EMPLOYMENT TRIBUNALS

Claimant: Ms S Powell

Respondent: Healthcare Homes Group Limited

Heard at: Bury St Edmunds (by CVP video link)

On: 2 April 2025 - 4 April 2025 (3 days)

Before: Employment Judge Skehan, Ms Gunnell and Ms Feavearyear.

Appearances
For the claimant: In person
For the respondent: Ms Mankau, counsel.

JUDGMENT

1) The claimant's claims are unsuccessful and dismissed.

REASONS

1) The hearing was heard by video link over 3 days. We had some technical issues during the course of the hearing however the tribunal was satisfied that all parties could properly participate within the video hearing and the hearing was carried out in accordance with the overriding objective to deal with matters fairly and justly.

Preliminary matters

2) At the outset of the hearing, the tribunal stressed the importance of the list of issues and we revisited the list of issues agreed before EJ Graham on 2 August 2023. Following submissions from the claimant and discussion with the parties, two further questions were added to the remedy section of the list of issues but the liability section was agreed and remained unchanged. It was agreed that the tribunal would first deal with the question of liability.

3) At the commencement of the hearing the claimant made written and oral submissions in relation to a Deposit Order made by EJ Brown following a hearing on 2 October 2023. The written Order was sent to the parties on 27 October 2023. The tribunal declined to revisit this Order. We concluded that there were 2 routes available to the claimant to revisit this Order being a request to reconsider in accordance with the Employment

Tribunal rules or an appeal to the Employment Appeal Tribunal. The Employment Tribunal rules required any such application to be made within 14 days from the date that written reasons were sent. Further, in light of the date of the Deposit Order and the timing of the application made by the claimant, it was not in the interests of justice to consider such an application. We considered the application to be misconceived on the claimant's part. We confirmed to the parties that we had not considered the findings made by EJ Brown as it would be inappropriate for us to do so.

The Facts

4) As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in determining the issues set out in the agreed list of issues. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents. All witnesses gave evidence under affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. We heard from the claimant on her own behalf. We also heard from Ms Huggins (nee Frame) and Ms Alexe on behalf of the respondent. We note the additional witness statements provided by the respondent and the letter attached to the claimant's witness statement however these individuals did not attend tribunal to face cross examination and for this reason reduced weight is placed upon them.

5) The respondent is a care provider who owns and manages 48 residential and nursing care homes. The Claimant commenced employment with the Respondent on 8 February 2021 as a part time nurse. The claimant remained employed during the events giving rise to this litigation. The claimant's employment has since terminated.

6) An incident occurred on 26 July 2021 relating to an unwell resident who sadly passed away on 27 July 2021. On 27 July 2021, a GP who was the duty doctor on 26th July 2021, raised a concern by e-mail to the respondent relating to the professional conduct of the claimant.

7) The respondent wrote to the claimant on the same day confirming that they matter had been referred to the local safeguarding team who would carry out an investigation. The claimant was suspended. The matter was also referred to the police. The external involvement of the police resulted in an unavoidable delay to the respondent's internal investigation. The safeguarding team concluded their inquiry with an inconclusive outcome. The police inquiry concluded as there was no evidence to support a criminal offence.

8) Following conclusion of the external processes, the claimant was invited to the respondent's internal investigation meeting on the 29 December 2021. The claimant was unwell at this time and fit notes referring to stress and anxiety were submitted to the respondent. The proposed meeting of 29 December 2021 did not proceed and there were various attempts to rearrange this meeting. On 14 March 2022 the respondent agreed to a suggestion from the claimant's trade union representative that the claimant be permitted to put forward written answers rather than attend in person. Questions were sent to the claimant but no response was received from the claimant.

9) On 30 March 2022 the respondent concluded it's investigation without input from the claimant and provided a report that recommended disciplinary proceedings. On 13 April 2022 the respondent wrote to the claimant inviting her to a disciplinary hearing scheduled for 20 April 2022.

