



EMPLOYMENT TRIBUNALS

Claimant: Mr Ian Wroe

Respondent: Barchester Health Care Limited

Heard at: Liverpool

On: 30 March–2 April 2026

Before: EJ Aspinall

Representation

Claimant: In person

Respondent: Mr Brown, Solicitor

JUDGMENT having been given on 2 April 2026 and a judgment sent to the parties on 28 April 2026 and written reasons having been requested in accordance with Rule 60(4)(b) of the Employment Tribunals Procedure Rules 2024, the following reasons are provided:

REASONS

Background

1. By a Claim Form dated 18 June 2024 the claimant brought complaints of disability discrimination failure to reasonably adjust and harassment. He relied on diabetes as his disability. The respondent defended the complaint. The matter came to case management hearing before EJ Aspinall on 7 February 2025 and again before EJ Slater, because of the volume of correspondence and applications, on 7 October 2025. Applications to amend to include historic failures to reasonably adjust were refused.
2. A complaint of victimisation was added by consent.

Opening discussion

3. The case had been listed in accordance with Presidential Guidance to be heard in person. There was no judge available at Manchester in person and the parties agreed with the decision made by Regional Employment Judge Franey that it

was in the interests of justice to convert the hearing to video rather than postpone.

4. During the hearing the respondent agreed to finalise and reformat the List of Issues from EJ Aspinall's case management order of 7 February 2025 and to include the claimant's complaint of victimisation in that List.
5. The litigation had been difficult with case management order compliance dates missed and the parties making applications and submissions about each other's conduct. Everyone agreed that those matters were not relevant to the liability issue and would be put aside for this hearing with their respective positions reserved on costs later.
6. Following detailed discussion about outstanding disclosure, the claimant withdrew any outstanding applications, specifically withdrawing his previous insistence that he be provided with minutes of a "10 at 10" meeting. The point of those minutes being that they would show that the respondent ought to have conducted a return to work interview during the week commencing 12 April and did not do so. The respondent was content to agree as a fact that it did not conduct a return to work interview with the claimant that week avoiding the need for the disclosure of any minutes that recorded respondent senior management telling all managers and shift leaders that such meetings must be carried out. The claimant withdrew any outstanding applications for disclosure. He understood that would mean that if he did not win and wanted later to seek to appeal he could not say that he had not had a fair hearing because there were documents he had needed to include that were not included. He explicitly agreed at 10.53 to withdraw any applications and to proceed based on the final bundle of 392 pages. He said he can have a fair hearing with the documents in that bundle and didn't need anything else.
7. The respondent withdrew its outstanding strike out application based on the claimant's unreasonable conduct of proceedings. It agreed that the case was ready for final hearing.

List of Issues

8. The following was the final agreed List.

- 1) Disability

Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about?

The respondent concedes that the claimant has a qualifying disability in respect of diabetes, and that it had knowledge of this fact at all material times in respect of the claims.

- 2) Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

- 2.1) Failure to reasonably adjust – rostering

- a) Did the respondent apply a PCP

PCP requiring the claimant to work more than two consecutive shifts

The claimant relies on the following; on the following occasions the claimant says the respondent failed to reasonably adjust in that it rostered him outside of the agreed working pattern:

- i) FTRA:A the claimant was rostered to work 19, 20 and 22 January 2024.
 - ii) FTRA:B the claimant was rostered to work 18, 19, 20 and 22 February 2024
 - iii) FTRA:C the claimant was rostered to work 16, 17, 18, 19 20 March 2024
- b) Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant experienced cumulative fatigue which would leave him bedridden?
- c) Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
- d) What steps could have been taken to avoid the disadvantage?
The claimant suggests:
- i) abide by the recommendations of the OH report so as not to roster the claimant more than two consecutive shifts and always have a gap equivalent to the shift length before his next shift.
 - ii) consult the claimant about shift allocations
 - iii) give the claimant adequate notice of shift allocation i.e. more than 24 hours so that he could manage his condition to avoid cumulative fatigue.
- e) Was it reasonable for the respondent to have to take those steps and when?
- i) The claimant, on these occasions, managed to swap shifts with colleagues so as to avoid working in excess of two consecutive shifts. The claimant's complaint is about the respondent's rostering in breach of their reasonable adjustment agreement and he refers to the relevant background circumstances being given late notice of his shifts so that, for example, on Friday, 19 January 2024 he found out at 2:27 PM that he was required to work at night and only found out

when he attended work that night he was also rostered for 20 and 22 January. This late notification put him under increased pressure trying to agree shift swaps with colleagues.

- f) Did the respondent fail to take those steps?

2.2) Failure to reasonably adjust – excessive workload

- a) Did the respondent apply a PCP

The claimant relies on the following:

PCP – Giving the claimant excessive workload

- i) FTRA:D the claimant was given excessive workload (having to manage and do medication rounds on two units) on 22 April 2024
- b) Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant experienced cumulative fatigue which would leave him bedridden?
- c) Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
- d) What steps could have been taken to avoid the disadvantage? The claimant suggests:
- i) not require the claimant to run 2 units nor carry out two medication rounds as the only nurse on duty.
 - ii) Provide the claimant with a manageable workload in accordance with this OH report

3. Harassment related to disability (Equality Act 2010 section 26)

- a) Did the respondent do the following things:

H1. No reply to the claimant's email of 7 April 2024 protesting about excessive workload – Accepted by respondent that no email reply was sent.

H2. No return to work interview during week of return from 12 April 2024 or thereabouts – Accepted by respondent that no formal return to work meeting took place on or around 12 April 2024 with the Claimant.

H3. General manager Kim Whelan said that the claimant's decision to walk off shift when he was required to perform excessive workload including carry out two medication rounds on two units was a "pretty poor show" on 22 April

H4. Angela Jones HR email on 22 April 2024 threatening a referral to NMC for refusing to continue the shift.

H5. Elizabeth Brotherton using significantly similar words of threat of referral to NMC as those used by Angela Jones in a letter to the claimant on 22 April 2024.

H6. In email 22/04/24 to M Harker the Claimant expressly requested a complaint be raised for “failure to accommodate my disability”. There was no response to this complaint request.

H7. In follow up email from A Jones to the Claimant on 23/04/25, Ms Jones again repeated the opinion that the Claimant had abandoned shift and left the service unsafe.

- b) If so, was that unwanted conduct?
- c) Did it have the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant
- d) The Tribunal must take into account
 - i) What was the perception of the claimant as to the effect of the conduct,
 - ii) What were the other circumstances of the case
 - iii) was it is reasonable for the conduct to have that effect
- e) Did the unwanted conduct relate to disability ?

