EMPLOYMENT TRIBUNALS

Claimant: Mrs R Cartwright

Respondent: Manchester University NHS Foundation Trust

Heard at: Liverpool (by CVP) **On:** 16, 17, 19 and 20 October 2023

Before: Employment Judge Buzzard
Mr I Frame
Ms E Cadbury

REPRESENTATION:

Claimant: Mr Ross of Counsel
Respondent: Mr Williams of Counsel

JUDGMENT having been sent to the parties on 27 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claims and allegations made by the claimant were set out in an agreed List of Issues prepared by the parties in advance of this hearing. Following initial discussion at the start of this hearing, after the Tribunal had taken an adjournment to read ,there was some clarification of the parties List of Issues. In addition to this clarification, a number of the claims identified in that list were withdrawn. All such claims were dismissed on withdrawal. In addition, as evidence was being heard, a further claim of discrimination arising from disability was withdrawn and is dismissed.

2. Following the initial discussion, the claims and allegations that were pursued at this hearing were identified as:

   2.1. Ten allegations of disability related harassment. These were argued to individually amount to acts of harassment, and in the alternative to collectively amount to disability related harassment.

2.2. Three allegations of detriment claimed to be unlawful victimisation. Six such allegations were on the parties List of Issues, however the three allegations of detriment relating to the actions of Kimberley Barnes were withdrawn.

2.3. Three claims of discrimination arising from disability. These relied on the same alleged acts that were pursued as victimisation claims, as also being as acts of unfavourable treatment. An additional allegation of unfavourable treatment was withdrawn during the course of the hearing.

2.4. Claims of discrimination by a failure to make reasonable adjustment to four provisions, criteria or practices ("PCPs") that are alleged to have been applied to the claimant. Claims in relation to a fifth potential PCP was withdrawn.

2.5. A claim for unlawful deduction from wages made in relation to allegedly underpaid holiday pay.

Time Limit Jurisdictional Issues Were Not Determined

3. In relation to some of the claimant's claims under the Equality Act 2010 it was not accepted by the respondent that the claim had been presented in time. In the circumstances the Tribunal determined the merits of all claims regardless of any time limit issue. No claims were dismissed on the basis that they were not presented in time.

The Law

4. Part 5 of the Equality Act 2010 applies to employees and prohibits discrimination against, and harassment of, employees in the workplace.

5. In relation to discrimination s39 states:

> *"39 Employees and applicants*
>
> *(2) An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
> *(d) by subjecting B to any other detriment.*

6. This prohibits discrimination in the terms of employment, in the way access to training or other benefits is given or by subjecting an employee to any other detriment.

7. In relation to harassment s40 states:

> *"40 Employees and applicants: harassment*

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

8. The right to make a claim in an Employment Tribunal in relation to a breach of these provisions of Part 5 comes from Chapter 3 of Part 8 of the Equality Act 2010. Specifically, s120 states:

"120(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);……"

Under this a Tribunal has the jurisdiction to determine if prohibited discrimination and / or harassment has occurred.

9. The definition of discrimination and harassment comes from Part 2 of the Equality Act. This firstly creates the concept of protected characteristics, the relevant one here being disabiltiy. Part 2 Chapter 2 goes on to define what discrimination and harassment are.

10. **Harassment**

10.1. Harassment is defined by s26 of the Equality Act as:

"(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."

10.2. This test has several elements relevant to this case:

10.2.1. The conduct complained about must be unwanted. It is well established that a single incident can constitute unwanted conduct, "*provided it is sufficiently serious".*

10.2.2. To amount to harassment the conduct must have met one of the two thresholds set out in s26(1)(b).

10.2.3. The test in s26(1)(b)(i) requires the conduct to have violated the dignity of the claimant. In **Betsi Cadwaladr UHB v Hughes**

UKEAT/0179/13/JOJ Mr justice Langstaff gave guidance that the words '*violating dignity'* are "*significant*" and "*strong*" words. Offending against, or hurting, dignity is not sufficient. The words "*look for effects which are serious and marked*" and that "*Tribunals must not cheapen the significance of these words*". In **Land Registry v Grant** [2011] ICR 1390 (CA) Lord Justice Elias observed:

> "*Tribunals 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."*

He went on to suggest that it would be wrong to distort this language and that doing so could bring discrimination law into disrepute.

10.2.4. The test in s26(1)(b)(ii) requires the conduct to have created a "*degrading, hostile, humiliating and offensive environment*" for the claimant. In **GMB v Henderson** [2015] IRLR 451 Mrs justice Simler gave guidance that the *conduct complained of* "*must reach a degree of seriousness*" before it can be regarded as harassment, in order not to "*trivialise the language of the statute*". She went to say that if an incident of conduct is not sufficiently serious, it remains just that, an "*incident*" rather than the *"creation of an environment"*.

10.3. Perception – how the claimant perceived the conduct

10.3.1. In deciding whether particular conduct, related to a protected characteristic, created a proscribed environment, the Employment Tribunal "*must*" take into account *"the perception of"* the claimant (EqA s.26(4)(a)).

10.3.2. The mere fact that the claimant was upset by the conduct is not of itself enough to establish that it has had the required effect to amount to harassment. In **Land Registry v Grant** LJ Elias noted that "*The claimant was no doubt upset …… but that is far from attracting the epithets required to constitute harassment.*" This principle must also mean that conduct will not amount to harassment simply because the claimant was "*offended*". The degree of offence caused must be sufficient to "*attract the epithets*" of "*creating an offensive environment*" for the Claimant. Not all conduct which causes offence will necessarily have that effect.

10.4. Context – the circumstances of the case

10.4.1. In deciding whether particular conduct related to a protected characteristic created a proscribed environment, the Employment Tribunal "*must*" take into account *"the other circumstances of the case"* (EqA s.26(4)(b)).

10.4.2. Whether as part of the s.26(4)(b) consideration, or as a standalone issue, *context* is central to the evaluation of whether the effect of conduct was to create a proscribed environment. In **Land Registry v Grant Elias** LJ stated:

> "*When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect.*"

10.5. *The importance of reasonableness*

10.5.1. If the conduct did create a proscribed environment for the Claimant, the tribunal "*must*" consider whether it was reasonable for that conduct to have had that effect (EqA s.26(4)(c)).

10.5.2. Indeed, if it was not reasonable for the conduct to have had that effect, it is not harassment. In **Pemberton v Inwood** [2018] ICR 1291 it was stated:

> *"The relevance of the objective question [i.e. s.26(4)(c)] 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."*

11. **Discrimination by failure to make reasonable adjustments**

11.1. The relevant provision relating to the duty to make reasonable adjustments is to be found in section 20 of the Act which sets out that where:

> *(a) a provision, criterion or practice applied by or on behalf of an employee, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as is reasonable in all the circumstances of the case, for him to have to take in order to prevent the provision, criteria or practice, or feature, having that effect."*

11.2. Accordingly, the claimant has to identify a PCP which was applied to her, and which caused her a substantial disadvantage, that a non-disabled employee would not encounter if the PCP was applied to them. If the claimant can show this, then the respondent will be under a duty to make *reasonable* adjustments.

11.3. These are not required to be the adjustments that the claimant would prefer. To be reasonable an adjustment must either reduce or eliminate the substantial disadvantage. Provided any adjustment that is made meets this requirement, it will discharge the duty to make reasonable adjustments regardless of whether the claimant would have preferred a different adjustment to be made that would have had the same or similar impact on the identified substantial disadvantage.

12. **Discrimination arising from disability**

12.1. This is defined by s15 of the Equality Act as when:

> *"15(1) A person (A) discriminates against another (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."*

12.2. The claimant must show that she has been treated unfavourably.

12.3. Establishing unfavourable treatment is not however sufficient. For a claim of discrimination to succeed, the conduct complained of must be also have been '*because of something arising as a consequence of*' the claimant's disability. This is an issue of fact for the Employment Tribunal to determine.

13. **Victimisation**

13.1. The definition of victimisation is found is s27 EqA, the relevant parts of which state:

> *"27 Victimisation*
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act, ….*
>
> *(2) Each of the following is a protected act—*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act"*

13.2. Accordingly, the first requirement is that the claimant did a protected act. There was no dispute in this case that the claimant had done the alleged protected acts.

13.3. To amount to victimisation the claimant must have been subjected to a detriment because of those protected acts. In this case the determining issue was whether the alleged detriments were occurred *"because of"* the identified protected acts. This is an issue of fact for the Employment Tribunal to determine.

14. **The Burden of Proof**

14.1. When determining the claimant's claims under the Equality Act 2010, the burden of proof is determined by s136 of the Equality Act. The relevant parts of this section state:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the pro-vision."

14.2. This in effect reverses the traditional burden of proof so that the claimant does not have to prove discrimination has occurred, which can be very difficult. S136(1) expressly provides that this reversal of the burden applies to '*any proceedings relating to a contravention of this [Equality] Act*'.

14.3. This is commonly referred to as the reversed burden of proof, and has two stages.

14.3.1. Firstly, has the claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination? This is more than simply showing the respondent could have committed an act of discrimination.

14.3.2. If the claimant passes the first stage then the respondent has to show that they have not discriminated against the claimant. This is often by explanation of the reason for the conduct alleged to be discriminatory, and that the reason is not connected to the relevant protected characteristic. If the respondent fails to establish this then the Tribunal must find in favour of the claimant. With reference to the respondent's explanation, the Tribunal can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case.

14.3.3. It is not necessary for the Tribunal to approach these two elements of the burden of proof as distinct stages. The court of Appeal in **Madarassy v Nomura International plc** [2007] EWCA Civ 33 gave useful guidance that, despite the two stages of the test, all evidence should be heard at once before a two-stage analysis is then applied.

15. **Unlawful Deduction from Wages**

15.1. There is a general right not to suffer a deduction from wages established by the Employment Rights Act 1996 ("ERA"). This states:

"13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him…"

15.2. What amounts to a deduction is defined by s13(3) as:

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction

> *made by the employer from the worker's wages on that occasion.*

15.3. This is not, however, an absolute right. Under s13(4) there is an exclusion for deductions made in error:

> *(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*

Structure of the discussion of the allegations

16. Noting the scope and extent of the allegations, these reasons set out the findings and conclusions in relation to the allegations individually.

17. Only the key findings of fact and conclusions are set out in relation to each allegation. All the evidence presented was considered by the Tribunal. Any failure to set out or discuss any specific part of the evidence presented in these reasons should not be taken to infer that the Tribunal did not consider that evidence. It is no more than a reflection of the fact that the Tribunal did not consider that evidence to have a significant influence on their findings. Where there is no discussion of the evidential basis for a finding of fact that is because there was either no dispute regarding the fact or no credible dispute.

18. When making their findings the Employment Tribunal had in mind the entirety of the allegations made. The findings of the Employment Tribunal were not made in relation to each allegation in isolation from the whole claim.

What Evidence was presented?

19. The Tribunal heard from the claimant who gave evidence on her own behalf.

20. The Tribunal also heard from six witnesses for the respondent as follows:

20.1. Michelle Hodgkinson – the claimant's line manager from July 2018 until around 5 July 2021.

20.2. Kate Murdock – a Lead Manager for Children's Community Health with the respondent.

20.3. Deborah Halicki – a Health and Safety Adviser for the respondent.

20.4. Fiona O'Shea – a Strategic Service Manager who had been involved in the investigation of the claimant's grievance.

20.5. Helen McNulty – who took over as the claimant's line manager from around 5 July 2021.

20.6. Kimberley Barns – a Senior School Nurse with the respondent and from around November 2018 she had been acting in a role with supervisory responsibility for the claimant.

21. In addition to witness evidence, the parties provided the Tribunal with an extensive bundle of documentary evidence.

22. All of the witnesses, including the claimant, had produced detailed written witness statements in advance. These cross referenced the bundle of documentary evidence where relevant.

23. All of the witnesses confirmed their statements under oath. Save for one minor typographical correction by a witness, no witness made any material change to their written statements.

24. Two of the respondent's witnesses' evidence was not subject to any cross examination, because it was not deemed by the claimant's representative to require challenge in respect of any content relevant to the claims made. The parties were assured at the outset of proceedings that the Tribunal would not make findings of fact in relation to any issue that was not necessary to determine the claimant's claims.

25. Both representatives provided the Tribunal with extensive written submissions. These were supplemented by brief oral submissions to assist the Tribunal. It is noted that, at least from the claimant's representative, the oral submissions were focussed primarily on the claimant's unlawful deduction from wages claim.

General Relevant Background Findings of Fact

26. The claimant is employed by the respondent as a Band 5 School Nurse. She has continuous employment, following a transfer to the respondent, going back to November 2015.

27. The claimant accepts that the role of a Band 5 School Nurse is a patient facing role. The role involves attending schools to see children, to see parents and to conduct welfare checks. There is no dispute that parts of this role, that have been described to this Tribunal as things like report writing and administration, can be done remotely. There is, however, no agreement between the parties as to how big or small a fraction of the work encompassed by the claimant's role fall into these categories and can be done remotely.

28. The claimant was employed on a term time only contract. She used salary sacrifice to increase her annual leave entitlement to enable her to take annual leave throughout all the school holidays, and therefore only have to attend work in term time. The claimant has a young daughter of school age who for whom she is the primary carer. In term time the claimant is contracted to work 22½ hours per week.

29. There is no dispute that the claimant has complex health needs. The respondent has conceded that the claimant is, and at all relevant times was, a disabled person under the definition in the Equality Act 2010 as a result of her

lymphedema and recurring cellulitis. There is no dispute that the respondent was aware of these disabilities at all times relevant to these claims.

30. In early 2018 the claimant's health deteriorated. This resulted in a period of absence starting around March 2018. In or around May 2018 the claimant's normal place of work was moved to Trafford Town Hall. This was done following an Occupational Health assessment which had recommended as follows:

> "*The condition is not caused by work, however environmental and physical factors both in and out of work could affect her symptoms. It does appear that walking for longer periods and regular use of stairs increase the risk of further exacerbation and I advise these activities should be reduced where possible. If operationally feasible I do believe it would be suitable to consider redeploying the claimant to an alternate team where these activities are most limited. As stated, she advised me that the placement in Trafford Town Hall improved her symptoms and I suggest that this or a similar option is considered."*

31. Following this the claimant returned to work in or around July 2018 on a phased return basis. At that point she was working for the team designated the "*North*" team. The school nurse provision was provided by three teams, a North, a Central and a South Team. As part of the North team the claimant was based at Trafford Town Hall. It is around about this point, that Michelle Hodgkinson became the claimant's line manager.

32. The claimant was further assessed by Occupational Health in April 2019 and this assessment recommended:

> *"If operationally feasible, in order to sustain the claimant in work and prevent exacerbation of her symptoms, it is advised that she is permitted to work from home to do administrative work and telephone consultations on the occasions that she has a flare-up."*

That report went on to state:

> *"If this support is put in place then I do not see any clinical barriers to prevent her from carrying out her duties and I cannot identify any other adjustments that would further ease her symptoms and prevent further absence."*

33. Accordingly, the recommendation from Occupational Health was that the claimant should be allowed to work from home *when she had a flare-up*.

34. A meeting, which was described in the documents and to the Tribunal as a "*reasonable adjustments meeting*", was held in June 2019 with the claimant, her RCN representative and an HR business partner from the respondent. The Tribunal were shown the records of this meeting.

35. The records reflect that this meeting concluded that, during a flare-up of the claimant's conditions, the claimant should not really be working at all. She should be at home resting, not at home working.

36. The outcome letter from the meeting records that the writer understood the claimant to have been asking for permission to work from home as a way to prevent her conditions flaring up. That is not what the Occupational Health reports suggested was clinically required. The outcome letter further stated that the claimant could work from home, on occasion, if necessary, as long as it had been agreed in advance including agreement as to what work would be done. The outcome letter further confirmed that, if the need arose, consideration would be given to extending any sickness absence indicators and triggers as an adjustment for the claimant, but at that time the respondent had no concerns related to the claimant's absence levels.

37. The claimant was again absent from work from 25 September 2019. She was further assessed by Occupational Health in December 2019. That Occupational Health report records the reason for the claimant's current absence at that time to be due to stress at home and not due to her disabilities. The parties referred to this as a "*personal matter*", which was not explained in any great detail to the Tribunal. The Occupational Health report records that the claimant already had a number of adjustments in place, which it was suggested should continue. The only further adjustment suggested in the report was that the claimant should return to work from her current absence on a phased basis over four weeks given the length of that absence.

38. Shortly thereafter the claimant returned to work on the recommended phased basis. During this phased return, in early 2020, the Covid-19 pandemic reached the United Kingdom.

39. The United Kingdom went into a lockdown in March 2020. The claimant was classified within the category "*clinically extremely vulnerable*" and was told by the UK government to shield from Covid-19 for her own protection. The claimant had, in fact, been told by the respondent to commence shielding a few days prior to the national lockdown being announced by the Government.

40. On 26 May 2020 the claimant emailed confirmation to Michelle Hodgkinson that, at that point, she was only managing to do roughly 1-2 hours' work a day. The claimant stated that she was not able or willing to work weekends or evenings, or during any periods of leave, to try to increase the number of hours she could do. These restrictions on evening working, weekend working and working during leave appear to have been driven principally by childcare responsibilities and the demands of home schooling, although the claimant did reference her need to prioritise her own health. There was no evidence of anything critical being said to or about the claimant in relation to the fact that she was not able to do more work than she stated.

41. At some point in June 2020 the United Kingdom Government announced that it was anticipated shielding would end on 1 August 2020. This would mean that, on her return from leave (the claimant being a term time only employee – that would not be until September 2020), the requirement to shield was not anticipated to be in place. Accordingly, it was understood that the claimant would not be required to shield on her return to work, and her daughter would be expected to be back in school with other children as normal.

42. This anticipated end to the Covid-19 pandemic transpired, with the benefit of hindsight, to have been unrealistically optimistic. At the time, however, the stated position and guidance produced by the United Kingdom Government was that shielding was ending.

43. There were, around about this time, a number of meetings and discussions between the claimant and respondent regarding plans for September, when it was anticipated there would be no shielding, children would be back at school and the service provided by the respondent would be trying to catch up. The claimant complains that at least some part of these planning discussions were either scheduled, or requested by the respondent, to occur during her period of summer annual leave.

44. A further Occupational Health referral was scheduled for autumn 2020. The claimant was due to return to work on 2 September 2020. She did not return and she was certified unfit for work due to stress and anxiety. There were then discussions regarding the claimant's return to work which involved the claimant and her RCN officer.

45. In mid-September alternative temporary duties were identified for the claimant. These were helping with the UK "*test and trace*" system for tracking Covid-19 infection. The claimant agreed to start this work on her return to work after her fit note expired. There is no dispute that, for a variety of reasons not relevant to this decision, these duties never came to fruition. The claimant returned to work on 19 October 2020. Some equipment and IT kit was delivered to the claimant's home, at some point in October 2020, to enable and facilitate her being able to work from home whilst shielding.

46. The United Kingdom went into a second national lockdown on 5 November 2020. This second lockdown lasted until 2 December 2020.

47. In mid-November, during this second lockdown, the claimant was asked if she could offer safeguarding support to the School Nursing Team. The claimant, at least initially, agreed to this. This was confirmed by letter dated 18 November from Michelle Hodgkinson, which stated:

> *"This change is for a temporary six week period as the full school nursing role continues to be a role that requires significant face to face contact with children and young people."*

48. The claimant encountered IT difficulties that appear to have started in late 2020 and that continued through to early 2021. The third national lockdown commenced on 6 January 2021. This lockdown was lifted in phases, not on a UK wide single date, guided by a roadmap that the Prime Minister announced on 22 February 2021. That roadmap started to apply from March 2021.

49. On 7 and 8 January 2021 the claimant states that she was unable to access any work related IT systems from home. Two WhatsApp messages, first asking the claimant to do a particular task and then asking if the claimant was in fact working that day, were posted on the School Nurses WhatsApp Group on 7 and

8 January respectively. The claimant left that WhatsApp in response to the second of these messages.

50. There was a review meeting on 22 March 2021, conducted via MS Teams, where the claimant confirmed to the respondent her Covid-19 vaccination status. She had had her first Covid-19 vaccine on 13 February 2021, and was due her second vaccine around mid-May 2021. There does not appear to be any credible dispute that it was well known to all relevant persons that the Covid-19 vaccination required a gap between first and second vaccine doses of at least 12 weeks.

51. The UK Government announced the end to shielding in the United Kingdom, for the second time, on 31 March 2021. The claimant returned to work at Trafford Town Hall on 19 April 2021.

52. In late April 2021 the claimant was asked to provide support to the South team of School Nurses. The claimant was emailed a one-to-one record of this discussion on 29 April at 11:31. That recorded that the claimant was being asked to support the South Team, instead of the North team, whilst working from home.

53. A few minutes later the School Nursing Unit was informed via email that the claimant would be supporting the South Team whilst working from home. A few minutes after that the leader of the South Team sent a further email to her team, which was copied to the claimant, that stated:

> *"There has been a short-term offer of remote help for the team. Becky Cartwright [the claimant] who I know you all know will start work tomorrow offering remote support."*

54. Around an hour after this the claimant raised with Michelle Hodgkinson, via email, a concern about offering this support. Her email had the subject line "*Working from the South*". It is noted by the Tribunal that the claimant appears to have conflated working *from* the South with working *for* the South team. The justification for the concerns the claimant raised appear to have been focussed primarily on her view that staffing levels did not justify her being asked to work for the South team.

55. The claimant was certified as unfit for work from 30 April 2021 and (as far as the Tribunal can discern) she never did any of the requested work for the South team or any work from the South.

56. The claimant submitted a formal grievance on 12 May 2021. The claimant was then further assessed by Occupational Health in June 2021. This referral stated, for the first time, a move for the claimant to any other location or team would "*provide difficult*" (which is taken to have been intended to say it would *prove* difficult). The report also suggested that the claimant should be given a different line manager and that a stress risk assessment should be undertaken. The claimant was given a different line manager.

57. The claimant presented her Employment Tribunal claim on 16 August 2021. There is no dispute that this would be a protected act for the purpose of any victimisation claim.

58. The claimant returned to work and was further assessed by Occupational Health in September 2021. The outcome of this assessment was recommendations as follows:

    58.1. that the claimant should have homeworking flexibility "*available to her at a time when her health is problematic*";

    58.2. that her previous adjustments should remain in place; and

    58.3. that she should continue in her present role and place of work because "*to move to another team is likely to promote anxiety reducing her health resilience, and current support and equipment is not available to her.*"

59. On 17 June 2021 the claimant was asked if she could assist with a session of a National Child Measurement Programme ("NCMP") at a school in Altrincham, which is a school that falls within the South area. This request was made by Kimberley Barnes. Kimberley Barnes was quite clear in her evidence that this request was made to the claimant because of an acute staffing shortage and the fact there was a required minimum staffing level at any such measurement session. When she was asked to do this the claimant became upset. There is some dispute between the parties as to the reasons the claimant gave for not being able to do this, namely was it connected to travel costs/expenses or whether it was to do with her health, but there is no dispute that the claimant was not required to assist with that session. There is no suggestion that this request was repeated or that any similar or further request was ever made. There is no dispute that there was no criticism of the claimant for refusing to assist with this NCMP session.

60. There was a one-to-one appraisal meeting with the claimant and Helen McNulty on 23 June 2021. At this meeting the claimant says that she was told her reasonable adjustments were too restrictive. The characterisation of the way this was said and the context in which it was said is disputed by the respondent. The claimant relies upon the assertion that this was said as being an act of victimisation and/or unfavourable treatment for the purposes of a discrimination arising from disability claim.

61. There was then a further one-to-one meeting in September 2022 where it is alleged that further comments were made that amounted to victimisation or were unfavourable treatment for the purposes of a discrimination arising from disability claim. These related to what the claimant could be expected to do, and they are disputed in their nature.

Findings and Conclusions in relation to Harassment Claims

62. *First Harassment Allegation*

    62.1. The first harassment claim relates to July 2020. The claimant claims that Michelle Hodgkinson told her that she would be expected to return to the office

in September (after the school holidays) and/or told her that she would then be expected to do immunisations. The claimant claims that this amounted to an act of disability related harassment.

62.2. There is no dispute that there was such a discussion. The Tribunal notes the context at the time, not just the words used in the discussion. Hindsight cannot retrospectively change the nature of an act such that it becomes an act of harassment.

62.3. At the time of this discussion the United Kingdom had been informed by the Government that shielding was going to end on 1 August 2020. Schools were due to fully reopen in September 2020. The clear message from Government was that the United Kingdom was emerging from the pandemic, and thus emerging from pandemic restrictions. The fact this message may have proved to be premature is irrelevant to the assessment of whether what was done at the time amounted to harassment.

62.4. The Tribunal is unable to understand any credible basis on which it could be reasonably be suggested that planning for what the claimant would do on return to work in September 2020 when shielding had ended could be harassment. It does not, in any way, amount to anything that could have reasonably been viewed at the time as unreasonable, improper, or in any way inappropriate.

62.5. To suggest that it amounted to harassment, or that it could be harassment, would "*cheapen the significance of the words that define harassment"*. It was no more than an entirely reasonable, proper and sensible discussion about what the claimant would do in what was anticipated to be a post pandemic restrictions world, on her return from summer leave.

62.6. Accordingly, the finding of the Tribunal is that this allegation cannot in any way form the basis of a well-founded claim of harassment.

63. *Second Harassment Allegation*

63.1. The claimant's second allegation of harassment is that in September 2020 the respondent stopped the claimant's scheduled "*test and trace*" role for a six-week period.

63.2. As with the first allegation of harassment, there was no factual dispute that this this happened.

63.3. Whilst the allegation is that the role stopped, the agreed facts are that it never actually started. Whilst not raised by the parties, this role, by definition, could not be permanent, being a specific pandemic response role.

63.4. It is not clear to the Tribunal how stopping a role in these circumstances could amount to an act of harassment. There was no suggestion in the evidence that the manner in which this was done could in any way be an aggravating factor that could make this harassment.

63.5. In cross examination the claimant appeared to the Tribunal to realise that her claim that stopping a planned test and trace role was harassment was not credible. The claimant then sought to suggest that what she had meant was not that the stopping that specific role was harassment, but rather that continually reviewing her role violated her dignity and was harassment.

63.6. "*Violated*" is a strong word. Even if the claimant felt hurt and offended by something, the authorities guide Employment Tribunals that this does not without more necessarily amount to enough to match the strength of the word "*violated*".

63.7. The Tribunal panel cannot see how what is described as having occurred gets close to being strong enough to meet the word "*violated*". The respondent was, in the circumstances that prevailed, trying to find work that the claimant *could* do that would meet her needs and best assist the respondent in its ongoing attempts to deliver a service in very uncertain and difficult times during an evolving national crisis.

63.8. Accordingly, the finding of the Tribunal is that this allegation cannot form the basis of a well-founded claim of harassment.

64. *Third Harassment Allegation*

64.1. The claimant's third allegation of harassment is that, in November 2020, Michelle Hodgkinson advised her, in response to a query from her RCN representative, that the role she was assigned to at that point was temporary. The claimant's RCN representative believed that what she was doing at that time was the claimant's substantive role, meaning it was not temporary.

64.2. As with the first claimant's two allegations of harassment, there does not seem to be any substantial factual dispute about what was said to the claimant.

64.3. Taken at its highest, the Tribunal panel cannot see how the claimants account of events could come close to the necessary threshold of seriousness required for the respondent's actions to amount to harassment. The Tribunal concludes that to find this allegation to amount to harassment would be unduly cheapened the definition of harassment.

64.4. There is no credible dispute that at this time the claimant's substantive role, face to face going into schools, could not be done. It could not be done by anybody when schools were shut or during the national lockdowns. At that time the entire school nursing service was unable to function effectively. Actions that are normally required for the safety and wellbeing of pupils, simply could not happen as needed.

64.5. It was implied by the claimant's representative that, because the claimant had been able to work from home entirely in those periods, that this somehow proved she could carry on working from home when the lockdown was not in place. The Tribunal do not find that this is a persuasive submission. Just because, in an artificial situation of a lockdown when a service ceases to be effective, those employed by that service can do whatever is possible from home, does not allow an inference that it has demonstrated that full

homeworking when the service resumes post lockdown was viable. In any event, it overlooks the fact that the evidence suggests the claimant was only actually working for a small fraction of her normal contractual working hours.

64.6. Accordingly, the finding of the Tribunal is that this allegation cannot form the basis of a well-founded claim of harassment.

65. *Fourth Harassment Allegation*

65.1. The claimant's fourth allegation of harassment relates to the actions of Michelle Hodgkinson on 6 January 2021. Specifically, it alleged that:

65.1.1. Michelle Hodgkinson appeared unhappy with the claimant because she needed to shield; and

65.1.2. Michelle Hodgkinson asked the claimant repeatedly why she was unable to work from home, despite being aware that the claimant did not have access to IT systems and/or was encountering IT difficulties.

65.2. Michelle Hodgkinson's evidence was that she did not believe she was unhappy. She was not able to provide evidence regarding how she may have appeared to the claimant. It was noted by the Tribunal that this was the day that the third national lockdown started, and it likely that many people that day appeared unhappy.

65.3. There is no dispute that the claimant was having IT issues. There was no evidence that other nurses in the school nursing service, who were all having to work remotely, were having comparable issues. There is no suggestion that the claimant's IT issues had any connection to her disability, they were to do with IT.

65.4. Even if Michelle Hodgkinson's appeared unhappy, the Tribunal have not been given any basis upon which it could be inferred that such appearance of unhappiness was related to the claimant's disability or her need to shield. On, what was inevitably a chaotic and difficult day when a third national lockdown was announced, the claimant was having significant IT issues and could do no work because of those issues. These appear to the Tribunal panel to be far more logical and credible reasons why somebody trying to manage the school nursing team would appear unhappy at that point.

65.5. Regardless, a manager appearing, as suggested here, to be unhappy does not meet the necessary threshold of significance and seriousness to amount to harassment.

65.6. Accordingly, it is found that any appearance of unhappiness that may have existed has not been shown to have been related to the claimant's disability. For this reason, it cannot form the basis of a claim of disability related harassment.

66. *Fifth Harassment Allegation*

66.1. The claimant's fifth allegation of harassment is that on 7 January 2021 Michelle Hodgkinson sent a message to the claimant on a WhatsApp group, asking the claimant:

> "*Hi Bekki just wondering if you would be able to deal with the calls tomorrow for the team just a thought thanks?*"

66.2. The Tribunal have had the benefit of sight of this message in context. In the context of the group chat it appears to be an entirely reasonable, temperately worded and appropriate request from an employer.

66.3. The claimant alleges that Michelle Hodgkinson was fully aware that the claimant was encountering IT difficulties when she sent this. Even if Michelle Hodgkinson was aware that the claimant had been encountering IT difficulties, that is not a basis upon which the Tribunal believe it can draw an adverse inference about the motives or meaning of this message.

66.4. The message was sent on the second day of the third national lockdown. At this point the entire School Nursing Team were having to adjust back into lockdown mode. This is not a small team, it has a significant number of nurses within it. The claimant's IT was not working, and she could not access work emails. The claimant had declined to share any other email address with the respondent that could have been used as a back-up or alternative. That left the telephone or WhatsApp as the only possible methods of communication with the claimant.

66.5. The Tribunal have had the benefit of seeing the context of that WhatsApp message within the surrounding group chat. From that it is apparent that nurses on the team were updating managers, and each other, about what they were doing and when they were working. WhatsApp appears, in effect, to have been used as a convenient method of communication between management and the nursing team, as well as between nurses, about work-related matters.

66.6. The Tribunal panel cannot see how communication in that context could get close to the threshold of being disability related harassment.

67. *Sixth Harassment Allegation*

67.1. The claimant's sixth allegation of harassment relates to a second message, sent on 8 January 2021, the day after the WhatsApp message that formed her fifth allegation of harassment. The claimant had not responded to the message that formed the fifth allegation of harassment. This second message stated:

> "*Hi Bekki are you are working today as not heard from you on the group. Thanks"*.

67.2. The claimant appears to have left the WhatsApp group in reaction to this message being sent. This strongly suggests that she was not happy with the message.

67.3. The test of harassment is, however, not a purely subjective test. It has an objective element. The Tribunal find that the message sent cannot, objectively, be reasonably found to get close to the necessary level of seriousness to amount to harassment.

67.4. In any event, there does not appear to be any basis to infer that this message was related to the claimant's disability in any way. It was sent because the claimant had not informed the respondent what she was doing that day, leaving the respondent unsure of whether she was working. The respondent could not email the claimant, and WhatsApp was a convenient way to communicate and find out. This was the third day of the national lockdown. In the other messages nursing staff are clearly telling managers and each other what they are doing, when they are logging off, when they are going to stop work etc. The message itself refers to the fact that the claimant had not been heard from on the group, suggesting that they were expecting to hear from the claimant on the WhatsApp group. This appears entirely consistent with the way staff had been using that WhatsApp group, to check in and update each other and management regarding what they were doing and when they were doing it.

67.5. Accordingly, neither the fact that these messages were sent, nor the content of these messages can in the circumstances amount to an act of unlawful disability related harassment.

68. *Seventh Harassment Allegation*

68.1. The claimant's seventh allegation of harassment relates to a phone call which occurred on 4 March 2021. The claimant alleges that during this call she was pressured into getting her Covid vaccination as soon as possible, and further she was told she should take her daughter to school despite the fact that the claimant was still shielding.

68.2. There is a dispute of fact about whether the claimant was pressured to get her Covid vaccine as soon as possible. The respondent denies ever putting such pressure on the claimant.

68.3. It seems clear that the respondent, along with the entire NHS and indeed the Government of the United Kingdom, generally wanted staff and citizens to be vaccinated, and vaccinated as quickly as they could be. This is not in dispute. The Tribunal has taken care to ensure it considered this allegation in the context of the circumstances that prevailed at that time in the United Kingdom and within the respondent and every other organisation in the NHS.

68.4. This is not a case where the claimant is suggesting there was some form of belief that was a bar to her being vaccinated. There is no dispute that the claimant received her first vaccine dose shortly before 4 March 2021. There is no dispute that the respondent was made aware of this. There is no dispute that there had to be a gap between vaccine doses. This meant the claimant could not have her second vaccine dose for some time in any event. Michelle Hodgkinson is a nurse, and it is accepted that she would be fully aware of this restriction. The view of the Tribunal is that it was a widely known and

understood fact that did not need specialist knowledge or training that there had to be a gap between vaccination doses.

68.5. The Tribunal do not accept the claimant's recollection of events regarding this day is the most likely to be correct. It is in no way logical or credible that the claimant would have been put under pressure on 4 March 2021 to get a vaccine dose when that was simply not possible. For this reason, we find this allegation is factually not well-founded.

68.6. Regardless, if there was pressure exerted, but at a later date, it seems likely and credible it would have been pressure exerted on all staff, indeed on all UK citizens, from Government and from the NHS, to be vaccinated as quickly as possible. There is no logical connection to the claimant's disability. The desire to get staff vaccinated as soon as possible was entirely to do with the need for staff and people to be vaccinated in order to control or reduce the spread of the pandemic. There are no features, or aggravating events, that suggest to this Tribunal that this could amount to disability related harassment.

68.7. Accordingly, it is found that this alleged harassment did not occur. Even if it had, or it did on a different date, it is found that it in no way related to the claimant's disability and accordingly cannot be disability related harassment.

69. *Eighth allegation of harassment*

69.1. The claimant's eighth allegation of harassment relates to comments made by Michelle Hodgkinson at a meeting on 29 April 2021. These comments were:

69.1.1. Regarding whether the claimant would be able to revalidate as a nurse because she had not done enough nursing hours. The claimant states that these were negative comments that amounted to harassment.

69.1.2. Again asking the claimant why she had not had her second covid vaccine.

69.2. There is not a significant factual amount of dispute in relation to the revalidation point. There was a discussion about the need to revalidate and about the requirements for that. The description of that discussion given in evidence appears to the Tribunal to have been an open, appropriate and factual discussion in which the Michelle Hodgkinson conveyed a reasonable and genuinely believed understanding of the position.

69.3. Even taken at their highest the claimant describes these comments as negative. She does not describe them as offensive, insulting, or degrading. The claimant does not use any of the words that would describe conduct of the seriousness and importance required to meet the definition of harassment.

69.4. To extend the scope of harassment to suggest that a negative comment, especially where the substance of the comment was reasonably and honestly believed to be accurate in a discussion of this nature, without some aggravating factor or element, would diminish the seriousness of what harassment is. It is not accepted that, even if the comments were made and

perceived as the claimant describes, that they can possibly amount to an act of unlawful disability related harassment.

70. *Ninth allegation of harassment*

70.1. The claimant's ninth allegation of harassment relates to events on 29 April 2021. An email sent to the respondent's South Team, indicating that the claimant was going to be doing some work for the South Team.

70.2. There is no dispute that the claimant was assigned, at this time, to assist the South Team on a work from home basis. It is noted that this was before the Occupational Health report relating to the claimant of September 2021. That was the report that first suggested that moving teams, of itself, would in any way be problematic for the claimant.

70.3. It was clear from the emails sent at the time that there was no reasonable basis upon which the claimant can honestly suggest that she or anyone else was not fully aware that this was short-term and entirely remote working. The claimant in her own emails appears to have sought to conflate working *for* the south team with working *from* the south. These are entirely different things, especially in the context of the fact that the issue with working from the south was due to travel, suitable office space and location.

70.4. The claimant's own email complaining about this starts with the words "*on reflection*". This strongly suggests that she had had further thoughts about what had been discussed. These words from the claimant also suggest that the respondent's assertion, that the claimant had agreed to this assignment, is correct.

70.5. The claimant was being asked to do the same kinds of work as she was already doing and had always been employed to do. The intent was that she would be doing this from the same location. No explanation of how asking an employee to carry on doing the same kind of work that they normally do, from the same place that they normally work, can amount to an act of harassment has been provided.

71. *Tenth allegation of harassment*

71.1. The claimant's tenth allegation of harassment relates to an Occupational Health referral made in May 2021. The claimant, in submissions made on her behalf, asserted that this referral included content that was both sarcastic and hurtful.

71.2. A significant part of the cross examination relevant to this allegation at this hearing focussed on whether the claimant had been shown this referral before it was sent to occupational health; and if not, why not? It was not in dispute that, whilst there was no firm requirement to show an employee such a referral before it is sent to occupational health, it would normally be best practice to show an employee the referral. The only firm requirement is to get consent from an employee for a referral to be made, which it is accepted occurred in this case.

71.3. The claimant's representative appeared to be inviting the Tribunal to conclude that the reason that the claimant was not shown the referral before it was sent was because the respondent did not wish to share the comments that the claimant submits were hurtful and sarcastic. This submission is not persuasive and is not logical. It appears not to be in dispute that it was inevitable that the claimant would, in due course, see the referral that had been made. It was not a private message between managers.

71.4. The Tribunal had the benefit of having sight of the full referral. This has enabled the Tribunal to decide whether the contents of that referral were sufficiently hurtful and/or sarcastic to meet the threshold of amounting to harassment. The Tribunal finds they are not.

71.5. In the words of Justice Underhill in **Richmond Pharmacology v Dhaliwal** it is important not to encourage a culture of sensitivity or the imposition of legal liability in respect of every unfortunate phrase. It is true – the referral could be read as being sarcastic towards the end. It was written after a long period when, for various reasons including the claimant's disability, the pandemic, her childcare needs and ongoing IT problems, the claimant had not been able to sustain any significant continued useful work for the respondent. The referral itself is not factually incorrect. It does not appear to this Tribunal to have been dishonest. We do not agree that it can be fairly read as in any way seeking to minimise the claimant's health conditions or concerns.

71.6. It was further submitted that the respondent had failed in this Occupational Health referral to, in some way, take responsibility for Michelle Hodgkinson's part in making the claimant's health worse. Including such a matter within an Occupational Health referral would be to put in writing an acceptance or blameworthiness for something that is not accepted. This is not a persuasive submission. The absence of such an admission does not suggest anything of significance to this claim.

71.7. To label the content of this occupational health referral as an act of disability related harassment would be wrong. At worst it is insensitive, which is well below the threshold needed for harassment.

72. *Harassment allegations taken together.*

72.1. It is noted that the claimant's representative invited the Tribunal to both consider the harassment allegations individually and also to step back and look at them holistically.

72.2. It appeared to the Tribunal panel that the reason this submission was a response to a recognition by the claimant's representative that individually many, if not all, of the allegations of harassment the claimant has made are hard to sustain as acts of harassment.

72.3. Regardless of that, even looking at them as a whole and together, they are not found by this Tribunal to be capable, objectively, of amounting to harassment. This would still be the case even if those which have not been found to relate in any way to the claimant's disability were taken into account.

Findings and Conclusions in relation to Discrimination by failure to make reasonable adjustments.

73. The claimant relies on four different PCP's for these claims. These were considered in turn. When doing so the Employment Tribunal reminded itself that any question of reasonableness has to be assessed in the light of the context of the Covid-19 pandemic, not what might be reasonable in more normal times, where there was not the uncertainty and (as described by the respondent) crisis within the NHS that was being dealt with by managers at various points in time.

74. *First PCP - that the claimant was required to work in the office in order to carry out her substantive role.*

74.1. Setting aside periods of lockdown when the claimant, and indeed all staff, were working from home, it is not disputed that this PCP was applied to the claimant. The claimant says this PCP caused her two potential substantial disadvantages:

74.1.1. that she was unable to carry out her role; and

74.1.2. that it caused her unnecessary stress.

74.2. The Tribunal were mindful of the clear evidence that the claimant had been assessed by Occupational Health on numerous occasions. The claimant was not able to identify any point in the reports produced from these assessments where it was suggested that requiring the claimant to attend Trafford Town Hall (provided it was Covid secure at the time) was something that was inappropriate or something that needed to be adjusted.

74.3. It is not correct that the respondent is under a duty to make the adjustments that the claimant prefers. Their duty is to make reasonable adjustments to address any substantial disadvantage. In doing so in these circumstances, to follow the guidance of Occupational Health is an entirely reasonable course to take. That is not to suggest that an employer will always be obliged to follow the guidance or suggestions of Occupational Health, or that an employer can delegate their legal duties to Occupational Health. It is however persuasive and authoritative guidance they can give significant weight to.

74.4. The evidence showed that the respondent had, at least, complied with the suggestions made by Occupational Health. It could be argued they went even further that Occupational Health suggested, and rather than suggesting that during a flare-up the claimant should work from home, they said that during a flare-up of her health (cellulitis) the claimant should not work at all – she should rest and recover.

74.5. Accordingly, insofar as this PCP was applied to the claimant, the respondent had fully met its duty to make reasonable adjustments. The claimant was not required to attend the workplace when she was encountering a cellulitis flare-up, and there was no duty to make any adjustment when the claimant was not encountering a flare-up.

75. *Second PCP – the requirement to work during normal contractual hours rather than reduced hours or flexibly around home schooling.*

75.1. The evidence did not suggest that this PCP was in fact applied to the claimant.

75.2. For significant periods the claimant did not work anything close to her full hours. She informed the respondent at one point she was working 1-2 hours per day. No issue was taken with this. Nothing was done to the claimant in response to this, there was no sanction, no evidence of any repercussions.

75.3. The evidence simply does not support the claimant's assertion that she was required to work during normal contractual hours rather than reduced hours.

75.4. Accordingly, it is found that this PCP was not applied to the claimant. Given this, the claim that there was discrimination by failure to make reasonable adjustments to this PCP cannot succeed.

76. *Third PCP - the requirement for the claimant to move to a temporary role rather than allowing her to carry on her normal substantive role from home.*

76.1. It is not clear to the Employment Tribunal that this is something that can be correctly described as a PCP. It appears to have been a one-off decision to assign the claimant to a different role on a temporary basis made in unusual and very difficult circumstances. As such, it certainly cannot be described as a practice, it is unclear that it is a criterion, and it is not clear that it would meet the definition of provision either.

76.2. Regardless, anybody asked to move to a temporary role that was not their normal role would then not be able to carry out their normal duties. As such, the first suggested disadvantage the claimant refers to would be equally suffered by anybody regardless of their disability.

76.3. As regard the second disadvantage (stress) there is nothing in the evidence that supports the claimant's assertion that this remote role would cause her stress, other than her assertion that it would. The claimant had accepted a temporary role working on test and trace. That was a role that involved very different duties. There is no suggestion that accepting that role caused her stress.

76.4. This was a temporary role supporting school nurses, which amounted to her doing the duties that she familiar with. These are duties that she would at least in part have covered as part of her normal role anyway. There was no credible explanation of how such duties would cause her stress.

76.5. Accordingly, it is found this decision, even if capable of amounting to be a PCP, did not cause the claimant a substantial disadvantage compared to a non-disabled person. In addition, given these are duties the claimant covered in her normal role, it is found that there would have been no reasonable way the respondent could have known that it would cause the claimant substantial stress.

77. *Fourth PCP - the requirement since September 2022 for the claimant to work in the office in order to carry out her role.*

77.1. It appears that this PCP was applied to the claimant in principle. However, the claimant commenced sick leave during September 2022 and so does not appear to have been required to attend the office in practice since September 2022. Accordingly, this PCP has never actually been applied in practice.

77.2. Regardless of this, the respondent had sought advice from Occupational Health professionals at numerous points regarding the claimant. At no time has this advice suggested the claimant should be allowed to work from home on a regular, or routine, basis.

77.3. The respondent's evidence is that the claimant was told she could work from home on occasion, when needed, but this should be agreed with her line manager. There was no evidence we could see of any occasion where work from home had been requested and refused. The claimant suggested in cross examination that there was such evidence in the bundle, but the claimant, her representative, the respondent's representative and the Employment Tribunal were all unable to locate or find such evidence.

77.4. Accordingly, it is found that the respondent has made a reasonable adjustment in line with that which was advised by Occupational Health. This adjustment is to allow the claimant to work from home on occasion, when needed. In making that adjustment the respondent has mitigated the identified alleged substantial disadvantage and thus discharged any relevant duty to make reasonable adjustments that may have existed.

Findings and Conclusions in relation to victimisation claims

78. There is no dispute that bringing an Employment Tribunal claim is a protected act. The Tribunal are content that making a request for reasonable adjustments under the Equality Act would also be a protected act. Accordingly, there is no relevant dispute regarding whether the claimant had done a protected act.

79. The claimant relies upon a number of detriments. This are discussed individually.

80. *First alleged Victimisation detriment*

80.1. This is a request made on 17 June 2022 for the claimant to assist by attending a school in Altrincham.

80.2. The respondent says this request was made because of a significant staff shortage and a need for additional staff to help cover the NCMP. The claimant did not present any evidence to suggest that this was not the reason for the request. As such, the Tribunal find that this reason, which appears entirely logical and credible, was the true reason.

80.3. Accordingly, this request was not made because the claimant had done a protected act. It was made because the respondent needed someone to cover

an NCMP session in Altrincham. For that reason, this claim of victimisation cannot succeed.

81. *Second alleged Victimisation detriment*

81.1. The second alleged detriment is that on 23 June 2022, in a one-to-one meeting, Helen McNulty commented that the claimant's reasonable adjustments were too restrictive when planning service delivery.

81.2. There was no dispute that words to this effect were used, although Helen McNulty and the claimant give very different characterisations of the discussion that was referred to.

81.3. Regardless of that, there is no evidence to suggest this was anything other than a discussion related to, and because of, the needs of the service and the difficulties delivering that service from the respondent's perspective.

81.4. The claimant, as noted in the discussion of her reasonable adjustments claims above, was consistently seeking blanket permission to work from home. That is not the reasonable adjustment that was required or made for the claimant. Even if taken as the claimant suggests, the comment relates to the impact of the adjustments the claimant wanted on the respondent's service. It was not a comment made because the claimant was seeking adjustments, but at best for the claimant because of the potential impact of her adjustments.

81.5. That being said, the Tribunal do not accept that the claimant's characterisation of this conversation is likely to be the most reliable. The claimant appears to the Tribunal to have consistently portrayed the respondent's actions in the most negative way possible. This is found to be a further example of that. The respondent's witnesses appear to have provided an honest and frank account of events. They have provided a wider explanation of circumstances and context for the entirety of conversations and not picked single comments from within a conversation and attributed meaning to them that may not be justified. For that reason, the Tribunal find the respondent's account is more likely to be a reliable and fair recollection of what was said in that meeting.

81.6. Reasonable adjustments, by definition, have to be reasonable. Accordingly, consideration of whether they continue to be reasonable, or are too restrictive and therefore unreasonable, will be a proper part of determining whether they remain reasonable. "*Reasonable*" has to take into account not just the needs of the claimant, but also of the respondent.

81.7. The respondent's characterisation of the discussion is consistent with the contemporaneous note of the discussion which was in the bundle. This notes that the claimant wanted to get a caseload back, but, given that the focus at the time was on immunisations and safeguarding, this was difficult for the claimant. In essence, her reasonable adjustments made it difficult for her to provide as much assistance (or much assistance at all) to the tasks currently being prioritised and undertaken by the service.

81.8. In other words, they were too restrictive for her to be able to return fully to her role. Discussing this with the claimant is not something that the Tribunal find amounts to a detriment for the purposes of victimisation.

81.9. It was not said because the claimant was seeking or had sought reasonable adjustments – it was said because it was the position that pertained at the time and for no other reason. Accordingly, this is not an act of unlawful victimisation.

82. *Third alleged victimisation detriment*

82.1. This claimed detriment related to comments alleged to have been made on 8 September 2022 by Helen McNulty. The comment related to the role of Band 5 nurses, the need for them to work from the office and the need for the claimant to obtain permission before working from home.

82.2. The claimant invites the Tribunal to find that she was told she was expected to work across the entire borough because she was a Band 5 nurse. The respondent disputes this and states that it was observed that fit and healthy Band 5 nurse would be subject to such a general expectation. Nobody was under the impression that the claimant was fit and healthy. There is no reasonable way it could be understood that such a comment would imply that such an expectation to work across the entire borough would apply to the claimant.

82.3. On balance, for the reasons given earlier, the Employment Tribunal prefer the respondent's witnesses' account of this conversation. That account contains, and gives, context. It does not pick single comments out of context to criticise them alone.

82.4. In any event, it is not found that this comment, even if made exactly as the claimant suggested, was made because she did a protected act. The more logical and sensible interpretation is that it was done because that was the position for Band 5 nurses. Any comment that the claimant was expected to attend Trafford Town Hall would logically have been made because the claimant was expected to attend Trafford Town Hall. Any comment that the claimant needed to get permission before she worked from home would logically have been made because the position was that employees needed to get permission before they worked from home.

82.5. Accordingly, it is not found that the events of this meeting amounted to an act of unlawful victimisation.

Findings and Conclusions in relation to discrimination arising from disability.

83. The claimant's claims of discrimination arising from disability relied upon the same three allegations as unfavourable treatment as had been identified as alleged detriments in the claimant's victimisation claim.

84. The claimant said that, for the purposes of her discrimination arising from disability claims, these were not done because of any protected acts, but that were done because of something arising from her disability.

85. The "*something arising*" was the adjustments that the respondent had already agreed, and the fact that the claimant needed those adjustments.

86. *First alleged act of unfavourable treatment*

86.1. As described earlier, this was the alleged pressure for the claimant to assist by attending a school in Altrincham. It is not logical that this (even if it was done as the claimant suggests) was done because the respondent had agreed to reasonable adjustments or because the claimant needed reasonable adjustments. It has not been explained to this Tribunal in any credible way how this could be found to be the case.

86.2. Noting that connection has not been made or explained, the claim cannot succeed.

87. *Second alleged act of unfavourable treatment*

87.1. As described earlier this alleged unfavourable treatment is that on 23 June 2022, in a one-to-one meeting, Helen McNulty commented that the claimant's reasonable adjustments were too restrictive when planning service delivery. Again, the Tribunal do not accept the claimant's characterisation of this conversation.

87.2. In any event, even if it did amount to unfavourable treatment because of something arising from the claimant's disability, it was a proportionate means of achieving a legitimate aim. It was part of a one-to-one appraisal, a discussion about how to accommodate the claimant in the workplace. There is no evidence of aggravating factors to suggest it was anything else.

87.3. Such a discussion is proportionate and reasonable in pursuit of the legitimate aims the respondent has set out, which taken together amount to ensuring that the school nursing programme was as effective as possible in achieving its objectives. Accordingly, we do not find this claim to be well-founded and it is dismissed.

88. *Third alleged act of unfavourable treatment*

88.1. Finally in relation to discrimination arising from disability there is the claim relating to the one-to-one meeting on 8 September 2022 where it is alleged that Helen McNulty said that Band 5 nurses should have to work across the entire borough, the claimant would have to complete immunisation clinics, the

claimant would have to be in the office and the claimant would need to ask for permission before working from home.

88.2. As noted earlier, it is found that these comments were not made as alleged. Specially, the comment about Band 5 nurses was limited to fit and healthy Band 5 nurses, not all Band 5 nurses regardless of circumstance.

88.3. Any comment that the claimant was expected to attend Trafford Town Hall logically was made because that is what the claimant was required to do and there was no adjustment recommended by Occupational Health to contradict that.

88.4. Any comment that the claimant could get agreement to work from home on occasions, when it was needed, would have been made because that was the position. There was no suggestion from occupational health that she should not have to ask for permission.

88.5. Accordingly, this claim cannot succeed.

Holiday Pay Claims

89. There does not appear to be any substantial factual disagreement relevant to holiday pay.

90. The claimant was paid for her holiday. At some point, as a result of her length of service, her entitlement to holiday and thus holiday pay should have increased. That increase, in error, did not occur.

91. When the claimant pointed this error out to the respondent, they accepted they had made a mistake. They said they would correct it. They provided the claimant with back holiday pay to cover the shortfall and they provided an explanation, although limited, of what amounts had been given in relation to what periods.

92. The claimant's case is put no higher than she thinks the amount of back pay she has been given does not seem right, although no suggestion of the basis for this in evidence was explained.

93. Under section 34 of the Employment Rights Act 1996, where there is a genuine error and miscalculation of pay, that does not amount to an unlawful deduction.

94. Where a respondent then refuses to correct that error when it is pointed out to them, that would cease to be an error and become a deliberate failure to pay the amount that should be paid. That would then be an unlawful deduction.

95. The claimant has a burden here of proving that an unlawful deduction was made. She has to put forward at least an explanation of why she says that there was an unlawful deduction from her wages. As far as the Tribunal can see she has not done so.

96. Accordingly, for that reason, this claim cannot succeed and must be dismissed.

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Employment Judge Buzzard

9 February 2024

REASONS SENT TO THE PARTIES ON

20 February 2024

FOR THE TRIBUNAL OFFICE