EMPLOYMENT TRIBUNALS

Claimant: **Ms J Kasprzak**

Respondent: **Hull University Teaching Hospitals NHS Trust**

Heard at: **Hull** **On:** **6, 7, 8, 9, 12 and 13 May 2025**

Before: **Employment Judge Miller**
Mr M Taj
Dr P C Langman

Representation
Claimant: In person
Respondent: Mr C Rix – counsel

RESERVED JUDGMENT

1. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

2. The following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:

    a. A failure to make reasonable adjustments arising from the alleged provision, criterion or practice of requiring the Claimant to work in larger wards, which involves a requirement to walk longer distances and a requirement to work under pressure.

3. The remaining complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

4. The complaints of harassment related to race and harassment related to disability were not presented within the applicable time limit. It is not just and equitable to extend the time limit. The complaints are therefore dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Ward Catering Assistant. Her employment ended when she was dismissed on 19 September 2023. The claimant undertook early conciliation from 6 December 2023 until 17 January 2024 and she presented her claim to the Employment Tribunal on 16 February 24.

2. The claimant brought claims of race and disability discrimination. Those claims were clarified at a preliminary hearing on 24 September 2024 as claims of harassment related to race, harassment relating to disability, discrimination arising from disability and failure to make reasonable adjustments.

3. The claimant is Polish which is the basis of her claim of harassment related to race and the respondent agrees that at the relevant time she was disabled by reason of fibromyalgia.

The issues

4. The disputed issues as clarified at the preliminary hearing on 24 September 2024 were as follows:

   TIME LIMIT ISSUES

   1. Were any of the Claimant's claims complaints presented outside the time limits set out in section 123 of the Equality Act 2010?

   2. If so, were they part of a course of conduct extending over a period with a complaint presented within the time limit?

   3. If not, should the Tribunal extend time for bringing the claim because it is just and equitable to do so?

   HARASSMENT

   6. Did the Respondent do the things alleged by the Claimant? The Claimant is alleging:

   a. Comments made by Michelle France on 6 February 2023:

   i. that the Claimant did not know how to do her job;

   ii. that she did not know why the Claimant came to the UK;

   iii. referring to the Claimant as stupid/not thinking/not speaking English well;

   iv. stating that the Claimant should not work 'there'; and

   v. questioning why the Respondent hired people such as the Claimant.

b. Comments made by a patient on 6 February 2023:

i. that the Claimant's English was poor;

ii. that the Claimant should go back to her country;

iii. aggressively asking why the Claimant had come to the UK and Hull; and

iv. aggressively stating that the Claimant should look for work somewhere else.

c. Comments made by Michelle France on or around 20 February 2023

i. That 'Polish does not know anything';

ii. questioning the Claimant's English; and

iii. questioning why the Claimant worked 'there' at all.

d. The Respondent ignoring the Claimant's complaints on 7 February 2023, 20 February 2023.

e. Comments by Adriana Verschoor on or around 22 May 2023:

i. encouraging the Claimant to resign; and

ii. informing the Claimant that a colleague suffering from fibromyalgia worked for the Respondent however at some point she had to resign because she was unable to work due to her health and remained at home receiving benefits.

7. If so, was it unwanted conduct?

8. Did 6(a)-(d) relate to the Claimant's race?

9. Did 6(e) relate to the Claimant's disability?

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

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

FAILURE TO MAKE REASONABLE ADJUSTMENTS

12. Did the Respondent apply a provision, criterion or practice ("PCP")? The Claimant is alleging the following PCPs:

a. requiring the Claimant to work in larger wards, which involves a requirement to walk longer distances and a requirement to work under pressure.

b. Requiring the Claimant to work within an environment of conflict (the Claimant was required to work with Michelle France).

13. If so, did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The Claimant is alleging the following substantial disadvantage:

a. Increased physical and mental pressure, causing increased symptoms from her fibromyalgia, which reduced her capacity to work.

14. If so, what steps could have been taken to avoid the disadvantage? The Claimant is alleging the following steps:

a. Moving the Claimant to a smaller Ward with up to 17-19 patients

b. Redeploying the Claimant

c. Resolving the issues between the Claimant and Michelle France

15. Was it reasonable for the Respondent to have to take those steps and when?

16. Did the Respondent fail to take those steps?

DISCRIMINATION ARISING FROM DISABILITY

17. Has the Claimant established that the Respondent treated the Claimant as alleged? The Claimant is alleging:

a. Dismissing the Claimant due to her sickness absences.

18. If so, does the treatment amount to unfavourable treatment?

19. Do any of the following things arise in consequence of the Claimant's alleged disability (i.e. the 'somethings')?

a. Sickness absence.

20. If so, did the Respondent subject the Claimant to the treatment found to be unfavourable treatment because of one of the alleged 'somethings' that arise in consequence of disability?

21. If so, has the Respondent proven that that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aims:

a. The efficient delivery of public services in an extremely busy unit.

b. Equitable management of staff and cost.

c. Safeguarding wellbeing of all staff, ensuring that other members of staff are supported and not overworked as a consequence of the sickness absence of their colleagues.

d. Ensuring that the Claimant is supported to maintain a suitable level of attendance.

e. Ensuring that patient safety is maintained by ensuring staffing ratios are not impacted on as a consequence of staff sickness.

f. Managing sickness absence and improving sickness absence rates is an indicator of both a healthier and more efficient workplace resulting in high quality patient care.

5. The issues as recorded also addressed matters relating to any remedy but that will be dealt with at a subsequent hearing so it is not proportionate to set that out here.

6. At the start of the hearing, we sought to clarify the issues and the claimant amended the issues by agreement in the following way:

7. Issues 6(a) and 6(b) are now said to have happened on 13 February 2023 rather than 6 February 2023; and only comment 6(b)(iii) was said to be made by patient, the other comments in paragraph 6(b) were now said to be made by Michelle France. It was the claimant's case that the patient seemed to be repeating comments the claimant believed Michelle France had said to them.

The hearing

8. We had the benefit of several different Polish interpreters throughout the hearing and, although we do not record their names (because there were too many), we are grateful for their assistance.

9. The claimant attended the hearing and represented herself. Until 10 days before the start of the hearing the claimant had been represented by a legal representative. The claimant was critical of her previous legal representative and, in circumstances where the claimant sought to introduce new evidence, on a number of occasions she said that the reason it had not been provided was that she had provided it to her legal representative who had not then passed it on. We do not make any findings about that because the claimant's previous legal representative was not here to give their version of events. When deciding whether to admit late evidence we considered its relevance and the balance of prejudice. We did not take into account the claimant's assertions about her previous representative.

10. The only documents that we refused to admit were two screenshots of text or WhatsApp exchanges between the claimant and Bernadette Swanepoel in July and September 2023 which the claimant sought to rely on as evidence of harassment by Ms France. The claimant sought to admit these documents after Ms France, Ms Swanepoel and the claimant had all given evidence which would have required all of those witnesses to be recalled. There was a dispute about the translation into English of those messages by the claimant and the interpreter kindly agreed to translate the messages for us. Once the messages were translated it was apparent that the messages were of no probative value in respect of the allegations of harassment against Ms France. By that time, it was perfectly clear from the

evidence we had heard that there had been an incident between Ms France and the claimant. The remaining dispute was as to the specific nature and content of that incident and the messages did not add any further clarity about that.

11. To that extent, therefore, the messages had little if any relevance to the matters to be decided and it would not have been proportionate to further delay proceedings by recalling witnesses to answer questions about them. For that reason, we refused to admit those documents.

12. The claimant produced a witness statement for herself and for Ms Monika Mazurkiewicz and they both gave oral evidence. The claimant had also produced a witness statement from Ms Bernadette Swanepoel. However, Ms Swanepoel had also produced a witness statement on behalf of the respondent. Ms Swanepoel attended to give evidence on behalf of the respondent.

13. The claimant believed that Ms Swanepoel had been coerced or manipulated into giving evidence on behalf of the respondent rather than the claimant. The claimant cross-examined Ms Swanepoel, as she was entitled to do because she was no longer the claimant's witness, and we are satisfied that Ms Swanepoel had not been manipulated or coerced into giving evidence for the respondent. In respect of witnesses, the legal position is that "there is no property in a witness" which means that any party can ask any person who can give relevant evidence for them to do so and, in the absence of an order of the tribunal, that person can agree to give evidence or not as they see fit.

14. In fact, the reality is that Ms Swanepoel's two witness statements (for each of the claimant and the respondent) were broadly the same and we found Ms Swanepoel to be an extremely plausible, reliable and helpful witness. Ms Swanepoel, who was also a catering assistant, is also Polish and worked with the claimant.

15. The respondent also called the following witnesses who each gave a witness statement and attended to give oral evidence:

    a. Ms Michelle France - housekeeper and alleged harasser of the claimant.

    b. Ms Adriana Verschoor - patient meals team leader and the claimant's line manager. Ms Verschoor is also alleged to have harassed the claimant as set out in issue 6(e).

    c. Ms Katie Fry - property manager and member of the panel that dismissed the claimant.

16. The respondent was represented by Mr Rix and we are grateful to both Mr Rix and the claimant for the helpful way in which they conducted the proceedings. Unfortunately, there was an issue with the attendance of the interpreter on the first day of the hearing which added delay and together with the additional time required for interpretation there was insufficient time to prepare and deliver a judgement in the allocated hearing time. In any event, however, it is likely that we would have reserved judgement because

of the practical difficulties of giving a detailed reasoned oral judgement through an interpreter.

Findings of fact

17. We make only such findings of fact as are necessary for us to determine the disputed issues we must decide. Where facts are in dispute we have made our decision on the balance of probabilities.

The claimant's role and different wards

18. The claimant started working for the respondent as a catering assistant on 4 July 2022. She was employed as a "floating" catering assistant which meant that she could be allocated to work on a variety of different wards. The claimant worked at Hull Royal Infirmary Hospital and her role included the following:

    a. preparing meals (including breakfast, lunch, snacks and dinner) for patients on a given ward,

    b. checking that there are sufficient meals provided for each ward,

    c. collecting meal orders from patients,

    d. delivering meals and drinks to patients at various points throughout the day,

    e. clearing away finished meals and crockery etc,

    f. washing-up, and

    g. cleaning the kitchen.

19. The claimant was appointed to work alternating shifts, working five days one week and two the next. In the long week she would work around 39 hours and around 17 hours in the short week. The claimant said that she often had to work an hour extra each day getting in half an hour early to be able to prepare breakfasts, and having to stay for half an hour at the end. She said she was rarely, if ever, able to take a break. We prefer the evidence of Ms Verschoor and Ms Swanepoel that in fact while many people did come in early and stay late it was not necessary to do so and that many people came in shortly before the shift started and left very quickly after it ended.

20. We also prefer Ms Verschoor's evidence that if a catering assistant was too busy they were able to call for assistance. That does not exclude the possibility, however, that the claimant was unaware of this. We also note that the claimant did not complain at the time about the early starts or late finishes, she merely noted that that was what was required and that everybody did it.

21. It was the claimant's case that some of the wards were harder work than others. This evidence was supported by the evidence of Ms Swanepoel

although Ms Verschoor said that all wards could be difficult for different reasons.

22. We find that there was a difference between some wards and others in that some wards had more patients, some of whom had differing needs, a combination of which created more work for the catering assistants. For example, Ms Verschoor identified that wards 5 and 8 had 30 beds and Ward 60 had 29 beds, whereas Ward 40 had 15 beds, Ward 36 had between 19 and 26 beds, Ward 37 had 26 beds and the FAB Ward had 24 beds. Ms Swanepoel agreed that Ward 10 was also quite a large and difficult ward, although she said it became easier the longer she worked on it.

23. The respondent's evidence was that all the wards were more or less the same size so that the amount of walking involved would have been the same. Ms Verschoor also said that on smaller wards (i.e. those with fewer patients) the caterer would not be assisted by a housekeeper to provide and deliver the food whereas on the larger wards there were more staff so that the work was spread out.

24. Having heard evidence about the tasks involved in being a catering assistant which included, as we have set out above, preparing food as well as delivering it to patients; and having regard to the evidence of Ms Swanepoel, we find that some wards *were* harder work and more stressful for the claimant than others.

25. Ms France gave evidence that for a significant period of time she was in fact undertaking the role of two people (housekeeper and hygienist). Ms Swanepoel said there was a high turnover of staff. Ms Verschoor said that that was no longer the case but that the catering team was a gateway job to working in the NHS, from which we conclude that sometimes staff move on to other jobs. The claimant gave evidence of a number of occasions when she had not received assistance she thought ought to have been provided from other staff on the larger wards. There are also likely to be various other factors which were touched on in the evidence relating to the availability of nursing staff to assist with catering functions which would vary from ward to ward depending on the care or other medical attention patients needed.

26. Putting all this together, it seems likely to us, and we find, that there was a turnover of staff resulting in circumstances where there were not as many people doing catering assistant roles or supporting catering assistants on each ward as the respondent might have anticipated and consequently larger wards (i.e. wards with more beds or patients) were a busier and more pressured environment than smaller wards (i.e. wards with fewer beds or patients) for catering assistants.

Events before the first allegation of harassment

27. On 27 September 2022, the claimant attended a mid-probationary review meeting with Ms Verschoor. There are errors in the form recording this meeting but we find that they are not material. We find that the document recording this meeting was a genuine one and that any errors in it are likely to be as a result of copying and pasting errors or other typos. Ms Verschoor

had no concerns with the claimant's performance and notes particularly "Joanna has excellent IT skills and has no problems logging onto Manna [a computer ordering system for the catering service] and entering patient numbers". We find that there were no concerns expressed by the claimant or the respondent at the time about the claimant's ability to communicate in this meeting in English. We conclude that the claimant was able to communicate adequately in this meeting in English.

28. The claimant was first off sick from 29 September 2022 to 1 October 2022. This was for diarrhoea and vomiting and was unconnected with her fibromyalgia. The claimant was put onto the first stage of the respondent's sickness absence policy by Ms Verschoor and there was a sickness absence review meeting on 22 November 2022. The claimant had no problem at this stage in working on the larger wards.

29. The claimant found out about her diagnosis of fibromyalgia in October 2022 but did not that time feel the need to tell the respondent.

30. The claimant had her final probation review meeting on 13 December 2022 which she passed with no problems. We find that the record of this probationary review meeting is a genuine record albeit that this also includes typos and references to other members of staff. In our view this is likely to have been because Ms Verschoor was extremely busy, being responsible for managing at least 80 staff. At this stage the claimant had no problems working on the larger wards and there were no problems with her fibromyalgia. The review records generally that the claimant is good at her job and particularly "Joanna has a good manner with patients and staff and is establishing good communication". The meeting was conducted in English and there is no suggestion that the claimant had any difficulties in engaging in the meeting.

31. The claimant was again absent through ill health from 3 February 2023 to 5 February 2023 returning to work on 6 February 2023. The reason for her absence was again diarrhoea and vomiting and was unrelated to fibromyalgia. There was a sickness absence review meeting on 6 February 23 with the claimant and Ms Verschoor, the outcome of which was to keep the claimant on stage 1 of the sickness absence management policy. There was no discussion in that meeting of anything relating to the claimant's fibromyalgia, any difficulty with large wards or any suggestion that the claimant might have had difficulty communicating in English.

Allegations of harassment

32. The claimant says that her first negative interaction with Ms France was in January 2023. This is not a complaint of harassment in the claim but relates to the alleged failure by Ms Verschoor to address the claimant's complaints. The claimant's complaint is that she went to work on a ward with Ms France who was the housekeeper on the day but that Ms France refused to help her serve breakfast. The claimant says that she then reported Ms France's refusal to help her to someone in "the office" and also later to Ms Verschoor.

33. The role of a housekeeper is maintaining the ward catering services such as giving out food and drink, wiping down machinery, checking on orders for the ward, filling up the treatment room and assessing catering needs. It can also include making beds whilst also undertaking mattress audits.

34. The claimant agreed that it was likely that this alleged incident was on 23 January 2023. The claimant worked the afternoon shift on Ward 10 that day and Ms France only worked mornings. It seems likely to us that the claimant has got the date wrong. She was very unclear about when this happened and 23 January 2023 was only considered by the claimant because Ms Verschoor had made some notes for the purposes of these proceedings on the timesheets for that day.

35. Clearly the claimant's complaint cannot have been about an afternoon shift because she was complaining about Ms France's alleged refusal to help serve breakfast. The claimant's assertion that Ms Verschoor's notes on the timesheets were compelling evidence that there had been an incident on this day is completely misguided. We prefer Ms Verschoor's evidence that she prepared these notes much later and for the purposes of these proceedings. They are, in any event, clearly associated with the wrong day on the timesheets because they say "this was the last time Joanna worked on Ward 10" which both parties agree was not the case.

36. We prefer Ms Verschoor's evidence that the claimant did not make a complaint to her about Ms France in January 2023. For reasons to which we will return later, it has been very difficult to make any findings about what actually happened and when at this time.

37. The claimant says that her second incident with Ms France was on 13 February 2023. This comprises the bulk of the claimant's claims of harassment as set out in the list of issues above.

38. The claimant's account is that Ms France was angry with her from the start of the shift on 13 February 2023 on Ward 10. She said that Ms France became hostile when she saw the claimant and her face turned purple with anger. The claimant says she approached her in an aggressive manner. She then says that Ms France complained about the claimant, saying that she didn't know how to perform tasks properly. This resulted, the claimant says, in two more senior people coming to observe the claimant and reprimand her for the way she was working.

39. The claimant then says that later the same day she had an interaction with a Muslim patient relating to a halal meal. She said that the patient told her that Ms France had told them the claimant had given them the wrong menu, which the claimant says was not true, and that Ms France's intention was to discredit her in the eyes of the patient.

40. The claimant says in her witness statement about the interaction between Ms France and the Muslim patient "she told them that I did not know anything about the job and I was constantly making mistakes. She even questioned why I was working at the hospital at all. This was deeply hurtful, and it felt like an attack on both my professional abilities and my character and also on my origin".

41. The claimant then says that she was so upset by this that it caused her to break down in the bathroom. She says:

> "I had diarrhoea, was vomiting, and crying. Even while I was in the bathroom, I could hear Michelle in the staff changing room talking about me to a nurse, which only worsened my emotional state. She said that I didn't speak English, that I was always making mistakes, that I hadn't given the menu to the patients, and questioned why I had even come to the UK. She called me stupid and said something along the lines of my English being poor and that she didn't understand how the hospital can hire people like me."

42. Finally that day, the claimant says that she went into a patient's room with tea and biscuits. At the time the patient was speaking with Ms France and gesturing, only to leave once the claimant entered. The claimant then said

> "I asked the patient if they wanted a sugar or two. After providing it, the patient in an aggressive way accused me of not understanding her. She then asked where I was from, from which country and when I said Poland, she questioned whether I knew English. When I confirmed that I did, she continued to be rude, asking why I was even in Hull and in the UK and why I was working at the hospital. The patient also stated that I should work somewhere else."

43. Ms France denies all of this. She said that her interaction with the claimant was limited on this day. She was working as housekeeper and hygienist (so undertaking two roles) on Ward 10 on the day. Ms France said that she spoke to the claimant in the morning and offered to do one part of the breakfast service and would be available to support the claimant if she needed anything. Ms France said that it was in fact the claimant who was annoyed because she expected Ms France to do more to help her on the shift. Ms France says that she was already busy covering the two roles she was doing.

44. Ms France says that she later went back out onto the Ward to ask the claimant if she was okay and that the claimant was banging items around in the kitchen making her feel uncomfortable. Ms France said that when she checked the kitchen at lunchtime there seems to be insufficient food for the patients and she asked the claimant if she had checked the food, in response to which the claimant said she had not. Ms France said that later on in the day the claimant slammed the oven door shut when Ms France tried to offer assistance and that she found the shift working with the claimant very difficult.

45. Ms France said that she did not say anything to Ms Verschoor about the claimant but that later she did discuss her concerns with her supervisor, Ms Chapman, about her interaction with the claimant.

46. The claimant says that she reported her interactions with Ms France on this day to Ms Verschoor a few days later. Ms Verschoor said that the claimant only made one report to her about her interactions with Ms France, (discussed below), and she did not report this on this occasion.

47. What did happen in the meantime was that on 14 February 2023, Ms Hazell (Ms Chapman's manager) sent an email to Ms Verschoor's manager (Ms Tock) setting out some concerns about the catering service on Ward 10. As far as is relevant that email says

    "There has been a real inconsistency with the catering staff who come to work on H10. I appreciate that staffing may be tight, however, we seem to get really good staff or quite the opposite. On Monday the 13th we had a caterer who was extremely rude to both patients and staff. She did not ask any of the patients what the (sic) wanted for their meals, or took into consideration that we had patients requiring renal menu and Halal needs".

48. The person referred to in this email as being rude was the claimant and the information in the email had come to Ms Tock originally from Ms France.

49. The next allegation of harassment relates to comments made by Ms France on 20 February 23. The claimant says in her witness statement that Ms Swanepoel told her that Ms France had been speaking badly about her to other staff members and patients and that Ms France had claimed that the claimant didn't speak English. The claimant says that Ms Swanepoel filed a complaint about Ms France on 20 February 2023 and that later she and Ms Swanepoel went together to see Ms Verschoor to make a complaint about Ms France. In her statement provided in support of the claimant Ms Swanepoel agreed that she had complained by herself first and then secondly accompanied the claimants to make a complaint. In her statement provided to support the respondent Swanepoel only said that she had told the claimant what Ms France said and that she had then accompanied the claimant to report it to Ms Verschoor. In oral evidence was Swanepoel appeared to agree that she had reported Ms Francis comments separately but because it was over two years ago found it hard to be precise.

50. The comments that Ms Swanepoel says she heard Ms France say are

    "something along the lines of, "I am so happy it is you and not her, the day will go better"."

51. It was clear to Ms Swanepoel that Ms France was referring negatively to the claimant and that she made these comments in front of patients. Ms Swanepoel felt that these comments were inappropriate and unprofessional. However, in oral evidence and in both statements prepared for the respondent and the claimant Ms Swanepoel was extremely clear that Ms France did not say anything relating to the claimant's origins or English language skills or the fact that she was Polish.

52. It is relevant that Ms Swanepoel is also Polish and that not only would it have been surprising for Ms France to say something to Ms Swanepoel in those circumstances, Ms Swanepoel said that had she done so she would have had no hesitation in reporting such comments.

53. We heard evidence from Ms Swanepoel and although her English was excellent and she gave evidence without the assistance of the interpreter she obviously does have an accent from which one would reasonably conclude that she was Eastern European even if it was not immediately

obvious to all English people which Eastern European country she was from.

54. Ms Swanepoel and the claimant did go and see Ms Verschoor on or around 20 February 2023 and the claimant was very upset at the time. They reported what Ms France had said, as explained by Ms Swanepoel above, and Ms Verschoor took the decision not to allocate the claimant to Ward 10 thereafter. The claimant agrees that she did not have to work on Ward 10 or with Ms France after that date and we find that she did not actually work on Ward 10 or with Ms France again.

55. We find that the claimant did not report any allegations of racist or discriminatory language by Ms France to Ms Verschoor or to Ms Swanepoel in February 2023. We concluded that Ms Verschoor understood that there were problems with the claimant working on Ward 10 both because of the email her manager Ms Tock had received on 14 February and because of Ms Swanepoel's and claimant's reports of Ms France's conduct.

56. On balance, in our view, it is likely that Ms France did not make any discriminatory comments to staff or to patients in January or February 2023 about the claimant. We think it is likely that the incident in the changing room described by the claimant did not happen as described or at all and that there is no evidence to suggest that, if any patient did make any racist comments to or about the claimant, they were motivated to do so by Ms France.

57. However, for reasons that we will explain below, these claims were brought a long way out of time. There is no contemporaneous written record of any of these alleged complaints and as we will discuss below the first time the claimant mentioned any allegation of discriminatory conduct by Ms France was in her sickness meeting at which she was dismissed.

58. Notwithstanding that these allegations are significantly out of time, we have made limited findings of fact because, on the basis of the evidence we **have** heard it seems unlikely that Ms France made any discriminatory comments and it is fair for us to record that finding, as far as we are able to make it, in this reserved judgment.

59. However, because of the time that has elapsed and the inconsistency in the claimant's evidence we have decided (as set out below) that we do not have the jurisdiction to hear this complaint. It is therefore inappropriate and unnecessary for us to make more detailed and definitive findings of fact about these incidents when part of the reason for deciding that we do not have the jurisdiction to hear them is that the respondent is prejudiced by the impact of the delay on the cogency of the evidence.

First long-term sickness absence

60. The claimant was then off work sick from 21 February 2023 because of an exacerbation in her fibromyalgia. The claimant submitted a fit note identifying "fibromyalgia flare" as the reason for her absence and she was signed off sick from 21 February 2023 until 20 March 2023. The claimant attributes the exacerbation of her fibromyalgia symptoms to stress from work. The medical records that the claimant has provided do demonstrate

an exacerbation of her fibromyalgia symptoms at the time and record that the claimant was experiencing symptoms of depression and anxiety. The claimant was referred for counselling.

61. The claimant set out in her witness statement details of her physical and mental health during her sickness absence. We accept the claimant's evidence of that. We do not, however, make any finding because we do not need to do so, as to whether any of those health problems were caused by any acts of the respondent, or Ms France specifically, prior to the claimant going off sick.

62. Ms Verschoor on 21 March 2023 made a referral to Occupational Health and asked for the following specific advice about the claimant:

    a. Is her health matched to her role? This means whether or not the claimant was fit to do the job of catering assistant.

    b. Is she covered under the equality act?

    c. Any other recommendations/advice?

    d. Is there anything we can do to support [the claimant] back to work?

    e. Would reducing hours help [the claimant] back to work.

63. The next day the claimant informed the respondent that her sickness absence was continuing but she intended to return to work on 30 April 2023. Even before the occupational health report Ms Verschoor contacted the claimant to agree a phased return to work from 2 May 2023 which was her first day due back at work.

64. The claimant met with occupational health on 4 April 2023 and they produced a report dated 5 April 2023. The report records the following points and recommendations:

    a. while the claimant was off with fibromyalgia, her health was starting to improve and that the claimant believed that her health was matched to that of the Ward Caterer,

    b. it would assist the claimant to work regular hours weekly rather than 17 hours one week and 39 hours the following week as she struggles with the excess hours (meaning, we conclude, the longer hours in the 39-hour week),

    c. the claimant would benefit from a slight overall reduction in these hours (which averaged to 28 hours per week),

    d. the claimant experienced pain after shifts worked on larger, busier wards and would therefore benefit from working on smaller wards such as Ward 37,

    e. she had experienced difficulties in Ward 10 and will benefit from avoiding this area where possible (it was unclear even after hearing evidence whether this referred to the difficulties with Ms France or the

fact that it was a larger ward, but in any event Ms Verschoor had already taken the decision not to allocate the claimant to Ward 10),

f. it was likely that the claimant would require consideration under the Equality Act 2010,

g. a phased return was recommended over a two-week period working approximately half the claimant's usual hours, and

h. ensuring the claimant receive adequate breaks during the day.

65. On 6 April Ms Verschoor emailed her manager, Ms Tock, and said that she would ask the claimant about reducing her hours at the sickness meeting scheduled with the claimant for that day. However, she said, as the claimant is a relief caterer (namely her role was to cover other caterers sickness or holiday absence) she could not just take the staff of Ward 37 and put the claimant on that Ward and she queried whether, if the claimant could only work on smaller wards, then whether her health was actually matched to the job.

66. Ms Verschoor and the claimant had a long-term sickness meeting on 6 April 2023. We find that at that meeting there was a discussion about the occupational health recommendation and the fact that the claimant had had fibromyalgia diagnosed in September 2022. A two-week phased return was agreed and Ms Verschoor recorded that the claimant's health condition was made worse by working on long shifts, but she would be okay with five-hour shifts. Ms Verschoor said in evidence that she did not ask the claimant why a smaller ward generally or Ward 37 particularly would be better. However, the outcome letter sent on 6 April 2023, which has more detail than the notes of the meeting, says "as for working on light wards, all wards at HRI are large wards but I will try my best to ease you back into work on wards with more support".

67. Although the respondent and Ms Verschoor have been clear that all the wards are the same physical size (in respect of the floor area), the fact that Ms Verschoor recognised there were wards that were more supportive tends to add weight to our conclusion that some wards were harder to work on than others.

68. Ms Verschoor gave the claimant a flexible working request application form for the claimant to request changes to hours in line with occupational health advice.

69. At the time claimant's average 28-hour shift pattern was as follows

	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
Week 1							
	0800-1330	0800-1330					
	1500-	1500-					

	1830	1830					
Week 2							
	0800-1330	0800-1330			0800-1330	0800-1330	0800-1330
	1500-1830	1500-1830			1500-1830		1500-1830

70. Although this does not add up to an average of 28 hours per week, we conclude that time was allocated within these periods for breaks, albeit that the claimant asserts she did not receive any or as many breaks as she should have.

Return to work in May

71. The claimant returned to work on 3 May 2023 and Ms Verschoor did a return-to-work meeting with the claimant on that date. The claimant had been off work for around 2 ½ months by the time she returned to work and the return-to-work form records a rolling 12-month attendance rate of 73.89%.

72. The claimant completed a flexible working request form and requested the following regular pattern, being the same each week:

Mon	Tues	Wed	Thurs	Fri	Sat	Sun
0800-1330	0800-1330					0800-1330
		1500-1830	1500-1830			1500-1830

73. This request was sent to Ms Tock who said that she could not agree the exact shift pattern proposed by the claimant because of the availability of work, but the only difference was that the claimant would work a full Sunday every other week so that one week the claimant would work nine hours on the Sunday and the next week should work zero hours on a Sunday

74. This was an average of 21 hours per week on a two-week rolling pattern. Ms Verschoor's explanation for this difference between the claimant's requested pattern and the pattern Ms Tock offered, was that there were insufficient free slots on a Sunday to accommodate the claimant working every Sunday and they could not create additional slots because they had not been allocated the budget to do so.

75. Initially, the claimant accepted the proposed pattern and told Ms Tock on 16 May 2023 that it was fine. It was to be implemented from 3 July 2023.

76. On 15 June 2023, however, the claimant changed her mind and told Ms Verschoor that she would not be going ahead with the changed contract hours. The claimant's reasons for this were that she could not afford the drop in pay that came with Ms Tock's proposed change. The claimant

understood that she would be paid double time for working on the Sunday and this would mitigate the loss of income arising from the drop-in hours throughout the week.

77. In the meantime, the claimant returned to work on 3 May 2023. She worked a total of 11 shifts over the next three weeks, three of which were on wards which the claimant agreed were larger more challenging wards of the type that she wanted to avoid.

78. For the first two weeks the claimant was working on a phased return and only worked a total of seven shifts. On no occasions in that two-week period did the claimant work a double shift (i.e. morning and afternoon).

79. On the third week, however, the claimant worked double shifts on Monday 15 May and Tuesday 16 May. Those four shifts were in Ward 7. The claimant agreed that the more challenging wards in that three-week period were two shifts on Ward 8 and one shift on Ward 5. We conclude therefore that Ward 7 was not one of the more difficult wards.

Second long-term sickness absence

80. On 22 May 2023, the claimant went off sick. She said

> "around 22 May 2023 I had to go on sick leave again because I couldn't manage the pressure and workload any longer".

81. The claimant sent in a fit note from 23 May 2023 until 22 June 2023 with the reason for her absence being fibromyalgia and depression. The claimant did not, however, return to work thereafter.

82. The claimant attended a sickness absence review meeting on 5 June 2023 with Ms Verschoor. At this meeting the claimant first indicated that she did not want to go ahead with her flexible working request as discussed above. Ms Verschoor did not action that straight away but gave the claimant a further day to consider. In the event, Ms Verschoor had not heard from the claimant by 8 June 2023 and sent a message asking her if she was going ahead with the flexible working request or not. The claimant replied a week later, on 15 June 2023 (as mentioned above) by WhatsApp to Ms Verschoor to say that she was not going ahead with the change of hours.

83. In that meeting on 5 June 2023, it is also recorded that the claimant's ill-health (which at that time is recorded as fibromyalgia and depression) is made worse by working long hours. We find that there was no discussion in that meeting of the claimant needing to work on quieter wards. It is recorded in the outcome letter from that meeting, and we find that that letter accurately reflects what was said, that the claimant said that her fibromyalgia was exacerbated by working full days. This, we note, is consistent with the claimant going off sick after working two full days for the first time on her return to work,

84. The claimant also made it clear that she wanted to remain on 28 hours per week for financial reasons but that her health could not accommodate working the longer hours.

85. There was a discussion in that meeting about whether the claimant could be redeployed to role where she was not required to be on her feet for long periods, and the claimant agreed that could be an option.

86. The claimant takes issue with the fact that she was not permitted to work every Sunday. We understand the difficulties the claimant faced because of the financial impact of having to reduce her hours, but we prefer Ms Verschoor's evidence that every Sunday was simply not available on a regular basis to build into the claimant's shift pattern.

Allegations of harassment against Ms Verschoor

87. The claimant alleges that sometime in May or June 2023 Ms Verschoor encouraged the claimant to resign and informed the claimant that a colleague suffering from fibromyalgia had worked for the respondent but at some point she had to resign because she was unable to work due to her health so remained at home receiving benefits.

88. In evidence the claimant was unable to identify with any degree of precision when this conversation might have been. In her witness statement she says that it was in May or June after she went for her second long-term sick leave, so after 23 May 2023, and she said that she told Ms Verschoor that she should be transferred to a smaller Ward with fewer patients, such as wards with 10 to 19 patients, as she said she thought this would help her return to work.

89. In evidence, the claimant said that she believed Ms Verschoor had made the comments to her in good faith; that she maybe said it to her to give her some relief. She did say, however, that the comment did not make her feel good.

90. Ms Verschoor denied making the comments at all, and in her evidence she said that not only did she not know of any colleagues with fibromyalgia, but before the claimant had said she had fibromyalgia she was not familiar with the condition.

91. For reasons which we will explain below, we do not have the jurisdiction to hear this complaint and as with the other allegations of harassment part of the reason for that is that the impact of the delay on the cogency of the evidence is prejudicial to the respondent. It is therefore not appropriate to make any more findings of fact about this allegation except to say that the claimant has not provided sufficient evidence or clarity for us to conclude that it did happen.

Second occupational health report

92. Shortly after that meeting, Ms Verschoor made a further referral to occupational health about the claimant. Ms Verschoor requested the following information about the claimant:

    a. Is [the claimant's] health matched to her role as a Ward Caterer?

    b. Is [the claimant's] health condition covered under the Equality Act?

c. Is there a connection between her fibromyalgia and stress and depression?

d. Would [the claimant] benefit from counselling?

e. As we have followed all other recommendations, would you advise any further adjustments?

f. Is there anything further we can do to support [the claimant] back to work?

g. Would redeployment to another role benefit [the claimant]? If so – what type of role would you suggest that might align with her limitations due to her health conditions?

93. The claimant met with occupational health and they produced a report dated 23 June 2023. The occupational health advisor made the following observations and recommendations:

a. The claimant was currently experiencing high levels of joint pain which was significantly impacting on her mobility giving her difficulty walking and impacting on her mood.

b. The claimant's health was not at that time matched with working as a Ward Caterer and there were no adjustments identified that would help to facilitate a return for the claimant to her role.

c. The claimant was experiencing stress and depression which may be related to fibromyalgia. The claimant was under the care of the psychology team.

d. The claimant

"would like to be considered for temporary redeployment until she is reviewed by the Pain Clinic. She reports having limited administration skills but is multi-lingual and requested to be considered for any roles in the Trust that may be able to utilise these skills. She is currently unable to undertake any roles which require manual handling tasks or standing/walking for long periods".

94. Although the claimant disputed the accuracy of this report, saying that her abilities were greater than that recorded in this report, we find on the balance of probabilities that the occupational health advisor's assessment of the claimant's health and abilities were based, at least in part, on what they were told by the claimant at the meeting.

Redeployment

95. In response to this report, Ms Verschoor put the claimant on the respondent's redeployment list and the claimant was notified of this on 27 June 2023. This is a system called 'TRAC'. This operates by an automatic email sent to the redeployee on a daily or weekly basis (the claimant chose daily) with details of available jobs. It is then the responsibility of the redeployee to apply for appropriate jobs.

96. It is relevant to refer to the respondent's redeployment policy at this stage. It says particularly

> "The line manager in conjunction with the Human Resources Advisory Team will hold regular meetings with the individual to discuss their job search, any potential opportunities which have been identified and any support required. The frequency of the meetings will be agreed at the start of the process".

97. The preference afforded by the redeployment scheme is that redeployee applicants who meet the essential criteria for the advertised job at the same or lower pay scale as their substantive job are interviewed before other applicants. If the interview panel consider that the redeployee meets the minimum threshold for appointment, a trial period will be offered. It also says that in some circumstances a less formal interview or slotting process can be applied instead.

98. The policy also says

> "Under the requirement to make reasonable adjustments, the Trust may give a greater priority to individuals with a disability as defined by the Equality Act. In these cases, any decision will be made dependent upon individual circumstances and Human Resources advice should be sought".

99. The claimant very quickly applied for a band 2 administrator role. This was the same band as the claimant's catering assistant role.

100. The essential criteria for the role were as follows:

    a. GCSE-C and above

    b. NVQ level II in administration or equivalent experience

    c. experience of providing a service to patients or customers

    d. previous administration experience

    e. experience of using electronic systems

    f. ability to communicate effectively using a variety of media

    g. team working

    h. ability to prioritise own workload

101. The advertisement said that the duties may include

    a. tracking patients through the journey to ensure a great patient experience

    b. clinical letter transcription

    c. answering the telephone

    d. logging referrals

e. sorting the post

102. There was further information about more detailed requirements in a job summary. The respondent had not provided the application form that the claimant submitted - they said that it was automatically deleted from the system. The claimant was, instead, asked questions in oral evidence about her application for her role of catering assistant and that application did not include any admin experience. The claimant's prior work history was in catering and cleaning. However, for seven years the claimant was a self-employed cleaner which she said, and we accept, included filing her own tax return. We also note that the only qualification listed on the claimant's application is called "administration" and was obtained in 1995.

103. The claimant asserted that she did tell occupational health that she had some administration skills but she did not say that they were limited.

104. The claimant also gave evidence of some IT systems that she was using, although none of those matched the ones referred to in the job summary for the admin role.

105. The claimant's application was refused without meeting the claimant on 29 June 2023. The form in which the reasons for rejection were recorded says that the claimant met the GCSE requirement and met experience of dealing with patients but has no evidence of any previous administrative experience.

106. The decision also records that the job was unsuitable because the admin office is located up three flights of stairs and the lift has been out of order for a year with no sign of repair.

107. The claimant took issue with the fact that her initials were recorded on this document which she perceived as misleading and incorrect evidence that she had seen or taken part in a meeting resulting in the completion of this form. This was not a fair conclusion for the claimant to draw. There was no suggestion that the claimant had met Ms Walker, who was the person who decided not to interview the claimant. We think it more likely that the initials were just a reference to ensure that none of the pages got mislaid. We also do not draw any adverse inferences from the fact that this document was dated 4 July 2023 and the claimant was notified of her failure in her application on 29 June 2023. It is more likely that the notes were just written up afterwards.

108. The claimant says in her witness statement that

"A key issue is that I was never interviewed for this administrator role or for any other role. Despite submitting my application and CV, there was no formal interview process where I could present my qualifications in person. The assessment was conducted without the proper context, which raises the question: on what basis was this evaluation made? The assessment was filled out without considering the complete set of skills I brought to the table. Without an interview or a proper evaluation of my CV and work experience, I believe the decision to disqualify me was made prematurely and without a full understanding of my abilities. This is highly problematic, as it undermines the fairness of the recruitment process".

109. In our view, this is an accurate reflection of the process that the claimant undertook. Although the redeployment policy says that the claimant must be supported by her line manager and HR with regular meetings to discuss the job search and support this did not happen. It is correct that redeployment was mentioned by Ms Verschoor in meetings but there was no discussion of what support the claimant might have in that process or any discussion of her skills and qualifications and how they might be transferable to other jobs in the NHS.

110. In evidence Ms Verschoor said, and we accept her evidence, that the redeployment process was solely in the hands of HR and she was not involved.

111. The claimant did send an email on 4 July 2023, via the TRAC system, to the recruitment team leader which said “Good Morning. I applied Administration job, there are no will offers available”.

112. This was then forwarded to Ms Macy Hewitt-Crabtree who was the HR support to the respondent in this case. The respondent said that Ms Hewitt Crabtree tried to contact the claimant and the claimant said she in fact tried to contact Ms Hewitt Crabtree and left a message to which she received no response.

113. We prefer the claimant’s evidence, not least of all because the respondent brought no evidence at all from any witnesses who knew anything about the redeployment process, and find that the claimant attempted to access support from HR but none was forthcoming.

114. There was then, on 8 August 2023, a further stage 2 sickness absence meeting between the claimant and Ms Verschoor. At that meeting the claimant said that she did not know when she would be ready to return to work. There was a discussion of the occupational health report and the fact that the claimant had been on the redeployment register but had not secured any alternative work. Ms Verschoor offered to refer the claimant to occupational health again, the claimant declined and Ms Verschoor told the claimant that she would be referred to a “Supporting and Managing Attendance Panel Hearing”. Although one of the possible outcomes from that next hearing was the claimant’s dismissal this was not set out explicitly in the letter with the outcome of the meeting on 8 August 2023.

115. The claimant attended that meeting unaccompanied and there is no suggestion that the claimant had any difficulty communicating with Ms Verschoor at that meeting.

116. On 17 August 2023 the claimant applied for a job of weekend housekeeper. That was refused on the same day. The reason for refusal of that job was as follows

    “The candidate stated on her application that she is not able to do a physical job. The role of the Neonatal housekeeper is a busy role. It is a physically demanding job at times. It includes moving incubators, equipment, putting stores away, stocking up the ward, supporting the parent’s accommodation on Woodland ward. It involves cleaning also”

117. The essential criteria for that job are as follows

    a. English / Mathematics GCSE or equivalent

    b. Willingness to undertake professional development

    c. Excellent time management

    d. Ability to work as part of the team

    e. Ability to recognize own limitations and seek advice from senior colleagues

    f. Ability to communication well within a multidisciplinary team

    g. Ability to deal with any potentially difficult or sensitive issues

    h. Understanding of confidentiality in the workplace

    i. Excellent organisational skills

    j. Ability to prioritise own workload

    k. Multi skilled

    l. Confident, approachable and of a cheerful disposition

    m. Ability to work on own initiative following guidance from Ward manager

    n. Self-motivated

118. It also had the following physical requirements:

    a. Ability to travel around site and beyond

    b. Ability to endure being on your feet for 90% of the day

    c. Ability to carry out non-clinical manual handling and safe lifting

119. Again, there was no discussion or meeting with the claimant either before or after being rejected for this job.

120. In respect of this job, we add that at the end of the document in which the reasons for rejecting the claimant were set out was another document which the claimant said suggested that the claimant had been at the meeting. The claimant asserted that this was another false document implying that she had had a meeting in respect of the housekeeper job before being rejected.

121. That is not what the second document is - it is, we find, a script produced for Mr Wood to use at the end of the capability hearing. The claimant did not have a meeting before being rejected for the housekeeper job about the job and neither has the respondent forged a document suggesting that she did.

122. We find that the reason that the claimant was rejected for this job was because she was not physically capable of doing the job as advertised at that time which is in accordance with the occupational health assessment.

123. The claimant also applied for at least one other job, namely that of apprentice health care support worker at the Humber Teaching NHS Foundation Trust (a different NHS Trust). There is no information at all about what the job entailed or why the claimant was rejected for it. The claimant said in evidence, and we accept her evidence, that she did not realise there were different requirements for different trusts, she just assumed that the NHS was one big organisation. The claimant did not have an opportunity to discuss this with HR or a manager in the course of the redeployment process because she did not have any meetings with them about it.

Dismissal

124. The claimant was invited to the final Supporting and Managing Attendance Panel Hearing on 5 September 2023 by Mr Neil Woods who was to chair the panel. The invitation set out the process for exchanging information before the hearing and informed the claimant of her right to be accompanied by a trade union representative or work colleague. It explained that the potential outcomes were referral back to stage II of the formal sickness absence management process or dismissal. It concluded by saying

    "if you have any special requirements that we need to consider or you wish to discuss the contents of this letter or have any questions, please do not hesitate to contact me."

125. On 10 August 2023 the claimant sent Ms Verschoor a message saying

    "unfortunately NHS has no job offer for me, when the contract be terminated?"

126. Ms Verschoor replied to say

    "it will be a panel who decided. That love. (sic) XXX".

127. The claimant asserted that the panel had already decided to dismiss the claimant by 16 August 2023, because steps were being taken to arrange the final panel when the claimant had not finished applying for jobs. There was no credible evidence to support this assertion and in our experience it is common in these sorts of situations for a panel to be convened and, if the employee is able to obtain redeployment in the interim, then that would either be a factor to be taken into account in the panel or the panel would be cancelled. We find that the decision to dismiss the claimant was not made before the final Supporting and Managing Attendance Panel Hearing.

128. The claimant contacted Ms Verschoor again by WhatsApp on 18 September 2023 to ask a friend could accompany her to the meeting she said

"I am very worried about this meeting, and it will be more comfortable for me if she accompanied me, I will be nervous and misunderstand. X".

129. Ms Verschoor replied to say that the claimant's friend could attend but that she could not speak at all.

Final hearing

130. The claimant attended the final hearing, which was chaired by Mr Wood who was accompanied by Ms Fry, on 19 September 2023. We find that the two sets of notes of this meeting - one typed and one handwritten - are broadly consistent and are broadly accurate summaries of what was discussed at the meeting, although they are brief. We reject the claimant's assertion that the notes or any part of them were created retrospectively to create the impression of notetaking. However, we also find that these notes do not necessarily by their nature reflect every word that was said at the meeting.

131. As an aside, and while we recognise there are likely to be potential issues particularly for large public sector employers in managing recordings, we observe that it is almost always more helpful to the Tribunal in such circumstances to have a transcript of a recording of the meeting. As an alternative, the provision of notes to the employee to agree at the relevant time would be almost as helpful.

132. We make the following findings about that meeting:

    a. The claimant was accompanied by her friend, Monika Matzurkiewicz as support and to assist with translating where necessary. Ms Matzurkiewicz but has a better understanding of English than the claimant. She also has experience as a trade union representative although she does not work for the respondent.

    b. Ms Matzurkiewicz was told at the beginning of the hearing that she could not contribute to the meeting but could talk to the claimant. We accept Ms Matzurkiewicz's evidence that she interpreted this as not being allowed to address the panel directly. Notwithstanding this, Ms Matzurkiewicz did address the panel directly on one occasion, but only on one occasion, to clarify matters relating to the claimant's diagnosis of fibromyalgia.

    c. Ms Verschoor presented a summary of what had happened over the preceding few months in relation to the claimant's sickness absence and the claimant's attendance rate. Ms Verschoor explained that the claimant had been offered reduced hours but had rejected that as we have described above.

    d. Ms Verschoor said that she felt that she had explored all possible options there was nothing else she could do to help claimant back to work. Ms Verschoor said that she could change the claimant's hours – that would not be a problem – but she could not accommodate a request for specific wards. Ms Verschoor also observed that all the wards had the same footprint.

e. The claimant presented her case and raised matters from February 2023 relating to Michelle France. For the first time she referred to this being related to her nationality or race. The claimant raised this in the context of the asserted actions of Ms France being, in her opinion, the cause of her fibromyalgia flareup leading to her absence. The claimant said that she had discussed this with Ms Verschoor in the various sickness meetings but in our view, and we find, that this was in fact the first time that the claimant had raised the issue that any of the allegations related to Ms Francis connected with her race or nationality in any way at all.

f. The claimant said that she felt that the occupational health letters did not accurately record everything she had told them. We find that, on the balance of probabilities, while the occupational health letters are not a comprehensive record of everything said in the appointments, they are broadly accurate.

g. The claimant said that the pain relief medication that she was receiving was helping to the extent that she may be able to work on a smaller ward. She explained that if it is a big ward even though there are more staff, they do not clean up and they leave everything in the kitchen. It is also a longer process to provide food to up to 30 patients. The claimant again reiterated that she would be able to work on a smaller ward but not a big one. She explained that having to walk fast on a large ward exacerbates her condition. There was a discussion about whether the claimant could return to work if she was allocated only small wards, but working her full-time hours, and the claimant said “no too many hours”.

h. The claimant also said that there was no help for her because she was Polish. We have seen and heard no evidence to support this. We refer to the evidence of Ms Swanepoel, who said that she had never experienced any discriminatory conduct or language from any members of staff in her years working at the hospital with a contractor and directly employed by the NHS. In our view, the claimant has reflected on her perception of how she was treated by Ms France particularly, and the respondent generally, and retrospectively concluded that this was connected with her race or nationality in some way. We have seen and heard no evidence beyond the claimant’s assertions, made for the first time only in the final sickness management hearing, that any conduct towards the claimant was connected with her race in any way at all.

i. There was a discussion about redeployment opportunities and the panel asked the claimant about her admin experience. The claimant said that she has IT skills but no English qualifications. The claimant appears to say in the meeting, and in fact did say in evidence, that she could do part of the admin role even if she did not have full skills to do everything. She said in the meeting that she could greet patients at the desk and Ms Fry responded that that is not the whole of the role.

j. It is then recorded in the notes that the claimant was asked whether if she was not at panel, would she continue to remain absent until the

end of her sick note, and the claimant said yes. She was further asked if she would get a further sick note to which the reply was “wouldn’t return”.

k. The panel asked the claimant about reduced hours or small wards but not a combination of both. The claimant said that stage she would consider a reduction in working hours and working pattern, but she would need to be restricted to smaller wards.

133. We find that the panel did discuss either reducing the claimant's hours, or allocating her to a single ward, but not both together. There is no evidence to suggest that they fully engaged with the nature of the claimant's difficulties and the pressures she said she experienced from the wards with more patients and how she said that exacerbated her fibromyalgia. It is clear on reading the notes and reviewing the claimant's evidence and that of Ms Mazurkiewicz that the claimant did struggle to cope on larger wards, but not because of the size of the ward but the intensity of the work and the variation in support from other staff.

134. Further, although Ms Verschoor told that panel that it was not possible to allocate the claimant to a specific ward, we find that it was possible for Ms Verschoor to restrict the wards that the claimant was allocated to. She had demonstrated this by deciding not to allocate the claimant to Ward 10 after February 2023 and in oral evidence to us she confirmed that she had ultimate control over ward allocation.

135. More particularly, since 2021 catering assistant had stopped being appointed to one ward so that they were, effectively, peripatetic. There were always at least 6 “floating” catering assistants including the claimant and we conclude that this number was likely to be higher in reality because of this change and would only increase with natural staff turnover. We further conclude, therefore, that there was potentially sufficient flexibility in the rota for Ms Verschoor to limit the claimant's allocation to “smaller” (i.e. less stressful and better supported) wards.

136. It also appears from the notes of the panel meeting that the claimant did say that she might reconsider reduced hours, but this was not explored by the panel. It is recorded in both the typed and handwritten notes respectively as follows (typos in original):

“NW – flex working request – submitted following advice – propsed reduction in hours, couldny support and came back with a different options, yes I know – can you explain why you declied that offer – I don’t know- scared of change –

NW – in this sitation – this would be more scary – didn’t want to change for financial reasons – yes. Finance above your health?? Yes

NW – if we looked at FW again – would you take a look at a reduction in hours. YES

NW would you consider that and work in a range of different areas. NO restricted – small wards.

KF – understand you could be assigned to any Ward – YES”

“Doesn’t know why decline doffer of flexible working scared of change

Was worried about financial implications over health

If were going to look at a reduction in ours would Joanna consider this.

Would consider a reduction in hours + working pattern.

Would work on any ward. Would need to be restricted to small wards only.

Understood when employed assigned to any ward.

Rejected flexible working as it wasn’t; for a specific ward”

137. The panel members decided to dismiss the claimant because they believed that there was nothing that the Trust could do to facilitate the claimant's return to her role. The outcome letter was sent to the claimant on 20 September 2023. The panel concluded that because the claimant would only be able to return to her job with reduced hours and to a smaller ward, that as there were no “small” or “less busy” wards, this was effectively not possible. In any event, being assigned to smaller wards was not compatible with the claimant's job role.

138. In respect of redeployment, they said:

“Unfortunately despite intervention from a physiotherapist along with support for your mental health, you still felt that you were not fit to return to work as a Patient Meals Catering Assistant unless it could be absolutely guaranteed that you would be placed on a ‘small ward’, I again explained that this was not possible due to the nature of your work and the role you undertook”.

139. The claimant was summarily dismissed with pay in lieu of notice.

140. At this hearing, the claimant remained of the view that she would not have been able to afford the reduction in hours associated with the proposed revised shift allocations that Ms Tock had proposed. She said that she was willing to take the housekeeper job of on 13.5 hours per week as that was only at the weekend and would have allowed her to take on additional work to supplement her income. **Address in conclusion reality of reduced hours**

141. The claimant was given the right of appeal and we find that she appealed by delivering the appeal to Mr Nearney’s assistant at Alderson House in accordance with the instructions in the outcome letter. The claimant heard nothing further about that. We prefer the claimant's evidence that she phoned to chase it up and left a message but heard nothing further.

Additional findings

142. The claimant raised on a number of occasions and in respect of a number of documents that they had been forged or changed by the respondent to

support their case. We reject these assertions. We have addressed some specific matters in our findings above, but in our view any inconsistencies or perceived problems with the documents were as a result of typos or a misunderstanding of the form and nature of the documents by the claimant.

143. Mr Rix submitted that the claimant's evidence was inconsistent and unreliable and should be treated with caution. We think that, in general the claimant was doing her best to be honest but in our view elements of her evidence were based on inaccurate recollections or a misunderstanding. Some of this is likely to have been down to language difficulties, and some down to the impact of the passage of time and the effect of revisiting matters repeatedly in the course of litigation. We do not make any criticism of the claimant, but where matters are supported by documentary evidence we have tended to rely on that on the grounds that we have found that the respondent's documentation is on the whole reliable.

144. The claimant gave evidence related to the delay in making a claim to the tribunal about the allegations of harassment. We make the following findings about that.

145. The claimant said, and we accept, that she had poor mental health from going off sick in February 2021. She was receiving treatment for that. However, she said – and we accept her evidence - that even so, she was perfectly capable of instructing a representative.

146. The claimant spoke to Ms Swanepoel initially in around May 2023 about potentially making a claim to the employment tribunal and asking Ms Swanepoel if she would be her witness.

147. The claimant was unclear about the dates of the alleged incidents with Ms France – initially in her claim form saying it was 6 February 2023 and later changing that to 13 February 2023 having seen some documents.

148. Some of the dates of events the claimant sought to rely on were contradicted by the rotas.

149. The claimant was unable to identify even the context in which the allegation of harassment against Ms Verschoor was made.

Law and conclusions

Time for bringing a claim

150. We consider first, the time limits for bring the claims of harassment related to race.

151. Section 123 of the Equality Act 2010 says, as far as is relevant

(1) 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 such other period as the employment tribunal thinks just and equitable….

(2) 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 on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

152. We were referred to the case of *British Coal Corporation v Keeble* [1997] IRLR 336. Factors suggested in that case to be taken into account are:

a. the length of, and reasons for, the delay;

b. the extent to which the cogency of the evidence is likely to be affected by the delay;

c. the extent to which the party sued has cooperated with any requests for information;

d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

e. the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

153. This is a helpful checklist, but we are reminded not to apply the factors slavishly. The overriding test is to balance the relative prejudice that extending time or not extending time would cause to the respondent and the claimant respectively. In almost every case it is relevant to consider the length of and reasons for the delay.

154. The respondent quite properly refers to the time limits in respect of the allegations of harassment related to race only. The other allegations of disability discrimination (under s 15 Equality Act 2020 and section 20/21 Equality ACT 2010) are in time or form part of a continuing course of conduct. All the allegations of harassment are substantially out of time.

155. The last allegation related to Adriana Verschoor on around 22 May 2023. The claimant started early conciliation on 6 December 2023 that finished on 17 January 2024 and the claimant submitted a claim on 16 February 2024. Working backwards, therefore, the earliest date of any allegation would have been in time was 17 September 2023. The last of the harassment allegations is therefore approximately four months out of time.

156. In fact, early conciliation does not operate to provide an extension where it is not started before the expiry of three months from the allegation so that in fact the claim was brought more than seven months out of time.

157. This of course only relates to the last of the harassment allegations, the other three being even earlier and even further out of time.

158. We agree with the respondent that these allegations of harassment do not form part of the continuing course of conduct with the allegations of failure to make reasonable adjustments. They concern a wholly different factual matrix and are based on a different protected characteristic. Although there is some overlap in that Ms Verschoor is said to be responsible for the last act of harassment and she also potentially had some responsibility for making reasonable adjustments, the mere fact of it being the same person is not sufficient to bring the alleged harassment into part of the same continuing course of conduct as the alleged failure to make reasonable adjustments.

159. Most importantly, in our view, the reason that is not just and equitable to extend time to bring harassment complaints is because the substantial passage of time combined with the absence of any contemporaneous records of the allegations has had a severe impact on the cogency of the available evidence. Not only is the respondent substantially prejudiced by this delay, the vagueness of the claimant's evidence is a clear demonstration of the impact in this case of the passage of time on the evidence.

160. The fact that we have been unable to make any conclusive findings of fact about the allegations because of the vagueness of the evidence is in itself reason to find that the prejudice to the respondent in having to meet these vague non-particularised allegations (which, in addition, have changed since the case management hearing to the start of this hearing) substantially outweighs any prejudice to the claimant in not being able to pursue these allegations.

161. In addition, we have found that the claimant contemplated bringing tribunal proceedings much earlier even to the extent of discussing with Ms Swanepoel whether she would be prepared to give evidence to support her. The claimant gave clear evidence that she was not prevented or restricted from obtaining advice or seeking information about bringing a claim by her mental health and we commend the claimant for her honesty in that respect.

162. Considering these particular *Keeble* factors and the balance of prejudice, in our judgement it is not just and equitable to extend time to allow the claimant to bring the claims of harassment related to race and consequently the tribunal does not have jurisdiction to hear those complaints.

163. The complaints of harassment related to race are dismissed for this reason and it is not necessary or appropriate for us to consider the substance of those complaints or the law applicable to them.

Discrimination arising from disability.

164. Section 15 Equality Act 2010 says, as far as is relevant:

(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.

165. Paragraph (1)(a) includes the following elements.

166. The respondent must have treated the claimant unfavourably. Unfavourable treatment is usually straightforward to identify and in this case it is not controversial that dismissal can be unfavourable treatment. There is no need for any comparison with another person – it is simply a question of whether the claimant was treated unfavourably and we find that she was.

167. The unfavourable treatment must be because of something arising in consequence of the claimant's disability. This part comprises of two elements – there must be 'something arising', and that something must be 'in consequence of' the claimant's disability

168. This question is an objective one – did the something *actually* arise in consequence of the claimant's disability?

169. Mr Rix did not dispute that the claimant's sickness absence arose in consequence of her disability, or that she was dismissed because of that.

170. The real issue is that the actions of the respondent will not amount to discrimination under this section if they can show that the treatment of the claimant was for a legitimate aim and that treatment was a proportionate means of achieving that aim.

171. For an aim to be legitimate it must be real, lawful and not discriminatory. The respondent relies on a number of aims as set out in the list of issues and addressed in the conclusion below.

172. In *Sott v Ralli* [2022] IRLR at para 79 and 80 the EAT said

"79. I agree also with Mr Davidson that the tribunal should in principle follow the general approach outlined in Allonby and numerous other authorities, in particular by weighing the employer's justification against the discriminatory impact. To do that, it must engage in what is called critical scrutiny, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end.

80. Mr Davidson also properly accepted in oral argument that, while the test is an objective one and not a band of reasonable responses test, the authorities also establish that the test as to whether the measure is "necessary" does not mean that the employer must show that it was the

only course open to it in order to achieve its aim. It effectively means "reasonably necessary", as judged by the tribunal".

173. Mr Rix also referred to *Bank Mellat v Her Majesty's Treasury (No. 2*) [2013] UKSC 39, in which Lord Sumption provided the following guidance on the issue of proportionality:

"the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of the fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of community…"

174. We were also referred to *Birtenshaw v Oldfield* [2019] IRLR 946 and the IRLR headnote says:

"…to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the tribunal to consider whether or not any lesser measure might have served that aim. Although there may be evidential difficulties for a respondent in discharging the burden of showing objective justification when it has failed expressly to carry out this exercise at the time, the ultimate question for the tribunal is whether it has done so. The tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly. It does not, however, follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or otherwise caused him to take a different course. That approach would be at odds with the objective question that the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker. Whilst justification under s 15(1)(b) has to be established at the time when the unfavourable treatment was applied, the tribunal when making its objective assessment may take account of subsequent evidence"

175. We must, therefore, balance objectively the discriminatory impact of the respondent's decision against the legitimate aims of the respondent, having some regard to the judgment of the decision maker at the time. This necessarily involves considering whether there was alternative, less discriminatory step that could have been taken.

176. In our judgement, the aims of which the respondent seeks to rely are legitimate. It is obvious that, to summarise, the efficient and effective delivery of public service for the purposes of supporting and maintaining patient safety in hospital by the provision of a full and regular complement of staff is a legitimate aim.

177. Dismissing the claimant in the circumstances that the respondent did, however, was not a proportionate means of achieving the legitimate aims set out above in the list of issues.

178. This question overlaps to an extent with the claim of a failure to make reasonable adjustments and we refer to our findings on that below. In our judgement, however, the decision to dismiss the claimant in circumstances where she had been inadequately supported through the redeployment process and in circumstances where the claimant was in any event paid three months in lieu of notice but could otherwise have remained on the redeployment register for those three months with no obvious detriment to the respondent (or, at least, none that we were made aware of) was not proportionate.

179. In considering whether the discriminatory act is proportionate we must consider whether something less discriminatory could have been done instead. This is an objective test but we must have some regard to the knowledge, experience and decision-making reasoning of the respondent in deciding whether the action was a proportionate means of achieving a legitimate aim. We have found that the dismissing officers did not give proper consideration to the combined potential adjustment of shorter hours and smaller wards, and in our judgement the claimant was not properly supported through the redeployment process and that was not well acknowledged by the dismissing panel.

180. Making further offers of redeployment, but this time properly supported by HR and/or the claimant's manager as required by the respondent's policy, would have been less discriminatory step.

181. We do have some regard to the respondent's views on this but in this case that is of little assistance to the respondent because their policy on redeployment clearly sets out the way in which they consider that a redeployee should be supported and they have failed to comply with that. If the respondent in its policy considers that it is proportionate to provide a proper level of HR/management support during redeployment, then in our view a failure to comply with their own policy requirements must mean that the decision to dismiss the claimant without going through that process was not proportionate.

182. Finally, the actions of the respondent will not amount to discrimination if it did not know and could not reasonably have been expected to know that the claimant had the disability on which the claim is based. The respondent does not dispute that they knew the claimant was disabled at the relevant time.

183. We note, for the benefit of facilitating agreement between the parties on remedy if possible and/or managing expectations, that having heard the claimant's evidence about her need for a certain level of income and the restricted circumstances that she was prepared to accept by way of working shifts the tribunal may be entitled to make a finding at the remedy hearing that an extension of the redeployment period or trial period would not have been successful, and that the claimant may well have been dismissed at a

later date in any event, or would have been dismissed then had the respondent applied the redeployment policy properly.

184. If the tribunal does make such a finding at the remedy hearing, this is likely to limit the losses the claimant has experienced by the respondent's discrimination and consequently limit her compensation.

Failure to make reasonable adjustments

185. Section 20 of the Equality Act 2010 says, as far as is relevant:

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.'''

186. A provision, criterion or practice (PCP) must have an element of repetition about it, or at least the potential to be repeated and there must be evidence from which we can infer the existence of a practice where it is in dispute.

187. The claimant relies on two PCPs in this case. The first is requiring the claimant to work on large wards which involves requirement to walk longer distances and requirement to work under pressure.

188. In our judgement, the respondent did have this PCP and it was applied to the claimant. Although it was the respondent's case that all the wards were the same physical size so that there was no difference, we have found the fact that some wards were, in reality, busier because they had more patients and more beds and varying levels of staffing. The fact of more beds with more patients in would necessarily mean more walking for the claimant as she would be required to walk backwards and forwards more often with meals, drinks et cetera. However, we have also found that the requirement to work on the large (or more heavily populated) wards also carried with it a high degree of pressure for the claimant and we refer to our findings of fact about thack.

189. The second PCP is requiring the claimant to work within an environment of conflict (the claimant was required to work with Michelle France).

190. We find that this was not a PCP that was applied to the claimant. It is correct that there was an environment of conflict briefly between the claimant and Michelle France, but that arose from no more than two incidents in January and February 2023 and once Ms Verschoor was made aware of that conflict the claimant no longer had to work on Ward 10. It could be that moving the claimant from Ward 10 meant that the respondent had taken reasonable steps to avoid any disadvantage, but actually the fact

that this was a one-off occasion which the respondent took quick and effective steps to resolve demonstrates to us that it did not have the characteristic of repetition or potential repetition required for a PCP, in that as soon as the respondent was aware of the environment of conflict they change the working arrangements.

191. That reason alone the second claimant failure to make reasonable adjustments in respect of having to working environment of conflict is unsuccessful and is dismissed.

192. Section 21 – Failure to comply with duty says

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

193. In our judgement the PCP of having to work on large and stressful wards did put the claimant at a particular disadvantage because of her disability of fibromyalgia compared to people who did not have that disability.

194. The additional physical effort and mental pressure arising to the claimant from having to work on the busy awards did exacerbate her fibromyalgia symptoms. That can be seen from the fact that when the claimant was required to work long days on these wards on a number of occasions she immediately went off sick and this conclusion is supported by occupational health. Although large wards are likely to be stressful and difficult for any person, medical evidence supports the contention that this is more so for people with fibromyalgia and it was so for the claimant.

Reasonableness of adjustments

195. The issue in dispute is really the reasonableness of the proposed adjustment. Once a potentially reasonable adjustment has been identified, the burden of showing why that proposed adjustment is not reasonable falls to the respondent.

196. We refer to the EHRC Employment Code. That says, at paragraph 6.28 and 6.29

"6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

• whether taking any particular steps would be effective in preventing the substantial disadvantage;

• the practicability of the step;

• the financial and other costs of making the adjustment and the extent of any disruption caused;

• the extent of the employer's financial or other resources;

• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

• the type and size of the employer

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case".

197. It is settled that an adjustment can include redeploying an employee to a different job (*Archibald v Fife Council [2004] ICR 954*) but an employer is not required to create a new job and nor are they required to appoint an employee to a role that they cannot do (*Wade v Sheffield Hallam University* (UKEAT/0194/12)), although it may be reasonable to adjust some of the criteria if the claimant can meet many, but not all, of the essential criteria.

198. It is not necessary for the proposed adjustment to have a very high degree of certainty in fully alleviating the disadvantage. We refer to the case of *Romec Ltd v Rudham* UKEAT/69/07. The EAT in that case said that the correct question for the Tribunal to ask itself what is "the extent to which the step would prevent the effect in relation to which the duty is imposed". In that case, the proposed step was extending a rehabilitation programme. The EAT said that the question for the tribunal was whether extending the programme would have a *real prospect* of allowing the employee to return to their substantive role.

199. The adjustments that the claimant contends for either moving the claimant to smaller wards with up to 17 to 19 patients and secondly redeployment claimant.

200. In our judgement moving the claimant only to smaller wards would not have alleviated the disadvantage. The evidence that we saw, and we refer to our findings of fact, was clear that the combined factors of long shifts *and* large wards had an adverse impact on the claimant. It is telling that the last time the claimant went off sick she had worked a number of shorter shifts without issue including on busy wards but once she worked a full, long shift she immediately had an exacerbation of her fibromyalgia and could no longer continue to work.

201. By the time of the second occupational health report, it was clear that the claimant was not fit to work long shifts or in large wards and the reasonable adjustment of just reducing the size of the wards would not have been, in our judgement, at all effective to alleviate the disadvantage from having to work on large wards. It required a combination of smaller wards and shorter shifts.

202. The claimant was not, prior to the dismissal hearing, prepared to accept shorter shifts/shorter working hours for her own financial reasons.

203. By the time of the dismissal hearing, however, the claimant was actively seeking redeployment. In our judgement it was only redeployment that would have alleviated the disadvantage of experiencing an exacerbation of fibromyalgia. The claimant took some steps to identify alternative employment using the respondent's redeployment process but these steps were unsuccessful. Part of the reason that they were unsuccessful is because the respondent failed to apply its own redeployment policy and provide the claimant with sufficient, or in fact any, HR or managerial support in that process. Such support is likely in our experience to have included exploring the claimant's transferable skills, helping the respondent understand her Polish qualifications and helping identify suitable vacancies. We would also expect that the claimant would at least be helped to understand the relationship between the respondent and other trusts and whether or how she could be supported to apply for jobs in other trusts.

204. Having failed to properly support the claimant through the redeployment process, rather than then dismissing her, the respondent ought to in fact have extended the redeployment process, but this time providing the proper amount of support to give the claimant a real opportunity to alleviate the disadvantage arising from her existing role.

205. The respondent failed to do that in circumstances where, as discussed above in relation to the section 15 claim, the claimant was in any event paid in lieu of notice and there is no obvious reason why the respondent could not have continued to help facilitate redeployment for a period equivalent to the notice period for which the claimant was paid anyway.

206. Paragraph 20 of Schedule 8 – Lack of knowledge of disability, etc provides that

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
>
> (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

207. Although there is some similarity in respect of knowledge for section 20 and section 15 claims, this requires additionally knowledge of whether the disability is likely to put the claimant at a disadvantage,

208. in Secretary of State for the *Department of Work and Pensions v Alam* [2010] IRLR 283, [2010] ICR 665, the EAT held that the correct statutory construction of s 4A(3)(b) involved asking two questions;

> (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

If the answer to that question is: 'no' then there is a second question, namely,

(2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

209. We have found as a fact, and in fact it is obvious, that the respondent was well aware both of the claimant's disability and by the time of her dismissal the disadvantage that caused to her. This was set out clearly in the occupational health reports and by the claimant in her correspondence and at the dismissal hearing.

210. The claimant's assertion in the hearing at which she was dismissed that she would, effectively, remain off sick while certificate by her GP to do so was not, in our judgment, unreasonable and whether she would have come back to work is a matter relevant to remedy (for this claim and the claim under section 15) to be decided at the next hearing.

211. In our judgement, therefore, the respondent has failed to make reasonable adjustments in respect of the need for the claimant be redeployed. For these reasons the claim of a failure to make reasonable adjustments is successful and is upheld.

212. However, we repeat our cautionary view are set out in respect of the section 15 claim that it is likely to be arguable that there is far less than 100% chance that an extended redeployment would have been successful for the claimant. We have regard to the limitations the claimant put on the work that she was prepared to accept and be extent of the skills that the claimant was able to demonstrate.

213. An adjustment does not have to have a very high chance of being successful to be required to be considered by the respondent, it is required only to have some prospect of success. We think there was some prospect that an extended redeployment would have been successful but we warn the claimant that it is entirely possible that we will find at the remedy hearing that there was a possibility that the claimant would have been dismissed for a non-discriminatory reason at some point, and possibly very soon after the date on which she was dismissed anyway. If we do make that finding, any remedy is likely to reflect that.

Employment Judge Miller

Date: 23 June 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
23 June 2025

FOR EMPLOYMENT TRIBUNALS