3) Victimisation (Equality Act 2010 section 27)

- a) Did the claimant do a protected act as follows:
 - i) raising a complaint on 22 April 2024 about a failure to accommodate his disability? – Accepted by the Respondent as a protected act.
- b) Did the respondent do the following things:
 - i) Threatening to initiate an investigation and refer him to the NMC (Angela Jones’ emails of 22 April 2024)
- c) By doing so, did it subject the claimant to detriment?
- d) If so, was it because the claimant did a protected act?

4) Remedy for discrimination or victimisation

- a) Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- b) What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- c) If so is it just and equitable to increase or decrease any award payable to the claimant?
- d) By what proportion, up to 25%?

Adjustments

9. The claimant has diabetes and was recently diagnosed in August 2025 with ADHD. The judge went through his ADHD report with him (it was agreed it could be copied to the respondent) and identified factors that might affect the hearing. In order to achieve best engagement and evidence the Judge acknowledged, and everyone agreed:
- a. The claimant can have difficulty sustaining attention. The Tribunal will take a break after 45 minutes in cross examination.
 - b. The claimant can struggle to listen and retain focus. Mr Brown will repeat questions and use signposting phrases such as *I'll ask that again* or *this is your opportunity to answer this point* to support the claimant.
 - c. The claimant can be forgetful in relation to routine such as taking medications but confirmed that he takes his medication in the evening and does not need any adjustment to the hearing.
 - d. The claimant can experience a negative impact after eating (become sluggish and find it harder to concentrate). It was agreed he will manage his food and drink during the normal tribunal timetable. The claimant asked if he could be allowed to consume coffee intermittently during the hearing time as he finds this stimulant helps with management of his ADHD. In the absence of medical evidence to support his contention that coffee aids his management of ADHD the Judge did not allow coffee drinking during the hearing. The Tribunal will take breaks ideally every 45 minutes during cross examination and otherwise take the regular breaks of any tribunal hearing. If the claimant is finding it difficult to manage his coffee consumption and eating and drinking in relation to diabetes, ADHD and his ability to give best evidence generally, then it was agreed he would keep the Judge informed and further adjustment could be considered.

- e. The claimant can over talk, interrupt and seek to focus the conversation on himself. Everyone agreed not to be offended by any over-talking, to wait patiently and use signpost words *thank you may I bring you back to my question* to support the claimant in remaining focused.
 - f. The claimant can feel overwhelmed in managing an internal narrative as well as what's happening in the hearing. It was agreed that he would say if that's the case and an extra break can be taken.
10. During closing submissions the claimant said that if he had realised that he could have sent a written closing submission document he would have done so. There had been discussion at close of evidence about format of closing submissions and the options had been laid out to the parties. The Tribunal accepts that the claimant genuinely missed that point. He said his "mind had been blown" by the written document and Mr Brown's oral presentation of it. Fifteen minutes reading time was allowed before Mr Brown presented and a further 45 minutes was granted to the claimant at his request to allow him time to assimilate what had been said before making his submission. He indicated that he would try to do a written submission like Mr Brown's in that time. The Judge impressed upon him that format did not matter, that she could take a note of what he said. He already had a written set of notes for himself and he could read those out and the Judge would make a note. It was a matter for him as to how to use his extra 45 minutes.
11. It was agreed that if the claimant submitted that Ms Harker was not credible he would need to say why and specify the points on which she should not be believed. This guidance had been given during his cross-examination of her, that he should put to her the points on which he says she should not be believed. It was not clear from cross-examination what those points were.

Documents

12. There was an agreed bundle of 392 pages including the index. It was available electronically. The page numbers on the face of the document matched the numbers electronically.
13. The claimant had prepared a 62 page witness statement and the supplementary Erratum Statement which set out some small corrections to his first statement.
14. There was a five-page witness statement from Ms Harker.

Oral evidence

15. The Judge heard oral evidence from the claimant. He was careful to give answers that he was comfortable were completely accurate. He used the words correct and incorrect both when answering and when asking questions.
16. Ms Harker gave evidence. She was the Regional Director. She had not set the rosters, not determined workload and had not been present on site on 22 April 2024. She had had email and telephone communications with Ms Whelan, the manager on site and Ms Jones, the HR Adviser on 22 April 2024. She said it was Ms Jones who had decided not to proceed to investigate the claimant's conduct

in leaving shift on 22 April 2024 and who had decided not to refer the claimant to NMC, despite having indicated that as a possible outcome of a forthcoming investigation.

17. Ms Whelan remained employed by the respondent but was not called.
18. Ms Jones has left the respondent's employment and was not called.
19. The Tribunal attached more weight to the oral evidence of the claimant and the contemporaneous emails of Ms Harker, Ms Jones and Ms Whelan than to Ms Harker's accounts of her perceptions and beliefs as to Ms Jones and Ms Whelan's purpose or effect on 22 April 2024 as set out in the reasoning below.

The Facts

20. The claimant started working for the respondent as a peripatetic nurse in December 2019. On appointment he completed a Medical Questionnaire in which he disclosed his Type II diabetes. He worked 36 hours per week and usually worked across three 12 hour long shifts per week or six per fortnight. He worked at different care homes within the group typically on short to medium term postings to cover nurse shortages.
21. In January 2021 he contracted COVID-19. When he returned to work he experienced fatigue. General Manager Ms Scott agreed to roster him no more than two day shifts in a row with a minimum of two days off after working two days on, to manage his fatigue on return from COVID. In April 2021 he started working night shifts at Dovedale Court under general manager Ms Watson. He found the night shifts caused extreme fatigue. He detailed the impact of the night shifts on him in an email dated 2 May 2021 to Ms Watson. He met with her and adjustments were agreed and recorded in the minutes of the meeting which were sent him on 30 May 2021. Those adjustments, no more than two consecutive shifts with then a two day rest period before next shift, continued in place when he resumed working 36 hours per week.
22. There were occasions in 2021 when the claimant was required to do the work of two nurses. There were occasions when rosters were produced that required him to work shifts that did not meet his agreed adjusted pattern. He spoke to managers and colleagues and got changes agreed.
23. The situation continued, that he was rostered outside of his agreed adjustments. In December 2021 he was rostered outside of his agreement and tried to work the rostered pattern. This left him fatigued and unwell so that he had to take a day's sickness absence for his next rostered shift, 27 December 2021, and lose pay. He protested about this to Ms Harker, Regional Director, specifically referencing rostering and his disability related fatigue. He asked for pay for his missed shift. His request was denied by Ms Harker in January 2022 and he was given fewer shift hours the following week. He brought a grievance.
24. He sought disclosure of documents, by way of subject access request, on his file that he believed existed and would evidence the agreement for his adjustments. He was told they did not exist.