10) The respondent had limited information in relation to the claimant's health at this time. The claimant has suffered ill health during her suspension. The respondent had:
    a. the fit notes relating to the claimant's inability to participate within the investigation process in December 2021 /January 2022. These referred to 'stress/anxiety';
    b. referred the claimant to their occupational health provider and the claimant attended an appointment with occupational health on 7 February 2022. However. the claimant refused permission for the occupational health report to be sent to the respondent;
    c. a fit note dated 24 February 2022 that stated 'stress related';
    d. the fit note dated 11 March 2022 that referred to, 'stress related problem, under investigation for bowel problems
    e. a fit note dated 4 April 2022 that stated 'under investigation for bowel problems and stress'
    f. On 12 April 2022 the claimant's trade union representative wrote to the respondent stating that they claimant was 'Very unwell and seeing her consultant tomorrow in relation to some medical investigations she has needed'.

11) We consider that a fair review of the information available to the respondent as of 12 April 2022 did not and could not have made the respondent aware that the claimant was experiencing serious ill-health or ill-health of a nature likely to constitute a disability. We consider this is borne out by the change in the respondent's approach and subsequent delay to the internal disciplinary process on learning of the claimant's serious ill-health /disability.

12) On 13 April 2022 the claimant was diagnosed with bowel cancer. The claimant's evidence is that she informed her trade union on 13 April 2022 and she questioned whether the respondent had this information on 13 April 2022. There is an e-mail in the bundle from the claimant's trade union to the respondent on 14 April 2022 attaching a fit note from 13 April 2022 Stating, 'adenocarcinoma colon' and stating that the claimant was going in for bowel surgery unable to attend any form of work related meeting at this time. We conclude that the respondent became aware of the serious nature of the claimant's illness and the claimant's diagnosis of bowel cancer on 14 April 2022, and was or should have been aware that she had a disability as defined within the Equality Act from this date.

13) Unfortunately, from April 2022, the claimant became very unwell. While keyhole surgery was initially envisaged the claimant underwent open surgery on 25 April 2022 and subsequently spent a month in hospital. Following, her surgery and during her recovery period the claimant experienced a recurrence of sciatica. The claimant had experienced sciatica prior to her diagnosis of cancer. However we consider that when viewing the severity of the claimant's ill-health and the severity of the complications experienced by the claimant following her surgery that the recurrence of the claimant's sciatica is on the balance of probability likely to be connected to her diagnosis of cancer and the treatment thereof.

14) The timing of the respondent's letter inviting the claimant to a disciplinary hearing of 13 April 2022 was highly unfortunate. This was not in any way intentional on the respondent's part. We conclude that the timing was wholly related to the respondent's reasonable desire to complete the outstanding disciplinary process and entirely unrelated to any sickness on the claimant's part.

15) The claimant cooperated with the respondent's request for further occupational health input and there is an occupational health report dated 22 July 2022 in the bundle. This report clarifies the significant ill-health experienced by the claimant at the time. In relation to fitness to attend meetings the report states:
    a. Management may wish to consider reviewing the situation in approximately 3 months time, when treatments for her abdominal condition and sciatic condition may have been completed by her GP. Alternatively, management may wish to review with [the claimant] and a regular basis, to determine if her symptoms have improved sufficiently, and possibly in less than 3 months, and when she is able to stop her medication, permitting her to engage with her employer's processes.

16) The tribunal reading of the occupational health report is that while it was unlikely that the claimant would be able to proceed with the internal disciplinary process within a 3 month period, it was possible. Therefore, it was reasonable for the respondent to broach the subject with the claimant.

17) The claimant attended a welfare meeting with the respondent's Ms Alexe an Ms Huggins on 6 September 2022. The claimant was accompanied by her union representative. It is common ground that at the conclusion of this meeting the respondent broached the possibility of the claimant attending a disciplinary hearing. The claimant was not invited to a disciplinary meeting on any specified date but she was asked to provide possible dates where she would be able to attend a disciplinary meeting. The claimant was unable to attend a disciplinary hearing at that time and any comment relating to the resumption of the disciplinary process was unwelcome and unwanted by the claimant.

18) We note the email from Ms Alexe to the claimant of 30 September 2022. This email sets out potential reasonable adjustments that could be made by the respondent to allow the claimant to participate within the disciplinary process and includes:
    a. bringing a companion;
    b. providing a few weeks notice rather than the minimum 48 hours notice
    c. allowing for written representations and could be drafted in consultation with union;
    d. allowing for breaks during any hearing and potentially having the meeting over a couple of days.

19) The claimant raised a grievance in relation to this and other matters on 20 October 2022. The outcome of that grievance dealt with by Ms Couldrey can be seen within the letter of 9 December 2022. This is a detailed review of the claimant's concerns. Under heading number 4 'unreasonable contact and pressure to attend meetings while you've been recovering from your surgery' the respondent considers the meeting of 6 September 2022. The outcome is:
    a. Having considered the information above, my decision is to partially uphold this ground of your grievance. My decision to partially uphold is specifically in relation to consideration not been given to the recommendations made by occupational

health in respect of the 3 month period. My findings are for all other communications and interactions that these were reasonable and in line with company policy and expectations.

20) For the sake of completeness the tribunal does not agree with the outcome of the grievance to the extent that our reading of the occupational health report is that it was possible (albeit unlikely) for the disciplinary process to proceed within the 3 month period and it was reasonable for the employer to explore this possibility. The employer did not insist upon the process proceeding and it would have been obviously unreasonable for it to do so.

21) The claimant's evidence was confused in places and appeared to conflate the external processes of the safeguarding team and the police with the respondent's internal disciplinary process. The gist of her evidence was that in light of the external processes concluding without further action the respondent should have abandoned its internal disciplinary process.

NMC Referral

22) The claimant worked on a part time basis for the respondent. The claimant also ran her own business 'Your Life In Your Hands' or YLIYH. The claimant's business interests were known about and permitted by the respondent. The services provided by the Claimant's business included personalised health assessments including various health checks for heart disease, blood pressure fingerprck tests or nutritional advice. The business offered individual wellness programmes. The claimant was a speaker at various events representing her business. The claimant's business relied upon her background as a nurse.

23) The claimant accepts that the respondent was under a duty in general terms to report potential risk to any member of the public or service user under the NMC Code of Conduct. The respondent's normal practice was to consider such a referral at the conclusion of an internal disciplinary process. However, in the claimant's situation for reasons relating to the claimant's ill-health, the respondent's disciplinary process had been delayed.

24) There is documentation in the bundle relating to a meeting between the respondent and the claimant's union representative on 28 April 2022. At this meeting the union rep confirms that the claimant had her operation on 25 April as planned, however this was an open procedure which was likely to affect her recovery. It was confirmed that the claimant was still in a lot of pain and in relation to a potential recovery period the notes record union rep commenting, 'as a nurse suggested that this could be anywhere between 6 -8 weeks'. An eight-week period from 25 April would be 19 June 2022. This suggested recovery period was disputed by the claimant and she considered this to be wrong. The claimant believed that the respondent's employees had medical backgrounds and should have realised that an open procedure was likely to involve a recovery period far in excess of 6 to 8 weeks.

25) An email was sent by Ms Gilks of the respondent to the claimant's trade union representative on 29 April 2022. This email follows up from their meeting and confirms a proposed welfare call with the claimant in May 2022, the possibility of a further occupational health assessment and potentially further information from the claimant's

consultant. This email notes that the respondent has raised a potential need to raise a referral relating to the claimant to the NMC. It sets out the respondent's normal practice being to make referrals on conclusion of the internal disciplinary procedure. The email notes that suggestions have been made by the claimant have continued to practice within her other business and although the respondent has not confirmed this, they feel that they do have a duty to raise the referral in the absence of a foreseeable conclusion to the disciplinary matter. They confirmed that any referral will only state allegations concerning her conduct have been made and would be clear that there was no conclusion decided outcome. The claimant's trade union representative responded to the email of 5 May 2022 only querying whether there was agreement request further information from the claimant's consultant. No comment was made on the referral. During the previous meeting the notes record the claimant's union representative stating that , '… Ultimately as the employer it would be your decision on this, anyone could make a referral to the and MC and you need to decide whether it is appropriate or not'.

26) The claimant contacted the respondent through her friend on 23 May 2022 in response to Ms Alexe's email enquiring about her well-being. The claimant confirmed that she was still in hospital and submitted a further fit note.

27) It can be seen from the contemporaneous correspondence that the respondent considered whether this NMC referral should be made prior to the conclusion of the disciplinary process. The respondent identified a risk that while the claimant was suspended from her post within the respondent organisation, it was possible that she may be practising as a nurse as part of her business, YLIYH. On consideration of the evidence within the bundle the tribunal considers it highly unlikely that the claimant was in fact practising elsewhere as a nurse at the time as she remained very unwell. However at the time, the claimant's business appeared from its online presence to be available to take bookings. The referral was made on 17 June 2022, towards the end of the original 6-8 week recovery period provided to the respondent. The referral was made in neutral factually correct terms. In examining the entirety of the documentation this tribunal concludes that the referral was made because:
    a. the incident relating to the resident had occurred and the initial employer investigation had concluded.
    b. there was a delay in the disciplinary process and the respondent genuinely believed that although the claimant was suspended from work, there was a possibility that she was working elsewhere. The respondent considered that this set of circumstances triggered an obligation on their part to make the referral.

The Law

28) There was no dispute in respect of the law and it is set out in detail in Ms Mankau's written submissions and adopted herein.

Jurisdiction/Time Limits

29) Section 123 EqA 2010 states that a late claim may be considered by the tribunal provided that it is presented within "*such other period as the employment tribunal thinks just and equitable*."

> *(1) Subject to section 140A, proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

(b) such other period as the employment tribunal thinks just and equitable.
….
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided it.

30) Tribunals have a wide discretion to allow an extension of time under s 123 EqA 2010. However, the exercise of that discretion is not a foregone conclusion. The onus is on the Claimant to convince the tribunal to extend the time limit. In *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, CA the Court of Appeal stated [25] regarding this exercise that:

> "*There is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule*."

31) It is a question of fact and judgment, to be answered on a case by case basis: *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, CA. The Tribunal must consider all the relevant factors in deciding whether it is just and equitable to extend time. Those factors will always include (a) the length of and reasons for the delay; and (b) any prejudice arising from the delay, but the Tribunal must take into account all relevant matters: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050 (CA); *Adedeji v University Hospital Birmingham NHS Foundation Trust* [2021] ICR D5 (CA). The merits of the claim may be a relevant factor when deciding whether to extend time: *Lupetti v Wrens Old House Ltd [1984] ICR 348, EAT*. The fact that a claimant was incorrectly advised as to time limits is not determinative, but one factor to consider: *Hunwicks v Royal Mail Group Plc* UKEAT/0003/07/ZT.

Discrimination Arising from Disability

32) Section 15 EqA 2010:

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

33) In order for a claim of discrimination arising from disability to succeed, it must accordingly be established that the alleged discriminator knew of the claimant's disability at the material time (s.15(2)).

34) There is a double causation test in s.15(1)(a): the unfavourable treatment must be "because of" the relevant "something" and that "something" must itself "arise in consequence" of the disability. The distinction between the two limbs of the test should not be elided and it is not a question of whether the complainant was treated less favourably because of their disability (*Basildon and Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/397/14).

35) It is for the employer to show that the treatment of a claimant is *"a proportionate means of achieving a legitimate aim".* The test to be applied by the tribunal is an objective one.

36) Legitimate aim: to be a legitimate aim, the aim must correspond to a real need on the part of the employer's business – this is not the same as a necessity. There is no limitation on the aims that may be regarded as legitimate for the purposes of justifying discrimination arising from disability, though for any aim to be legitimate, it must itself be legal and not be discriminatory in itself (§4.28 EHRC Code). Further, an aim solely to reduce costs cannot expect to be considered as legitimate (§4.29 EHRC Code).

37) Proportionality: the requirement that a measure be proportionate means that ETs must seek to balance the discriminatory effect of the requirement or condition against the legitimate aim in question (*Hardys & Hansons Plc v Lax* [2005] EWCA Civ). The CA stated that in deciding whether or not there has been objective justification, ETs should take account of the reasonable business needs of the employer. An employer does not have to show that the legitimate aim was an absolute 'must', but rather that it was reasonably necessary. The ET must consider both the quantitative and the qualitative effects of the discrimination. A measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in so doing (*Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601).

Harassment related to disability

38) Section 26 of the Equality Act 2010 provides:

(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*

39) In determining whether conduct has the effect of violating the claimant's dignity or creating the relevant environment for the purposes of EqA 2010, s 26(1)(b) the ET must take into account the claimant's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect (EqA 2010, s 26(4)).

40) The intention of the alleged harasser may be relevant in determining whether the conduct could reasonably be considered to violate a complainant's dignity (*Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336, EAT). It is not necessary that the alleged harasser should have known that his behaviour would be unwanted (*Reed and Bull Information Systems Limited v Stedman* [1999] IRLR 299, EAT)

41) In *Land Registry v Grant [2011] EWCA Civ 769*, Elias LJ focused on the words *"intimidating, hostile, degrading, humiliating or offensive"* and observed that: *"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."*

42) The Court of Appeal gave guidance on the determining whether the statutory test has been met in *Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564*:

"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

Failure to make reasonable adjustments

43) The duty is set out at Section 20 EqA 2010 and is supplemented by a detailed schedule: EqA 2010, Sch 8. Section 20 imposes a "requirement" on an employer:

a. whose provisions, criteria or practices puts a disabled person at a *"substantial disadvantage"* in relation to a relevant matter in comparison with persons who are not disabled (*s.20(3)*);

b. to *"take such steps as it is reasonable to have to take to avoid the disadvantage"*.

44) A failure to comply with any of the requirements set out in s.20(4)-(6) is treated as a failure to comply with a duty to make reasonable adjustments (EqA 2010, s.21(1)) which, in turn, amounts to an act of discrimination (EqA 2010, s.21(2)).

45) The EqA does not define the phrase *"provisions, criteria or practices"*. The EHRC Code suggests that the terms should be construed widely and would include: *"any formal or informal policies, rules, practices, arrangements or qualifications including one-off decision and actions"* (*§6.10*). However, a PCP should have a degree of repetition about it, see: *Nottingham City Transport Ltd v Harvey* UKEAT/0032/12 and *Ishola v Transport for London* [2020] EWCA Civ 112.

46) In order for the duty to arise the employee must be subjected to a *"substantial"* disadvantage in comparison with persons who are not disabled. *"Substantial"* is defined at EqA 2010, s.212(1) to mean *"more than minor or trivial"*.

47) Schedule 8, Paragraph 20(1)(b) provides that an employer is not subject to the duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that that the disabled employee in question has a disability and is likely to be placed at the disadvantage relied upon.

48) In *Wilcox v Birmingham CAB Services Ltd* EAT 0293/10, Mr Justice Underhill held in relation to the similarly worded equivalent section of the Disability Discrimination Act 1995 that *"…an employer is under no duty under section 4A unless he knows (actually or constructively) both (1) that the employee is disabled and (2) that he or she is disadvantaged by the disability in the way set out at in section 4A (1) . As Lady Smith*

points out, element (2) will not come into play if the employer does not know element (1).” (§37)

49) Content of the Duty: the employer must take such steps as it is reasonable to have to take to avoid the disadvantage (EqA 2010, ss.20(3) to (5)). Whether or not any adjustments were reasonable will be determined by the ET objectively.

50) Whilst making clear that the reasonableness of any step is ultimately dependent on all of the facts in any particular case, paragraph 6.28 of the EHRC Code of Employment lists factors that the tribunal may consider when making the assessment:

51) Burden of Proof: Elias J has suggested (see *Project Management Institute v Latif* [2007] IRLR 579, EAT) that a claimant is required, at the first stage: (a) to establish the provision, criterion or practice relied upon; and (b) to demonstrate substantial disadvantage. The burden then shifts to the respondent to show that no adjustment or further adjustment should be made.

Deliberations and decision

Disability

52) The issue of disability in respect of the claimant’s cancer was conceded. The respondent raised an issue in respect of matters related to the claimant’s sciatica. The argument was that the claimant sciatica was a pre-existing separate condition and did not form part of the pleaded disability. We refer to our factual findings above that the reoccurrence of the claimant sciatica was part and parcel of her post surgery complications. We do not accept the respondent’s argument that any issue in relation to sciatica at this time can be separated from or properly distinguished from the claimant’s acknowledged disability.

Discrimination Arising out of Disability (S15 Equality Act 2010)

53) The claimant brings a claim under section 15 of the Equality Act in respect of the respondent contacting the claimant about the disciplinary meeting on 13 April 2022 and contacting the claimant about the disciplinary meeting on 6 September 2022. The claimant says that the ‘something’ arising from her disability is her ongoing absence due to post-operative complications.

54) It is common ground that the claimant was invited to a disciplinary meeting on 13 April 2022. The reason for the contact on 13 April 2022 was to progress the disciplinary process and the respondent was at that time entirely unaware of the claimant’s cancer diagnosis or potential disability. As stated above the timing of the letter was extremely unfortunate, however we have found that it was unconnected in any way with the claimant’s disability. In order for a claim of discrimination arising from disability to succeed, it must be established that the respondent knew of the claimant’s disability at the material time (s.15(2)). As the respondent did not know of the claimant’s disability this claim must fail. Further, the claimant was not invited to the disciplinary meeting for any reason relating to her ongoing absence. She was invited to the disciplinary meeting because the respondent wished to proceed with the disciplinary procedure.

55) The second allegation, contacting the claimant about a disciplinary meeting on 6 September 2022. At this time the respondent was fully aware of the claimant’s disability. The meeting on 6 September 2022 was predominantly a welfare meeting. It is common ground that the respondent requested that the claimant provided dates for potential

disciplinary meeting during this meeting. The comments made by the respondent on 6 September 2022 relating to resuming the disciplinary process were only required because the process had been delayed due to the claimant's absence, however the claimant was not asked to provide dates for a potential disciplinary hearing *because of* her ongoing absence. The respondent made the request because it wished to proceed with the outstanding disciplinary process.

56) Even if we are wrong in relation to a lack of link between the 'something', being the claimant's absence and the behaviour complained of, we would then consider whether the respondent was able to justify the treatment. In the context of a care home setting, concerns received from a GP, and the death of a resident, the respondent has justified the treatment on the basis of the following legitimate aims relied upon by the respondent being:
    a. the necessity for the Respondent to safeguard the health and safety of its service users;
    b. to comply with its reporting requirements; and
    c. to fulfil its obligations to manage misconducts promptly and in accordance with the Respondent's Disciplinary Policy and the Acas Code of Practice on disciplinary and grievance procedures.
57) For the reasons set out above we conclude that the claimants claims for discrimination arising from disability fail and are dismissed.

Harassment relating to Disability

58) The claimant has brought and harassment claim relating to the respondent (1) contacting her about the disciplinary meeting on 13 April 2022, (2) contacting her about the disciplinary meeting on 6 September 2022 and (3) making the NMC referral in June 2022.

59) We take the question somewhat out of order in that for the harassment claim to be successful, the actions complained of must be 'related' to disability. Taking the entirety of the witness evidence and the contemporaneous documentation we conclude that the disciplinary meeting contact of 13 April 2022 related only to the respondent's desire to progress the outstanding disciplinary process. The respondent was unaware of this point of the claimant's disability or her serious ill-health. We conclude that this action is entirely unrelated in any way to the claimant's disability or disability in general terms.

60) We consider the contact of 6 September 2022 to be different from that set out above. These comments are made in the course of a welfare meeting to discuss the effects of the claimant's disability. At this time the claimant is being asked to provide dates for a meeting in circumstances where she is too poorly to do so due to the disability. We consider that this contact could be reasonably said to be 'related to' disability. These comments were unwanted. We consider it likely that the claimant considered the request made by Ms Alexe for dates for a disciplinary hearing to be, in light of her continuing ill-health, harsh and uncaring and to create a hostile environment for her. However while we accept that this was the claimant's subjective view we must also consider an objective view.

61) There is no evidence whatsoever to suggest that these comments were made by Ms Alexe with the purpose of violating the Claimant's dignity and/or creating an hostile environment for her. The tribunal accepts that the comments were made because the respondent wished to move the outstanding disciplinary process forward if possible.

62) As stated above when looking at the circumstances as a whole, we consider that the respondent's actions in broaching this topic and seeking to move the internal disciplinary process forward was not unreasonable. The respondent's occupational health report had raised a possibility that progress might be made before the end of the stated 3 month period. The respondent did not stipulate the date for the meeting, nor did the respondent hint at any negative consequence for the claimant in the event that she was unable to provide such a date. We conclude that it was not reasonable for the respondents conduct to be regarded as creating a hostile or adverse environment for the claimant.

63) In summary while we have considered the claimant's perspective, we conclude that it was not reasonable for the claimant to consider the comments to create a hostile or otherwise adverse environment. We conclude that the comment did not have the effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

64) The final part of the harassment claim relates to the referral made to the NMC. We conclude that the respondent genuinely considered its obligation to report to the NMC was triggered by the unavoidable delay within the disciplinary process alongside the possibility that the claimant was working elsewhere as a nurse. The respondent was open in respect of its concerns and raised these with the claimant's union representative. While the respondent's concerns that the claimant may be practising as a nurse elsewhere was unlikely to be the case due to the serious nature of the claimant's ill-health, it was reasonable for the respondent to identify the potential risk from the information available to it at the time. The referral was made by the respondent in factually accurate terms and in compliance with the respondent's genuine understanding of their reporting obligations. While the timing of this report has been affected by the claimant's absence to the extent that that absence has caused a delay within the disciplinary process, we conclude that the respondent's making of this report is not 'related to' the claimant's disability or disability in general.

65) Even if we are wrong, we consider that the making of a NMC referral by an employer in circumstances where the employer reasonably considered that it had an obligation to do so would not result in circumstances that could objectively be said to have the effect of violating the claimant's dignity or creating an adverse environment for her. For all of these reasons, the claim is unsuccessful and dismissed.

Reasonable adjustments

66) The provision criteria or practice (PCP) or the respondent's way of doing things identified by the claimant in the list of issues is, 'the requirement to participate in a disciplinary investigation before the Claimant had recovered from her surgery. The original invitation being dated on or around 6 September 2022.' This is problematic in that it is not generally applicable to the respondent's employees. We have proceeded on the basis that the PCP is read as a requirement for 'employees to participate within disciplinary processes before they have recovered from surgery/serious illness'

67) However when viewing the entirety of the evidence in this case we conclude that the respondent did not apply any such PCP. It can be seen from the fact that the disciplinary hearing did not proceed once the respondent was aware of the nature of the claimant's illness that the PCP was not applied. Further, it can be seen that the

respondent was willing to make substantial reasonable adjustments to its procedure as set out above to allow the claimant to attend, once she was able to do so. The claimant's stated disadvantage is, 'the claimant was hindered in her effective participation at the disciplinary hearing', however the respondents suggested adjustments seek to alleviate this disadvantage.

68) We note the claimant's suggested reasonable adjustment is stated as, 'it would have been reasonable for the respondent to not require the claimant to partake in the disciplinary process or to attend a disciplinary hearing.' We note the claimant's evidence that the respondent should have abandoned the disciplinary process. When looking at this matter we do not consider it unreasonable for the respondent to decline to abandon the disciplinary process in light of the seriousness of the original incident. The outcomes of the safeguarding investigation and the police investigation would no doubt be relevant to the respondent when considering their internal process however these are all separate processes and the conclusion of external processes do not in isolation make it unreasonable for the respondent to continue with its internal process. Further, the proposed adjustment far exceeds any steps required to address the disadvantage identified by the claimant. We do not consider that a requirement that the respondent abandons disciplinary process could be considered to be a *reasonable* adjustment in the circumstances. The reasonable adjustment claim is unsuccessful and dismissed.

Limitation

69) Although the claim was unsuccessful, we were requested to determine the limitation point. When looking at the limitation point, we concentrate on the allegation arising from 6 September 2022. Early conciliation should have been commenced prior to 5 December 2022. This did not happen. The claimant entered early conciliation on 13 January 2023 however the clock did not stop for limitation purposes. The early conciliation certificate was issued on 22 February 2023. Proceedings were issued on 22 March 2023.

70) When looking at this matter we conclude that for a large proportion of the primary limitation period the claimant was unable to consider issuing proceedings due to her serious ill-health. While it is the case that towards the end of that period the claimant engaged in certain activities is highlighted within Ms Mankau's written submissions, we accept that the claimant continued to experience considerable serious ill-health and her condition was at best fluctuating. We note that the claimant did have the assistance of her trade union and was aware at least in general terms that there were required 'timelines' however the claimant's oral evidence on this point was muddled and confused. The claimant referred to lodging her claim before midnight on a particular date and the tribunal considered it likely that the claimant was unaware that the conciliation process did not 'stop the clock' and she did not have a month subsequent to the issue of the ACAS certificate to issue proceedings. There was confusion on the claimant's side in relation to the limitation period. We have carefully considered the prejudice arising from the delay. While the respondent has been required to deal with this matter, it is the case that the claimant raised this issue promptly within the internal grievance process and on balance we consider that the cogency of the respondent's evidence was unlikely to be affected by the claimant's delay. While the claimant's claim was unsuccessful, after hearing the entirety of the evidence, we do not consider that it could be properly labelled as having little reasonable prospect of success. Considering the entirety of the particular circumstances in this case we consider it is just and equitable to extend time and we find that the claims are brought within the statutory limitation period.

Approved by

Employment Judge Skehan

Date: 24 April 2025

JUDGMENT SENT TO THE PARTIES ON

10 May 2025

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE