". The claimant had worked on Elmswood Unit for 15 years.
93. We conclude that the decision by Andrena Barber to exclude the claimant from Elmswood Unit was detrimental treatment and the claimant reasonably saw it as such.
94. We also find that Andrena Barber intended to exclude the claimant from the Elmswood Unit permanently. Andrena Barber said in evidence that she could not foresee a circumstance where the claimant would return to work at the Elmswood Unit.
95. However, we do not find that Andrena Barber said to the claimant that she "*wouldn't set foot in the Elmswood Unit again*" to the claimant at the time. We find that this is an example of the claimant misremembering what was said at the time. We prefer the evidence of Andrena Barber which was she told the claimant she would not be working on Elmswood Unit.

Reason for the treatment (issue 4.5)

96. Turning now to the reason for the claimant's exclusion from Elmswood unit.
The respondent's case is that the reason for the exclusion was about protecting Patient I. The respondent's cases it was nothing to do with the claimant's disability but rather it was because the claimant was perceived to be a risk to Patient I.
97. We have accepted Andrena Barber's evidence that the reason the claimant was permanently removed from the Elmswood unit was because she presented a risk to Patient I.
98. We find that Andrena Barber had been concerned for some time about the claimant's failure to observe appropriate professional boundaries with patients on Elmswood unit. This had led Andrena Barber to have supervision discussions with the claimant on 6 October 2020, 1 December 2020 and 1 February 2021. It was not usual for Andrena Barber to have discussions with a member of staff on the claimant's grade. This indicated the concern that Andrena Barber had about the claimant's failure to observe appropriate professional boundaries with patients on Elmswood unit.
99. We have found that Andrena Barber had reasonably concluded there was a link between the relationship the claimant had with Patient I, the impact of the behaviour of the claimant on 16 February 2021 on Patient I and their decision to self-harm.
100. We find it was reasonable of Andrena Barber to reach an initial conclusion that it was not safe for the claimant to remain on Elmswood unit as she would represent a risk to Patient I self-harming again.

101. We accept that at this point a full investigation had not taken place regarding this issue as there had not been time to do so. However, we nonetheless accept Andrena Barber's evidence that she formed the view it was too risky to return the claimant to Elmswood unit at this stage. The stakes were too high. We accept Andrena Barber's evidence that she was focused on ensuring that Elmswood unit was a safe place for all patients, including Patient I. Andrena Barber was also focused on responding appropriately to the risk and producing the appropriate safeguarding report to the care quality commission.

102. Having reached this finding, we conclude that the respondent has given a clear non-discriminatory reason for excluding the claimant from Elmswood unit. As we have said, the reason is that Andrena Barber had concluded it was too risky to return the claimant to the Elmswood unit. This was because of her concern about the claimant's failure to observe appropriate professional boundaries with patients on Elmswood unit, which meant Patient I had a close attachment to the claimant, which meant she was a risk to Patient I and potentially to other patients, when working in the unit.

Less favourable treatment (issue 4.3) and Treatment because of disability (4.2)

103. It follows from our conclusion at paragraph 102 that that the claimant has not established that she has been treated less favourably than someone in the same material circumstances without a disability would have been treated. We conclude that such an individual would have been treated the same as the claimant.

104. We also conclude that the decision to exclude the claimant from the Elmswood unit was not made on the grounds of disability, but rather for the reasons set out in paragraph 102 above. The claimant's claim for direct discrimination in connection with this allegation therefore fails.

Harassment

Unwanted conduct (issue 3.2)

105. We turn now to consider whether the conduct complained of was unwanted and, if so, whether it was related to disability.

106. We have no doubt that the claimant perceived the conduct of Andrena Barber to exclude her from the Elmswood Unit as un-wanted, for the reasons set out in paragraphs 92 and 93 above.

Was it related to disability (issue 3.3)?

107. Having established that the conduct was unwanted we go on to consider whether the conduct was related to disability. The reason the claimant was excluded from Elmswood unit was (as we have said in paragraph 102 above) not related to the claimant's disability, but rather was related to a concern about the claimant's failure to observe appropriate professional boundaries with patients on Elmswood unit, which meant Patient I had a close attachment to the claimant, which meant she was a risk to Patient I and potentially to other patients, when working in the unit.

108. For this reason, the claimant's harassment claim fails, and we do not need to consider issues 3.4 and 3.5 in connection with this allegation.

3.1.4 and 3.1.5 On 17 February 2021, the respondent relocated the claimant's workplace to the Featherstone unit.

109. It is accepted by the respondent that the claimant was relocated from the claimant's workplace to the Featherstone unit. As we have found in paragraph 86 above, this took place on 25 February 2021.

110. The Featherstone unit is a Psychiatric Intensive Care Units (PICU). It is an all-male unit. The patients on this unit are all detained under the Mental Health Act on a section. They are individuals who may present with a risk of violence and aggression to others, and those who are psychotic and unpredictable.

111. The claimant would be required on this ward to be involved in physically restraining patients and to deal with their unpredictable and potentially violent and aggressive behaviour.

112. This was in marked contrast to the Elmswood unit and in particular Elmswood view, which as we have found in paragraph 92 above, was a very popular environment to work in.

113. Whilst the respondent gave evidence that the PICU was appropriately staffed and there were appropriate safeguarding measures in place to ensure staff safety (which we accept), we nonetheless find that the Featherstone unit was a much less desirable place to work than the Elmswood Unit because the claimant would be required to carry out the matters set out in paragraph 111 above.

114. We conclude that the claimant has established facts that support her claim that she was relocated to the Featherstone unit. This is potentially unlawful discriminatory treatment as this relocation may have been made on

the grounds of the claimant's disability and there is also a link to the claimant's disability, in that the reason for the claimant's outburst on 16 February 2021 and subsequent exclusion from Elmswood Unit was connected to a discussion about her mental health. We conclude the burden of proof is shifted to the respondent to provide a non-discriminatory reason for this treatment.

Direct Discrimination

115. We turn now to look at:
- a. whether the claimant reasonably saw this treatment as a detriment (issue 4.2); and if so,
 - b. what non-discriminatory reason for the treatment is advanced by the respondent (4.5).
116. The claimant identifies a hypothetical comparator only. We consider, following the guidance in *Shamoon v Chief Constable of the Royal Ulster Constabulary*, that in connection with this allegation the question of less favourable treatment on the grounds of disability cannot be answered without first considering the 'reason why' the claimant was treated as she was.

Detrimental treatment (issue 4.2)

117. We have already found at paragraphs 110 to 113 that moving the claimant to Featherstone Ward was less favourable treatment.

Reason for the treatment (issue 4.5)

118. The respondent's case is that the reason for the claimant's relocation to Featherstone Ward was because Andrena Barber had concluded the claimant

could no longer work at the Elmswood Unit and having considered all the different wards within Cheadle Royal Hospital, Rachel Jackson had concluded the most appropriate ward for the claimant was Featherstone Ward.

119. Rachel Jackson gave evidence, which we accept, about the reason she concluded the male PICU unit was an appropriate unit to send the claimant to. Rachel Jackson said that the male PICU unit best matched the claimant's experience of working with adult males. The patients on the male PICU units stayed for short periods of time, which would reduce the risk the claimant would fail to maintain professional boundaries with them, which might lead them to form a close attachment to the claimant.

120. Rachel Jackson's evidence, which we accept, was that the other rehabilitation wards such as Child and Adolescent Mental Health Services (CAMHS) wards and eating disorder wards were not suitable for the claimant because she would require additional training to work in both of those wards. Those patients in the eating disorder ward are generally more challenging and wanted to form relationships with staff. There was therefore the risk that the claimant would fail to maintain professional boundaries with those patients, which might lead them to form a close attachment to the claimant.

121. We also find that Rachel Jackson had decided it was not feasible for the claimant to return to Elmswood view. Some of the patients had already seen that the claimant had become upset on 16th February 2021 and it is likely they would have discussed it. It would therefore not be appropriate to return the claimant to work with those patients in those circumstances. There remained the risk that the claimant would fail to maintain professional boundaries with

those patients which might lead them to form a close attachment to the claimant.

122. Rachel Jackson gave evidence, which we accept, that she was aware of how difficult it was for individual staff members to move wards within Cheadle Royal. For this reason, she had selected the Featherstone Ward as the ward manager was Emma Johnson who Rachel Jackson knew to be an effective and supportive manager who would assist the claimant in the transition to the new ward.

123. We therefore conclude that the respondent has given a clear non-discriminatory reason for moving the claimant to the Featherstone ward. As we have said, this is because it was seen as the best fit for the claimant based on her skills, experience (and potential vulnerabilities) and because of the supportive and effective ward manager who could assist in the transition.

Less favourable treatment (issue 4.3) and Treatment because of disability (4.2)

124. It follows from our conclusion at paragraph 123 that that the claimant has not established that she has been treated less favourably than someone in the same material circumstances without a disability would have been treated. We conclude that such an individual would have been treated the same as the claimant.

125. We also conclude that the decision to move the claimant to the Featherstone ward was not made on the grounds of disability, but rather for the reasons set out in paragraph 123 above.

Harassment

126. We turn now to consider whether the conduct complained of was unwanted and, if so, whether it was related to disability.

Unwanted conduct (issue 3.2)

127. We have no doubt that the claimant perceived the conduct of Rachel Jackson to move her to Featherstone Ward as un-wanted, for the reasons set out in paragraphs 117 above.

Was it related to disability (issue 3.3)?

128. Having established that the conduct was unwanted we find the reason the claimant was moved to Featherstone unit was (as we have said in paragraph 123 above) because it was seen as the best fit for the claimant based on her skills, experience and potential vulnerabilities and also because of the supportive and effective ward manager who could assist in the transition.

129. That reason was not related to the claimant's disability.

130. For this reason, the claimant's harassment claim fails, and we do not need to consider further issues in connection with this allegation.

Issue 3.1.5 and 4.1.5 On a date between 17 February 2021 and 1 March 2021, Ms Stubbs and/or Ms Barber told colleagues that the claimant was unwell and posed a danger to patients at the Elmswood unit.

131. The claimant did not return to work after 17 February 2021 as she was absent from work due to sickness. The claimant therefore cannot know, first

hand, what Beatrice Stubbs or Andrena Barber did or did not tell colleagues about the reason for her absence.

132. We find that neither Beatrice Stubbs nor Andrena Barber said anything to colleagues at all about the reason for the claimant's absence.

133. There was no reason for Beatrice Stubbs to do so. She was a clinical psychologist with no line management responsibility for the claimant. No evidence was advanced by the claimant to suggest Beatrice Stubbs had done so.

134. We accept Andrena Barber's evidence that she did not brief staff about the claimant's absence at all. Andrena Barber's evidence was clear and straightforward on this point. We are surprised that Andrena Barber chose not to inform staff that the claimant was no longer working on Elmswood Unit. It would have been a simple thing to do and would, in our view, have been good practice.

135. However, not telling staff about the reason for the claimant's absence is a very different thing from telling colleagues the claimant was unwell and posed a danger to patients at the Elmswood unit, as alleged.

136. We find that this is an example of the claimant jumping to conclusions about what might have been said by Andrena Barber or Beatrice Stubbs, in circumstances where there was no evidence to support that conclusion.

137. We therefore conclude that the claimant has not established facts that support her claim that the comments, set out in allegations 3.1.5 and 4.1.5 were said.

138. The claims for direct discrimination and harassment therefore fail in connection with these allegations.

Issues 3.1.6 and 4.1.6 Between 17 February to 14 October 2021, Rachel Jackson (Clinical Nursing Director) and/or Ms Barber failed to communicate or resolve the issue of the claimant's unwillingness to work at the Featherstone unit.

139. We find that between 17 February and 14 October 2021 neither Rachel Jackson nor Andrena Barber communicated with the claimant about her unwillingness to work at the Featherstone ward, other than the text message exchange between the claimant and Andrena Baber on 25 February 2021.

140. We conclude that the claimant has established facts that support her claim that neither Rachel Jackson nor Andrena Barber communicated with the claimant about her unwillingness to work at the Featherstone ward between 17 February and 14 October 2021. This is potentially unlawful discriminatory treatment. We conclude the burden of proof is shifted to the respondent to provide a non-discriminatory reason for this treatment.

Direct Discrimination

141. We turn now to look at:

142. whether the claimant reasonably saw this treatment as a detriment (issue 4.2); and if so,

143. what non-discriminatory reason for the treatment is advanced by the respondent (4.5).

144. The claimant identifies a hypothetical comparator only. We consider, following the guidance in *Shamoon v Chief Constable of the Royal Ulster Constabulary*, that in connection with this allegation the question of less favourable treatment on the grounds of disability cannot be answered without first considering the 'reason why' the claimant was treated as she was.

Detrimental treatment (issue 4.2)

145. We find that the failure of Rachel Jackson or Andrena Barber to contact the claimant about her unwillingness to work at the Featherstone ward during this period did amount to detrimental treatment. The claimant wanted to have a further discussion about this issue with Rachel Jackson or Andrena Barber because she was unhappy about being placed on the Featherstone ward. It was detrimental to her for this discussion not to take place.

Reason for the treatment (issue 4.5)

146. We find that the reason Andrena Barber did not contact the claimant after 25 February 2021 about her return to work to the Featherstone ward was that she had handed overall line management responsibility over to Emma Johnson, ward manager of the Featherstone ward. We have also accepted Andrena Barber's evidence that she forgot to contact Rachel Jackson and a member of HR to set up a discussion about the claimant's move to Featherstone Ward, after she sent the text message on 25 February 2021 to say she would do so. We have accepted that this was the genuine reason why Andrena Barber did not contact the claimant. Andrena Barber's evidence was straightforward on this point. It also made sense to us that Emma Johnson would pick up line management responsibility of the claimant at the point the claimant moved across to her ward, on 25 February 2021.

147. We find that the reason Rachel Jackson did not contact the claimant between 17 February and 14 October 2021 was that she had had reached the view that the matter was been dealt with by either Emma Johnson or Katie Warren in the HR team.

148. In fact, the claimant had been invited to welfare meetings by Katie Warren on 10, 14 and 24 May 2021. The claimant had said on 28 May 2021 she was not ready to attend a meeting with the respondent. The claimant did send a message to say she was ready to have a review meeting with Katie Warren on 23 July 2021. However, we accept the evidence of Katie Warren that the claimant did not then engage with her between 6 August and 29 September 2021. For example, the claimant stopped submitting a fit note during this time.

149. On 11 August 2021 the claimant emailed Katie Warren and said that she felt that she needed to “walk away” from the respondent for her mental health and that she was going to forward her written notice of resignation. In response to this, on 17 August 2021, Katie Warren informed the claimant that she should take some time to get herself well and suggested that she wait until she was feeling better to pick up their discussions.

150. The claimant emailed Katie Warren on 5 October 2021 to say that she thought she had resigned from her employment in August 2021, which was why she had not been in touch beforehand.

151. The claimant then chose to place her resignation on hold, in an email to Katie Warren dated 10 October 2021. This then led to Katie Warren arranging the welfare meeting with Rachel Jackson on 14 October 2021, to discuss the claimant’s return to work.

152. We have accepted Rachel Jackson’s evidence that she did not communicate with the claimant about a return to work at the Featherstone ward because she thought the claimant’s absence from work and return to work was being dealt with by Emma Johnson and Katie Warren. Rachel Jackson’s

evidence was clear on this point. It is also consistent with the contact Katie Warren had with the claimant regarding her absence from work during this period.

153. In fact, we find it was the claimant's decision not to engage with Katie Warren in May 2021 regarding the reason for absence and then her decision to resign from the respondent in August 2021 (albeit she did not send her letter of resignation) which was the reason why the respondent did not discuss the claimant's return to work at the Featherstone ward between 17th February and 14 October 2021. We also accept Katie Warren's evidence that as she was aware that the claimant was ill, she did not wish to 'overcontact' her until the claimant felt ready to re-engage with the respondent.

154. As soon as the claimant confirmed that she was ready to re-engage with the respondent Katie Warren set up a welfare meeting to address the claimant's issues of concern. Katie Warren asked Rachel Jackson to attend this meeting. This meeting took place on 14 October 2021.

155. We therefore conclude that there is a clear non-discriminatory reason to explain why Rachel Jackson and/or Ms Barber did not communicate or resolve the issue of the claimant's unwillingness to work at the Featherstone unit between 17th February and 14 October 2021. This reason was that Andrena Barber genuinely believed that Emma Johnson was dealing with the matter and Rachel Jackson thought the matter was being dealt with by either Emma Johnson or Katie Warren in the HR team.

Less favourable treatment (issue 4.3) and Treatment because of disability (4.2)

156. It follows from our conclusion at paragraph 155 that that the claimant has not established that she has been treated less favourably than someone in the same material circumstances without a disability would have been treated. We conclude that such an individual would have been treated the same as the claimant.

157. We also conclude that the failure of Andrena Barber or Rachel Jackson to discuss the claimant's unwillingness to move to Featherstone ward during this period was not made on the grounds of disability, but rather for the reasons set out in paragraph 155 above.

158. The claims for direct discrimination therefore fail in connection with these allegations.

Harassment

159. We turn now to consider whether the conduct complained of was unwanted and, if so, whether it was related to disability.

Unwanted conduct (issue 3.2)

160. The failure of Rachel Jackson or Andrena Barber to contact the claimant about her unwillingness to work at the Featherstone ward during this period was unwanted conduct, for the reasons set out in paragraph 145 above.

Was it related to disability (issue 3.3)?

161. Having established that the conduct was unwanted we find the reason neither Rachel Jackson nor Andrena Barber contacted the claimant about her unwillingness to work at the Featherstone ward during this period was (as we have said in paragraph 155 above) because Andrena Barber genuinely believed that Emma Johnson was dealing with the matter and Rachel Jackson thought the matter was being dealt with by either Emma Johnson or Katie Warren in the HR team.

162. That reason was not related to the claimant's disability.

163. For this reason, the claimant's harassment claim fails, and we do not need to consider issues 3.4 and 3.5 in connection with this allegation.

Issues 3.1.7 and 4.1.7 The conduct of Ms Jackson at a meeting with the claimant on 14 October 2021.

164. Rachel Jackson gave a clear account of the meeting she had with the claimant on 14 October 2021.

165. We find that the meeting was emotive. We find Rachel Jackson conducted that meeting appropriately. Unfortunately, the claimant could not understand why the respondent had decided it was not appropriate for her to return to Elmswood unit.

166. We find that Rachel Jackson did not say "*why would you have a problem with moving to Featherstone*" to the claimant as alleged.

167. Instead, we find that Rachel Jackson genuinely was attempting to resolve matters and return the claimant to work at the Featherstone ward.

168. We find that the claimant's recollection that the meeting on 14 October 2021 had been conducted inappropriately by Rachel Jackson was driven by her primarily not understanding the purpose of the meeting and her misremembering what was said at the meeting.

169. We also take into account the claimant's own evidence that Katie Warren and Rachel Jackson were supportive of her during the meeting on 14 October 2021.

170. We therefore conclude that the claimant has not established facts that support her claim that the comments, set out in allegations 3.1.7 and 4.1.7 were said.

171. The claims for direct discrimination and harassment therefore fails in connection with these allegations.

Issues 3.1.8 and 3.1.9 Between 14 October 2021 to 2 February 2022, there was a lack of communication by the respondent with the claimant

172. We do not find that there was a lack of communication between the respondent and the claimant during the period 14 October 2021 to 2 February 2022.

173. On the contrary, Katie Warren maintained regular contact with the claimant during this period, by email.

174. Katie Warren sent an email to the claimant on 24th of October 2021 regarding her sickness absence.

175. On 16 November 2021 Katie Warren responded to the claimant's request for personal data.

176. Katie Warren dealt with a request from the claimant regarding her SSP1 form in December 2021.
177. On 14 December 2021 Katie Warren emailed the claimant and tried to set up a call to discuss the claimant's personal data request, grievance and other allegations. Katie Warren said in her email "*I would really like to help you to resolve this Jane, please let me know when would be a good time to call you.*"
178. The claimant did not engage with Katie Warren's request to set up a telephone call to discuss these matters. The claimant accepted in evidence that she had an iPad and was able to send and receive emails at this time. We find that the claimant was regularly sending emails to Katie Warren during this period.
179. On 31 January 2022 Katie Warren emailed the claimant to provide an update on the claimant's request for personal data, grievance and investigation.
180. We find that there was not a lack of communication by the respondent with the claimant during the period 14th October to 2 February 2022. We find that Katie Warren maintained regular contact with the claimant during this period and tried to set up a telephone call to discuss the claimant's concerns. It was the claimant that failed to engage Katie Warren's attempts to set up this telephone call which meant it did not take place.
181. We therefore conclude that the claimant has not established facts that support her claim that the comments, set out in allegations 3.1.8 and 4.1.9 were said.

182. The claims for direct discrimination and harassment must therefore fail in connection with these allegations.

Time limits

183. As we have not upheld any part of the claimant's claim, we do not need to consider the issue of time limits.

Employment Judge Childe

25 January 2024

JUDGMENT SENT TO THE PARTIES ON

1 February 2024

FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s)