25. Following a hearing on 2 February 2022 with General Manager Ms Nicholson his grievance about failures in rostering to accommodate his disability was partially upheld.
26. In 2022 he was referred to OH. He had a telephone assessment on 25 April 2022 and received the report on 26 April 2022. It set out that he had diabetes, experienced fatigue and *his shift pattern at work does impact on his fatigue ...is aggravating his fatigue symptoms.....especially after working two consecutive shifts or two shifts without having had adequate rest.* It recorded *he experiences hyperglycaemia symptoms such as blurred vision, impaired concentration, thirst and frequency of urine but is able to manage it at work depending on his shift pattern and if he is able to pace himself at work.*
27. The report cited *heavy and increased workload, irregular shift pattern and lack of adequate rest in between shift patterns* as aggravating factors.
28. It advised that management consider:
 - a. Regular shift pattern of 2 days in a row and 2 days off or 1 day in a row and 1 day off to allow adequate rest in between shifts
 - b. Same pattern for night shifts
 - c. Flexibility with working pattern in case he needs to leave early due to fatigue when necessary and when it can be facilitated or supported
 - d. being mindful of regulating night and day shift pattern changes
 - e. allowing him to pace his work activities and take micro breaks
29. Following the report he was largely rostered in accordance with its recommendations and any mis-rostering was corrected locally. In August 2022 he raised concerns about understaffing at Dovedale Court so that he had had to work a 24 hour shift. He requested reasonable adjustments so that this would not happen again but got no reply.
30. After August 2022 the rostering largely met his requirements with again any misrostering being corrected in response to his approach, locally. He worked in two set locations Skipton and Dumfries, travelling and staying in a motor home at the expense of the respondent.
31. The claimant experienced stress at work after raising a compliance issue in November 2023 and had a week off sick. He returned to work from 13 November 2023 and following intervention by Ms Harker he was based, with his agreement, at Glenroyd in Blackpool, about ten minutes drive from his home under the management of Sonia Smith. The claimant had an induction meeting with Ms Smith and set out his disability, its impact and work roster adjusted patterns. The claimant was then off sick with fatigue and subsequently a chest infection.
32. He was ready to return by 26 November 2023 but soon became fatigued again. There was friction between the claimant and Ms Smith including him requesting

not to be contacted other than by email after a heated telephone exchange. He asked about temporary adjustments to his hours but was told that would require a new contract. Any immediate change to his hours would require him to use annual leave. Ms Smith then sent a return to work plan which included the claimant using annual leave to achieve a phased return. The claimant confirmed he could work 36 hours per week, three single shifts with gaps in between and asked for sight of rosters.

33. He then found a new job and in January 2024 told Ms Harker that he would be leaving but was not giving formal notice yet. On 7 January he was ill and admitted to hospital overnight. The claimant was fit to return from 19 January 2024 for one or two shifts. He contacted the respondent by email on 15 January to say to say *Can I arrange for return to work end of this week ? Friday and Sunday ideally. Then back to 3 nights the following week though I'm thinking best to keep them split for now if that's ok.*
34. By the morning of 19 January 2024 he had not had confirmation of which shifts he would return to. He emailed asking Ms Smith for his working pattern. He got no reply and was later that day told he should take annual leave. He then had an email at 14.27 saying he could work that night and the next; Friday 19 and Saturday 20 January 2024. He had around 5 hours notice of that shift on the Friday. He attended on Friday and saw he was also rostered for Monday 22 January 2024. (FTRA A). He swapped shifts with a colleague so as to maintain his two on two off adjusted pattern. He did not work three consecutive shifts. He did not work two shifts without a two shift gap before his next shift.
35. On 8 February the claimant chased for notice of his shifts for the week commencing 12 February 2024. He was offered Monday, Saturday and Sunday. He declined the Monday as he was already working Friday and Saturday so needed a two day gap (FTRA B). Shifts were agreed with the respondent.
36. On attending work on 18 February the claimant saw that he had not been allocated shifts for the week commencing 19 or 26 February 2024. He contacted the respondent and shifts were agreed.
37. When he arrived at work on 25 February 2024 he saw that he had been rostered for three consecutive nights. He also saw a roster giving him a run of five consecutive nights. The claimant became tired of not being given notice of his shifts, not being rostered to meet his needs and having to contact the respondent to chase up allocations. Those things were a source of anxiety to him as it made it almost impossible for him to plan for his rest and to manage fatigue. He wrote to Ms Harker on 27 February 2024 to say
Part of me is aggravated part of me just cant be bothered.... I'll keep chasing them down til I get bored of doing that
38. He was at this point fatigued and becoming disengaged at having to continually pursue the implementation of adjustments. The shifts were changed. He did not have to work more than two consecutive shifts.
39. The claimant had annual leave booked from 4 March and was due to return on

11 March 2024. Before going on leave, on 3 March 2024 he checked his rosters. His shifts for week commencing 11 March were manageable, 11th, 16th and 17th March. For the week commencing 18th March though he was rostered three consecutive nights 18th, 19th, 20th March. That meant he was due to work 16,17,18,19 and 20 March, five consecutive shifts (FTRA C) He emailed Ms Harker on 3 March and raised

- Repeated failures to provide timely rosters
- Failures to roster him in accordance with the two on two off adjustment
- Loss of pay from insufficient hours having been rostered
- And a failure to comply with the duty to make reasonable adjustments,

40. He set out on 3 March 2024 in his email to Ms Harker the recent history of publication of rosters that did not meet his agreed reasonable adjustment working pattern. He set out that he did not think it acceptable that Ms Smith had suggested he take annual leave so as not to have to attend a shift she had rostered him for in breach of his working pattern. He set out how late notice of shifts was an issue for him and how late changes meant that he was under his contracted hours. He said

Poor rostering practices represent a failure to comply with a duty to make reasonable adjustments.

41. On 6 March 2024 whilst on annual leave he pressed for site of rosters for his return. On 7 March he contacted Regional Managers to ask for rosters by 8 March. On the morning of 8 March 2024 he rang Ms Harker to protest about the rosters being inconsistent with his reasonable adjustment working pattern. He was finding it impossible to plan for rest.
42. Ms Harker suggested that he move homes and offered him a move to a home in Cumbria. He wasn't keen. She fixed his rosters so he had no more than two consecutive shifts but this meant he lost a shift for the week commencing 18 March. He was so dissatisfied with the uncertainty and loss of pay that he spoke again to Ms Harker about moving homes. The proposed move was to a home called Newlands in Cumbria, a two hour drive from the claimant's home. He was finding it so difficult to manage his fatigue with short notice of rosters and rosters that did not meet his adjusted needs close to home, that he consented to the move away from home, in the hope that it would bring a fixed working pattern and the certainty he needed to manage his condition.
43. It was agreed the claimant would be paid up to date and would take a week's leave before beginning at Newlands on 18 March. Shifts were 8am to 8pm with the requirement that staff attend 15 minutes earlier for handover.
44. The claimant emailed the manager at Newlands on 11 March 2024 before taking up the role there. He introduced himself as the peripatetic nurse and set out his disability related adjustments. He offered to attend on 17 March 2024 for an orientation meeting before starting on shift on 18th. Newlands had three units :

Lakelands, Lonsdale and Elderly Frail. Each unit had one registered nurse for its day shifts and, at night, one nurse covered Lakelands and one covered Lonsdale and Elderly Frail. The claimant was to work day shifts so should have had just one unit to supervise and another nurse on site for each of the other two units.

45. When he attended on 17 March 2024 no one was expecting him. The manager Ms Whelan later told the claimant that she had forgotten to tell anyone he was coming.
46. On 18 March the claimant attended his day shift and found he was the only nurse able to administer medications across Lonsdale and EF. There was another nurse present but with restrictions on his practice. The claimant was required to administer medications for two units. When the medication rounds were running late he asked for help so Ms Whelan assisted. The claimant worked on EF unit for the following two weeks. On 24 March the claimant saw the roster for April. On 31 March 2024 he gave formal three months notice of resignation.
47. On 2 April the claimant attended to discover he was the only nurse and was expected to run both EF and Lonsdale. At 9.30 the claimant told Ms Harker that working alone across two units was unsafe. Ms Whelan came to assist but only stayed for about half an hour. The claimant's workload was heavy. He was unable to pace himself or take micro-breaks to manage fatigue.
48. Two incidents, one of a resident leaving the building and the other a fall with a head injury, occurred on 2 April and despite the emergency buzzer being sounded the other two nurses on site, managers Ms Whelan and Ms Moffat, did not attend so the claimant was left to deal with the incidents. He instructed a HCA to go and find the managers. They then attended and commented that as the fall had not involved anyone else they did not need to complete safeguarding paperwork. The claimant worked beyond his finish time to 9pm, had not been able to manage his eating and drinking well on that busy shift and was exhausted. He spent most of 3 April 2024 in bed recovering before returning to work on 4 and 5 April 2024. By Friday 5 April he was extremely fatigued on shift. He went home that weekend and was too fatigued to return to make the two hour drive to work on Sunday night for the Monday morning shift so rang in sick. His next shift was Friday 12 April,
49. On 7 April he emailed Ms Harker (stating that the content was most relevant to Kim Whelan and Lisa Moffat, managers at Newlands), details of his condition and reasonable adjustment. He set out adjustments for shift patterns to pace his week and micro breaks to pace his day.
50. He said the fact that he had effectively been working as 2 nurses on the Tuesday 2 April shift meant that he was fatigued and needed longer recovery time so that by Friday 5 April he was exhausted and did not recover in time to do the 2 hour drive back on the evening of 8 April, the Sunday night. He said *. It's only likely ever okay to cover two units with one nurse if there is a second person completing morning med all of the units..... If we can't get a second for nursing then perhaps a manager or any meds competent staff doing Lonsdale from 830 to 10 would be the next best option and not resorting to leaving one person to do all the meds for two units from 8 AM to 1145. Even still, for me and my disability*

may not be okay to cover two units at all single-handedly

51. His email gave details of the duties the claimant had had to perform and the difficulties he had experienced. It explained that by the Friday lunchtime he was needing an increasing number of micro-breaks to be able to cope. He described himself as an irritable mess by the end of the shift on Friday.
52. He said that as a result of cumulative fatigue brought on by the extraordinary working conditions imposed on he had missed out on his Monday 9 April shift and would like that sick shift paid in full. He said that this was not the first time he had been left to administer both units medications. He said

to prevent future fatigue and also reduce risk of medication errors I will refuse to take keys from more than one unit in the morning. I will keep keys safe until someone comes if necessary but will not perform the administration of medication for more than one unit in the morning.... The responsibility for ensuring safe systems of medication administration and overall staffing is not mine.

53. He returned on 12 April 2024 and at a meeting heard Ms Whelan tell managers how imperative it was that return to work interviews be completed on the first instance of return to work. 12 April was the claimant's return to work after absence on 9 April but he did not have a return to work interview.
54. On 15 April 2024 Ms Whelan emailed the claimant about swapping weekend shifts from Saturday and Monday to Sunday 21 and Monday 22 April which he agreed to do.
55. On Sunday 21 April when the claimant arrived at work he was told by his nurse colleague Judith that she had worked the 20th and had had to cover two units, being the only nurse. That evening, 21 April no night nurse arrived so Judith offered to stay, working a 24 hour shift to ensure cover and allow the claimant rest before his day shift on the Monday.
56. The claimant arrived on Monday 22 April 2024 at around 7.30 am ready for handover at 7.45 and to begin his shift at 8am. No second nurse arrived. He was not told of any cancellation of any booked nurse. He understood it to be expected that he would cover two units, as Judith had done on 20th. He began the EF medication rounds. He was concerned at the volume of work and rang Ms Harker at 08.52 but got no response. Ms Whelan arrived around 9am and went to Lakeland but did not come to see the claimant who was being expected to cover EF and Lonsdale. He went to see her at 9.15. He explained, as per his email of 7 March, that he was not able to cover two units because of his disability. He said he needed support. He put the Lonsdale keys on the desk. Ms Whelan, a registered nurse, did not offer to help. She said "what are they for" referring to the keys. He said they were Lonsdale keys and used the words "I won't do both". Ms Whelan shut the office door. She said she was trying to find cover and said this was a "*pretty poor show that you won't do meds for Lonsdale*". He felt insulted that she criticised him for not doing both when he had set out in his 7 April email that this was not something he could do without adverse effect on his health. He then put the medication rounds keys for both units on the desk and

said “in that case I am not staying”. He gave a medical handover and left at 9.30.

57. At 13.21 he emailed Ms Harker, Regional Director to set out what had happened that morning. He said *I am absolutely appalled at the lack of appreciation for my disability and understanding its impact not only on my personal life but also the risks this presents to residents when placing me under pressure to work the role of 2 nurses when I am already working under reasonable adjustment.* He set out the adjustments from his OH report that he said had been in place for over 2 years without issues. He said

I request that the nature of this incident be treated as a formal complaint against Kim Whelan in her failing to accommodate my disability.

He requested a written apology, compliance with adjustments going forward and payment for the 22 April shift. He stated his willingness to return to work on Friday 26 April.

58. Ms Harker spoke with Ms Whelan and then with Angela Jones from HR. Angela Jones emailed Ms Harker at 15.49. She said

So this gets a bit trickier from when we initially spoke earlier today as you didn't mention he had a disability and claimed he had walked out because of a disability and lack of support. Do we know that disability is and what adjustments we have put in place for him etc ?

59. Ms Harker replied at 15.52.

He didn't at the time that's why

#he has pulled this card time and time again – can we just not process as he has requested and get shot – he was the only RN yet managed to go for 3 cigarettes when he only started at 8am

60. At 16.14 Ms Jones wrote to the claimant. She said she had been forwarded his email following the incident. She said

I understand from your Regional Director that you have elected to leave the service unsafe and at risk by abandonment of your duties earlier today which will need to be investigated fully and upon doing so may result in a referral to the NMC.

I am unclear as to why you feel you cannot complete medication on both units and that is down to your disability as I can see no mention of this being an adjustment that has been suggested in your occupational health report which I have reviewed this afternoon – perhaps you could explain

Could you please confirm back to me by return your position and if you are wanting us to take your email as your formal resignation.

61. The mention of a referral to NMC was a source of anger and distress to the claimant. He had been subjected to an NMC investigation in 2006 and although

his name had been cleared he had found the process stressful. He was confident that if referred there would be no finding against him but he did not want to have to go through that process again.

62. Ms Jones then wrote at 16.34 to say she had not been aware he had already resigned and was on notice. There were then discussions and it was agreed that the claimant would not return to work and would be paid in lieu of notice.
63. Ms Brotherton wrote on 22 April to accept the claimant's resignation letter dated 31 March 2024. She wrote

Following a serious incident which took place at Newlands Care Centre on 22 April 2024 where you abandoned your shift and left the service unsafe we feel it is appropriate for both parties that you do not return to work the remainder of your notice period.

64. The claimant was distressed to read that it seemed to have been concluded that he had left the service unsafe. There had been no investigation and he left the service in the hands of registered nurse and manager Kim Whelan. To his knowledge the service had been in the hands of Judith alone on 20 April and was left in the hands of one registered nurse on every night shift. He felt victimised that his walking off shift for disability related reasons was being portrayed as a professional conduct matter and fearful of NMC investigatory processes.
65. The claimant contacted ACAS on 5 May 2024 and achieved a certificate on 11 May 2024. He was concerned from 22 April 2024 about a referral to NMC and the impact this would have on him for his new job in the NHS and career generally. He was worried from 22 April 2024 that any NMC process might take time and prejudice his new role or delay it, and that there might be possible interim restrictions or sanctions imposed on him whilst under any investigation. He felt he had been threatened because he had asserted his rights to reasonable adjustment and he was worried that bringing a claim might further antagonise the respondent and prompt it to refer him if it had not already done so. He had to weigh in the balance whether bringing a claim was the right thing to do or not. This caused him additional stress. He brought his Tribunal claim on 18 June 2024.
66. He heard nothing about any NMC referral but felt it was still hanging over him. He heard nothing about any investigation into his complaint about Kim Whelan. The NMC referral threat hung over him until he found out in the Response Form which he saw in mid August that no referral had been made. The Response Form said that the claimant had not lodged a grievance or formal complaint. He felt this was inaccurate, he had lodged a formal complaint against Kim Whelan.
67. The claimant did not consult his GP about his worry and stress at that time. He is a registered mental nurse himself and is from a family of health professionals. He put in place good well being measures for himself. He did not need medication or talking therapy.

Relevant Law

68. The Equality Act 2010 provides

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.

21 Failure to comply with duty

(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.

69. The words “provision criterion or practice are not defined in The Equality Act 2010. The Commission Code of Practice paragraph 6.10 says the phrase “should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions”.

70. The importance of a Tribunal going through each of the constituent parts of the provisions relating to the duty to make reasonable adjustments was emphasised by the EAT in Environment Agency –v- Rowan [2008] ICR 218 and reinforced in The Royal Bank of Scotland –v- Ashton [2011] ICR 632.

71. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in 2018 in Sheikholeslami v The University of Edinburgh UK EATS 2018. Mrs Justice Simler considered the comparison exercise. At paragraph 48:

“It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question...There is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.”

“The PCP may bite harder on the disabled group than it does on those without a disability. Whether there is a substantial disadvantage is a question of fact assessed on an objective basis and

measured by comparison with what the position would be if the disabled person in question did not have a disability.”

72. The Code provides that a PCP is a PCP that is applied by or on behalf of the respondent. In *Ishola v Transport for London* [2020] EWCA Civ 112 Lady Justice Simler considered what might amount to a PCP at para 35:

“The words “provision, criterion or practice” are not terms of art, but are ordinary English words...they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application.”

And at paragraph 37:

“In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treated employee by an act or decision and neither direct discrimination nor disability -related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.”

73. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being “more than minor or trivial”.

74. Section 26 covers harassment:
26 Harassment

- (1) A person (A) harasses another (B) if:
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of:
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;

- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are—
 - age;
 - disability;
 - gender reassignment;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

75. Section 27 provides the following in relation to victimisation:

27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because:
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Applying the Law

76. The claimant in this case is a litigant in person. He has had the support of the Judge in accordance with the Equal Treatment Bench book to present his case. The parties worked together to produce and agree the List of Issues. The Judge supported the claimant to put his case to the respondent witness in accordance with that List. The List is used below to set out the reasoning and decision of the Tribunal. It fell into four parts; the rostering failures to adjust, the excessive workload failures to adjust, the harassment complaints and the victimisation complaint.

Failure to reasonably adjust: rostering

77. The Tribunal accepts the claimant's evidence that there was a backdrop from 2021 until November 2023 of his needs largely being met. After the 2022 OH report he was, on the whole, rostered to work two shifts on and two rest days off. He worked three shifts of twelve hours a week. From November 2023 things changed. Again, by way of background, the Tribunal accepts the claimant's evidence that Ms Smith produced rosters that had him working outside of that agreed adjustment pattern and he had to chase up changes sometimes even agreeing swaps with colleagues to ensure he worked in a way that met his needs. When he could not get local alterations he tried to work the pattern rostered and this caused him excessive fatigue and left him bedridden and sometimes unable then to work his next shift. He put this in writing to the respondent. He set out clearly that what he needed was adequate advance notice of shift patterns so that he could be well rested and ready to work. Ms Harker's actions, in moving him to Newlands, and her evidence at Tribunal supported his evidence of background events between November 2023 and his move to Glenroyd. He came to Glenroyd reluctantly, agreeing to work two hours away from his home, in order to achieve his adjusted working pattern.
78. He did all he could before his move and on arrival to let his new manager know his needs and his agreed working pattern and to work to that pattern.

LOI FTRA:A the claimant was rostered to work 19, 20 and 22 January 2024.

79. PCP: The Tribunal finds that in rostering the claimant outside of previously agreed reasonable adjustment working pattern on 19,20 and 21 January 2024 it operated a PCP of requiring him to work three consecutive shifts. The respondent submitted that there was no PCP as the claimant accepted in oral evidence that he was never actually required to work those shifts. The Tribunal finds that producing the roster was in effect a management instruction that the claimant work those shifts. It had regard to the effect of the roster. It would have produced substantial disadvantage to the claimant as compared to a non disabled person. The claimant is a litigant in person and the Tribunal applies the law in seeking to guard against the mischief intended. The only reason the claimant was not ultimately required to work three consecutive shifts was because he contacted the respondent and restated his adjustments and arranged for changes to the roster. To say that there was no PCP because he was not, ultimately, required to work three consecutive shifts, is to shift the burden of reasonable adjustment from the respondent to the claimant. The duty lies with the respondent. It knew following the OH report in April 2022 and the meeting in May 2022 that two shifts on, two shifts off was recommended and agreed. It should not, thereafter have rostered the claimant three consecutive shifts. In doing so it applied to the claimant a PCP.
80. Substantial Disadvantage: The claimant experienced cumulative fatigue if he worked more than two consecutive shifts. The OH report had set this out. The claimant had raised it in writing as set out above. On communication of the roster he did not *work* more than two consecutive shifts. He thought he might have to.

No substantial disadvantage arose from thinking he might have to. This complaint fails for lack of substantial disadvantage. Sending a roster that disregarded his adjustments was unkind and in doing so the respondent showed a disregard for its statutory duty to reasonably adjust but no substantial disadvantage flowed from it. It was irritating, worrying and annoying to the claimant, particularly given the background of disregard he had experienced. He accepted in oral evidence that when he raised the rostering issues it was changed. He was not put to substantial disadvantage. This complaint fails for want of substantial disadvantage.

FTRA A Fails for want of substantial disadvantage

FTRA:B the claimant was rostered to work 18, 19, 20 and 22 February 2024

81. The Tribunal repeats its reasoning for FTRA A. The communication of the roster was the application of a PCP. The claimant was not required to work those shifts when he protested about the failure to honour his agreed reasonable adjustments so no substantial disadvantage flowed from the rostering. He was irritated, worried and annoyed by the roster and becoming tired of the pattern of mis-rostering and the disregard for his disability, but this was not substantial disadvantage.
82. He told the respondent that the rostering itself was becoming a problem for him managing his well being, that he needed advance notice.

FTRA C the claimant was rostered to work 16, 17, 18, 19 20 March 2024

83. The respondent operated a PCP when it communicated rosters on 3 March 2024 showing the claimant scheduled to work five consecutive nights. The effect of that roster was problematic for the claimant because
 - a. As a disabled person he needed advance notice of rosters to be able to plan for rest before and after working shifts.
 - b. The respondent knew of that need.
 - c. He had an adjustment in place of no more than two shifts.
 - d. He had repeatedly asserted that adjustment in the face of rosters that did not meet it.
 - e. He saw the five consecutive days rostering on 3 March and was due to go on annual leave on 4 March. He had to chase up changes whilst on leave on 6,7 and 8 March.
84. He had told the respondent on 27 February in email to Ms Harker that the 5 shifts were rostered and nothing had been done about that.
85. The Tribunal finds that at this point, after previous communications and roster changes, the impact of the rostering itself was substantial disadvantage to the

claimant. It accepts his oral evidence that the mis-rostering was itself causing him stress, worry, annoyance and beyond that fatigue which exacerbated his condition. It was no longer a minor or trivial matter. The mis-rostering itself was, by this point, affecting his health.

86. The respondent knew of the disadvantage in mis-rostering the claimant because he had asserted it in writing. He had set out the impact on him. He had written to Ms Harker on 27 February and had demonstrated his fatigue saying he just couldn't be bothered to have to pursue rosters in accordance with his adjustment. That email in the context of what had gone before including the claimant moving venues because of difficulties with rosters was enough for the respondent to be on notice of the impact of the mis-rostering putting him as a disabled person at substantial disadvantage. It had knowledge of substantial disadvantage at that point.
87. Reasonable steps: the respondent failed after 27 February communication to take reasonable steps to roster the claimant in accordance with his required and agreed reasonable adjustment. It was a breach of the statutory duty to act reasonably to produce a roster with five consecutive shifts for the claimant whom it knew to have a two on two off shift pattern in place and who had previously challenged rosters other than that pattern and who had demonstrated the impact of continually having to "chase them down" to get the roster right on his health.

FTRA C succeeds

LOI: FTRA:D the claimant was given excessive workload (having to manage and do medication rounds on two units) on 22 April 2024

88. The Tribunal finds that the respondent operated a PCP of requiring the claimant on 22 April 2024 to manage and complete medication rounds on two units. It finds this was an excessive workload for the claimant.
89. Substantial disadvantage: being required to manage and conduct medication rounds on two units was substantial disadvantage to the claimant who needed micro breaks to manage fatigue. The additional work meant that he could not take micro breaks, was put at increased risk of stress and cumulative fatigue.
90. Knowledge: the respondent knew that managing and doing medication rounds on two units was a source of substantial disadvantage to the claimant because he had set it out in writing. He had protested about the medication rounds on 18 March 2024, had been left to do them alone on 2 April 2024 and had protested. He had described the impact on him in detail in writing on 7 April by email and had gone so far as to say on 7 April that he would not do it. He said he would hand the keys back if he was expected to manage and medicate two units.
91. Reasonable steps: The Tribunal rejects the respondent's submission that it took the reasonable steps of trying to get cover. From 7 April onwards the respondent was on notice of disability and substantial disadvantage for the claimant in managing two units. A duty arose then, if it had not before in relation to excessive workload, to consider reasonable adjustment. That meant having a contingency

plan so that if the entirely foreseeable situation of there being only one nurse, the claimant left alone to run two units, there was something in place to avoid the disadvantage to him of its PCP. It did not do that. It did not have cover and Ms Whelan did not step in immediately she was aware of the second nurse not having attended to take on those duties herself or to reallocate duties to a plan that was manageable for the claimant. It was not for the claimant to have to fill in the gaps in the respondent's under staffing. It is not exonerated from its obligations to him to reasonably adjust for disability because it has staffing issues or there are staffing issues in the sector generally.

92. The respondent's Ms Jones cited the OH report and said she couldn't understand why the claimant couldn't do two rounds. She said she had seen the OH report from 2022. The Tribunal finds that was a startlingly un insightful comment from an HR professional. The respondent's duty to adjust is ongoing and evolving. An OH report is advisory. A respondent does not necessarily wholly discharge its duty by complying with a report. It has an ongoing requirement to review and consider a disabled person's evolving needs. Many organisations have a Reasonable Adjustment Plan document or Adjustment Passport, with a manager holding responsibility for keeping it up to date and engaging in regular consultation on regular review dates. This respondent does not appear to have asked and not listened when it was told by the claimant of his evolving needs. It failed in its duty after his email of 7 April to consider and if possible have a plan in place to avoid him managing two units. As at 7 April a conversation was needed and possibly a new referral to OH to look at what amounted to an excessive workload, what the claimant could and couldn't manage without substantial disadvantage. This was a claimant who had already moved locations to seek to get his needs met. There had been tacit acknowledgment from Ms Harker in suggesting that move that his needs would be better met at Newlands.
93. The Tribunal saw emails that showed that the respondent knew it needed cover for 22 April shift from 6 April. It accepts the respondent's submission that the emails may not have been the whole story as there may have been other emails showing efforts to get cover and achieving cover with other agencies. It submitted that it had done all it reasonably could and that undisclosed emails would have shown that to be the case. The respondent cannot rely on its own lack of disclosure. Even if those emails had shown staffing difficulties, as above that would not have exonerated the respondent from failing to reasonably adjust. Further, even if there had been cover in place it is entirely foreseeable that a nurse may not be able to attend shift at short notice and a contingency plan was needed from 7 April onwards when the respondent knew the claimant ought not to be left to cover two units.
94. The Tribunal accepts the claimant's submissions that the respondent failed to take the reasonable steps of ensuring there were two nurses on duty, and in the alternative if cover failed not requiring him to cover two units but having a contingency plan in place so that he had a workload that did not put him at a substantial disadvantage as a disabled person. The Tribunal noted the claimant's evidence that there was an occasion when there were two nurses on shift, the claimant and another, because the other had restrictions on his practice in relation to medication administration at that time. The respondent thereby

demonstrated that it could have a contingency plan to cover someone who couldn't do medications on one round, it was not reasonable for it not to have had a plan for someone who because of his disability could not manage and medicate two units.

FTRA D succeeds

The harassment complaints

H1. No reply to the claimant's email of 7 April 2024 protesting about excessive workload – Accepted by respondent that no email reply was sent

95. This complaint fails of its facts. The Tribunal finds that not replying to the email of 7 April 2024 did not amount to unwanted conduct. The Tribunal read the email in full and looked at the surrounding context of communications between the claimant and respondent at that time. The email did not require a response. The tribunal noted that Ms Harker did try to telephone the claimant at 1652 and he rejected the call. They spoke at 1656 for one minute and four seconds which the Tribunal finds a sufficient time for them to have a conversation about his return to work on 12 April 2024. Ms Harker tried to ring the claimant again at 1701 and he rejected that call. The Tribunal accepts that he had been attending a pharmacy appointment and that it was not a convenient time for him to have a lengthy conversation.
96. If the complaint had not failed for want of unwanted conduct then the Tribunal would have found that it was not reasonable for the claimant to perceive that not getting reply to his email between 7 and 12 April 2024 had the purpose or effect of creating an environment of harassment.
97. Further, the Tribunal would have found that any failure to respond was not related to a protected characteristic.

H2. No return to work interview during week of return from 12 April 2024 or thereabouts – Accepted by respondent that no formal return to work meeting took place on or around 12 April 2024 with the Claimant.

98. This complaint of harassment also fails. The respondent accepted that no formal return to work meeting took place on 12 April 2024 for the claimant. The Tribunal finds that this did not amount to unwanted conduct. The claimant's email of 7 April 2024 had set out in detail what he required on return to work. There had been a brief telephone call with Ms Harker on 7 April 2024. There was then 10 to 10 meeting on 12 April 2024.
99. Whilst failing to conduct a return to work meeting on the first day of return may fall short of HR best practice, the Tribunal finds that it did not amount to unwanted conduct because the claimant had only had one day's absence on 9 April 2024 and the claimant's email of 7 April 2024 kept the respondent fully informed as to his condition and ability to return to work
100. The Tribunal accepts the respondent's submission that by this point in the

chronology the claimant was deeply mistrustful of the respondent. That mistrust was born out of the respondent's persistent failures to roster him in accordance with his agreed reasonable adjustments. However, the Tribunal finds that it would have been unreasonable the claimant to perceive the failure to provide a return to work interview on 12 April 2024 as having the purpose or effect of creating an environment of harassment.

H3. General manager Kim Whelan said that the claimant's decision to walk off shift when he was required to perform excessive workload including carry out two medication rounds on two units was a "pretty poor show" on 22 April

101. This complaint succeeds. The tribunal heard no evidence from Kim Whelan. It has drawn no adverse inference from her failure to give evidence. It is not necessary to do so because it has direct oral evidence from the claimant. The Tribunal accepts the claimant's oral evidence about the sequence of communication at the meeting on 22 April 2024. The Tribunal accepts the claimant's evidence that she used the words "pretty poor show" in relation to his refusal to manage and do medication rounds for two units. It accepts that his refusal was related to his disability, that Ms Whelan and Ms Harker had been on notice of the impact of managing two units on his disability from 7 April 2024 if not sooner. The Tribunal finds that the remark was made in relation to the protected characteristic of disability. The effect of the remark was to create an environment that was intimidating, hostile, degrading, humiliating and offensive to the claimant.
102. Having regard to the perception of the claimant and all the circumstances of the case it was reasonable for him to perceive the remark to have that effect.

H4. Angela Jones HR email on 22 April 2024 threatening a referral to NMC for refusing to continue the shift.

103. This harassment complaint succeeds. This sequence of email communication between Ms Harker and Miss Jones is very revealing. The Tribunal accepts the claimant submission, borne out by the email chronology, that the NMC is only mentioned by the HR professional *after* she becomes aware that the claimant has said he has walked out because of his disability. The Tribunal finds that the remark had the purpose of intimidating the claimant. The Tribunal accepts his submission that it was done to "chill" that is act in an intimidating or threatening way, to stop him raising Equality Act disability issues. The Tribunal saw the email from Ms Harker and relies on the evidence for the finding of purpose of intimidation, where Ms Harker says in direct linear response to his Jones comment about disability

#he has pulled this card time and time again.

104. The Tribunal rejects the respondent's evidence that the reference to "pulled this card" was a reference to excessive workload. Ms Harker was not a credible witness when she sought to persuade the Tribunal that her email meant he had complained about excessive workload. Even if that is what she had meant, it

still related to disability. The reason he was complaining about excessive workload was because excessive workload put him at a substantial disadvantage as a disabled person. The Tribunal finds Ms Harker's reference, coming as it did in direct linear response to reference to disability, related to disability and amounted to harassment. The claimant was not aware of the remark at the time. He became aware of it as part of disclosure in the litigation. It speaks to the mindset of the respondent. This complaint also succeeds below as an act of victimisation.

H5. Elizabeth Brotherton using significantly similar words of threat of referral to NMC as those used by Angela Jones in a letter to the claimant on 22 April 2024.

105. This complaint fails on its facts. The claimant accepted in oral evidence that Ms Brotherton did not threaten a referral to NMC in her letter of 22 April 2024.

H6. In email 22/04/24 to M Harker the Claimant expressly requested a complaint be raised for "failure to accommodate my disability". There was no response to this complaint request.

106. This complaint fails. Whilst the lack of response amounted to unwanted conduct in the sense that the claimant wished to have his complaint investigated. The Tribunal finds that it did not relate to his disability. Following the agreement that he not return to work during his notice period, the respondent did not investigate his complaint, did not investigate the incident on 22 April 2024 which it has said amounted to him leaving the service unsafe, and did not refer to NMC.

107. The respondent felt that it had, to use Ms Harker's words in her email to HR, "got shot" of the claimant and that it did not need to take any further action. This was not because he was disabled, but because he was off its agenda now. This finding is consistent with the Tribunal's view that the respondent, Ms Harker did not really think that the claimant had left the service unsafe or that this was a matter for referral to the NMC because if they have done, they would have investigated the incident, that might have included investigating the claimant's complaint against Ms Regan, and they would have considered referral to NMC.

H7. In follow up email from A Jones to the Claimant on 23/04/25, Ms Jones again repeated the opinion that the Claimant had abandoned shift and left the service unsafe.

108. This complaint succeeds. The Tribunal finds that the remarks was made with the purpose of intimidating the claimant. It accepts his evidence that managers regularly left the service to be run by one nurse, eg Judith, and did not consider that unsafe. In so describing it when the claimant protested the respondent demonstrated an exercise of power over a person who might bring a claim because he had a protected characteristic.

- f) If so, was that unwanted conduct?
 - g) Did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant
 - h) The Tribunal must take into account
 - i) What was the perception of the claimant as to the effect of the conduct,
 - ii) What were the other circumstances of the case
 - iii) Was it is reasonable for the conduct to have that effect
 - i) Did the unwanted conduct relate to disability ?
109. The NMC threat comes after Mrs Jones is aware of the claimant's disability. The Tribunal finds this was related to disability because of the email evidence and chronology it saw. The claimant was reasonable to perceive it this way. A threat to report to NMC had potentially far reaching consequences including suspension from registration or conditions and restrictions on practice and ultimately removal from the register affecting the claimant's ability to work in his profession and earn his living. The other circumstances included the history or mis-rostering, the 7 April email and then the correspondence between respondent managers with the threat of referral coming directly after the communications about the claimant being disabled. The harassment related to the protected characteristic of his disability. The complaint succeeds.
- 2) Victimisation (Equality Act 2010 section 27)
- e) Did the claimant do a protected act as follows:
 - i) raising a complaint on 22 April 2024 about a failure to accommodate his disability? – Accepted by the Respondent as a protected act.
 - f) Did the respondent do the following things:
 - i) Threatening to initiate an investigation and refer him to the NMC (Angela Jones' emails of 22 April 2024)
110. The threat followed on from Ms Harker saying "he has pulled this card before" and Ms Jones saying this is trickier...he's disabled. The Tribunal accepts the claimant's evidence that this was done to "chill" or threaten and intimidate him. The Tribunal had regard to Ms Harker's evidence that there were no other referrals she could recall to NMC in last five years though there had been investigations. That evidence showed the Tribunal that Ms Harker knew that a threat of referral to NMC was a serious matter. It amounted to a detriment to the claimant because it had the potential to impact on his role with the

respondent, to lead to suspension and possibly findings and to impact on his future career. The Tribunal finds that a referral or suggestion of referral could be a neutral act, such that a member of staff may have an unjustified sense of grievance at a respondent which properly discharged its reporting responsibilities but in this case, given the chronology and the email content, the Tribunal finds as above that the threat was done to intimidate and so amounts to an act of victimisation detriment. It left him with uncertainty and worry not just about his current role during his notice period but with risk to his new role and career.

- 109 The Tribunal had no evidence from Angela Jones as to her purpose or effect in making the remark. It attaches weight to the claimant's oral evidence and submission, corroborated by the timing and content of communications between Ms Harker and Ms Jones that day. The Tribunal also notes that there was no subsequent investigation. The Tribunal rejects the evidence of Ms Harker as not being consistent. On the one hand she would have the Tribunal believe that the conduct was so serious on 22 April 2024 when the claimant was serving his notice as to warrant investigation and possible referral to NMC but that, on the other hand, by the time of the agreement that he would not be returning to work during that notice, the matter was no longer serious because the respondent then took no action, made no referral. The respondent abandoned consideration of a referral to NMC and this showed the Tribunal that the threat had been made in a disingenuous and detrimental way. The threat continued to have impact on the claimant until August 2024 by which time he saw that there had been no referral to NMC. The Tribunal accepts the claimant's oral evidence that this was a deeply distressing time to him as he thought his future registration and ability to earn his living were at risk. The Tribunal finds that the claimant was put to this detriment because of the protected act. His complaint for victimisation succeeds.

Conclusion

111. The complaints succeeded in part as set out above and in the short form judgment and a remedy determination will be needed.

Employment Judge Aspinall

Date: 1 June 2026

REASONS SENT TO THE PARTIES ON

1 July 2026

FOR EMPLOYMENT TRIBUNALS

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Case No: