

RESERVED JUDGMENT



## EMPLOYMENT TRIBUNALS

**Claimant:** Miss M Lietor  
**Respondent:** Barts Health NHS Trust  
**Held at:** East London Hearing Centre  
**On:** 21, 22, 23, 24 & 30 November 2023  
**Before:** Employment Judge S Povey  
**Members:** Mr R Blanco  
Mr L Bowman

### Representation

**For the Claimant:** Ms Millin (Counsel)  
**For the Respondent:** Ms Snocken (Counsel)

## JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaints of discrimination arising from disability are not made out and are dismissed.
2. The complaint of a breach of the duty to make reasonable adjustments is not made out and is dismissed.

## REASONS

1. These are complaints brought by Miss Maria Lietor ('the Claimant') against Barts Health NHS Trust ('the Respondent').

### Introduction

2. By way of a brief introduction to the claim:

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- 2.1 The Claimant is a nurse. She was employed as an Emergency Staff Nurse at the Respondent's Royal London Hospital ('RLH') between July 2021 and October 2023.
- 2.2 The Claimant commenced ACAS Early Conciliation on 13 July 2022 and the ACAS Early Conciliation Certificate was issued on 23 August 2022. She presented her claim to the Tribunal on 9 September 2022, alleging discrimination arising from disability and failure to make reasonable adjustments.
- 2.3 In its response, the Respondent resisted the claim in its entirety. It did not admit, at that time that the Claimant was disabled. In any event, the Respondent denied discriminating against her. The Respondent subsequently accepted that the Claimant was disabled at the relevant time but maintained that it had not discriminated against her as alleged.

### The Hearing

3. The hearing was conducted in person. We heard oral evidence from the Claimant. For the Respondent, we heard oral evidence from the following:
  - 3.1. Mr Paul Smith (at the relevant time, Associate Director of Nursing, Newham University Hospital)
  - 3.2. Ms Gillian Fox (Senior Sister, RLH & the Claimant's line manager)
  - 3.3. Ms Amy Hooton (at the relevant time, Emergency Department Matron, RLH)
  - 3.4. Mr Michael Moeller (Associate Director of Nursing, RLH; from July 2022 – September 2022, seconded Director of Nursing, Royal London & Mile End Hospitals)
4. All of the witnesses provided and adopted written statements as their evidence in chief.
5. We were also provided by the Respondent with a witness statement for Alistair Bursey (who at the relevant time had been the other Emergency Department Matron, RLH). However, Mr Bursey (who has left the Respondent's employment) did not attend the hearing. There had been no application for a witness summons and we were invited to attach little weight to his statement.
6. The Tribunal was also provided with a paginated bundle of documents to which we were referred throughout the hearing ('the Bundle'), a Cast List, a Chronology and an updated List of Issues. Finally, we received written and oral submissions from Ms Millin for the Claimant and from Ms Snocken for the Respondent.
7. The issues to be determined by the Tribunal were agreed over the course of a number of case management hearings and confirmed by the parties at the outset of the final hearing. So far as they related to liability, they are set out at Annex 1.

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8. The Tribunal heard oral evidence and submissions between 21 to 30 November 2023. Due to lack of time, we reserved judgment.
9. In reaching our decision, the Tribunal had regard to all the evidence we saw and heard, as well as the submissions we received.

**The Relevant Law**

Discrimination

10. Section 39(2) of the Equality Act 2010 ('EqA 2010') states:  
An employer (A) must not discriminate against an employee of A's (B) –
  - (a) as to B's terms of employment;
  - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
  - (c) by dismissing B;
  - (d) by subjecting B to any other detriment.
11. Section 6 of the EqA 2010 defines disability for the purposes of the Act. Disability is one of the protected characteristics under the EqA 2010.
12. Section 15 of the EqA 2010 defines discrimination arising from a disability as follows:
  - (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.
13. Section 20 sets out the duties to make reasonable adjustments in respect of disabled persons. So far as relevant, section 20 states:
  - (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 ... 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

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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.

...

14. Schedule 8 to the EqA 2010 provides more details as to the duty to make reasonable adjustments. In addition, section 212 EqA 2010 defines “substantial” as “*more than minor or trivial.*”
15. If a person fails to comply with the duty to make reasonable adjustments, that person discriminates against the disabled person (per section 21 EqA 2010).
16. Section 123 of the EqA 2010 requires that proceedings under the EqA 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. By reason of section 123(3), conduct done over a period of time is treated as being done at the end of the period, for the purpose of calculating the three-month time limit for bringing proceedings.
17. The time limits in section 123 of the EqA 2010 are subject to section 140B of the EqA 2010 (which makes provisions for the extension of time limits as a result of engagement in ACAS Early Conciliation, as contained within section 18A of the Employment Tribunals Act 1996).

**Findings of Fact**

18. As detailed above, we heard from a number of witnesses throughout the course of the hearing. Every witness did their best to assist the Tribunal and answered the questions they were asked candidly and honestly. We did not find any witness to be evasive or dishonest.
19. Much of the relevant facts and chronology were not in dispute. However, two factual disagreements arose due to a lack of corroborative documentary evidence, as follows:
  - 19.1. The Claimant’s claim that, prior to her employment with the Respondent, she had been exempt from working night shifts during her employment in the Emergency Department at University College Hospital (‘UCH’), part of the University College London Hospitals NHS Foundation Trust; and
  - 19.2. The Respondent’s claim that it had advertised for a nights-only nurse to cover the Claimant’s night shifts in the RLH’s Emergency Department.
20. Given the overall credibility and reliability of the witnesses we heard from, the Tribunal had no basis to doubt the oral evidence testifying to both of these factual claims. We were therefore able to find that the Claimant had been exempted from night shifts in her previous employment with UCH and the Respondent had advertised for a nights-only nurse in an attempt to cover the Claimant’s night shifts in its RCH Emergency Department.

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Background

21. The Claimant had worked as an Emergency Department Nurse at UCH since January 2020. She also had prior work experience in infectious diseases, gastro and liver departments and high dependency care. The Claimant was particularly keen to develop her skills in the field of trauma. Unlike UCH, RLH was a designated trauma centre.
22. The Claimant applied for the post Adult Emergency Staff Nurse at the RLH in late 2020 (at [157] – [170] of the Bundle). The post was permanent, full time and salary Band 5. The job description included the following under “*Effort, skills and working conditions*” (at [65] of the Bundle):

Need to work flexible hours to meet service need. Shift rotation between days and nights.

23. The Claimant was interviewed on 2 March 2021. By a letter dated 10 March 2021, the Respondent offered the post to the Claimant, conditional on pre-employment checks (at [175] – [178]). The conditional offer was made by Mr Foyzul Miah, the Respondent’s Recruitment Co-ordinator. It was copied to Ms Hooton (who had been on the interview panel).
24. Part of the pre-employment checks included an occupational health (‘OH’) check. In the course of that process, the Claimant informed both the Respondent’s Human Resources (‘HR’) department and OH that, due to a health condition (fixed body clock), she was unable to work night shifts. OH recommended that the Claimant be permanently exempted from working night shifts and cleared her for appointment on that basis (see, for example, the letter of 17 May 2021 at [182]).
25. By a letter dated 25 May 2021, the Respondent made an unconditional offer of employment to the Claimant, with an agreed start date of 19 July 2021 (at [184] – [185] of the Bundle). That letter also included the Claimant’s statement of terms and conditions of employment (at [186] – [204]), which the Claimant was asked to check, sign and return to the Respondent. The copy in the Bundle was neither signed nor dated, however it was not suggested that the Claimant did not sign and return the statement of terms and conditions. Clause 2 included the following (at [189] of the Bundle):

The principal duties of the post are set out in the job description. This provides guidance regarding the work that you are currently asked to perform and will be subject to change from time to time in order to meet the changing needs of the Trust. At times your contractual obligations may be wider than the particular duties upon which you are normally engaged.

26. As recorded above, the job description included shift rotation between days and nights.

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27. Neither the recommendation from OH nor the unconditional offer of employment were copied to Ms Hooton or anyone else within RCH's Emergency Department team.
28. As a result, when the Claimant began her employment on 19 July 2021, no one in the Emergency Department were aware of her health condition or her inability to work night shifts (due to their adverse effect on her health). Rather, the Claimant informed Ms Fox during her induction on 19 July 2021 that she had been exempted from working nights by OH and prior to her unconditional offer of employment.
29. It was not in dispute that the rota pattern for nurses in RLH's Emergency Department was split 50/50 between day and night shifts. All nurses at Bands 5, 6 and 7 were expected to work night shifts.
30. There was detailed and compelling written and oral evidence as to how and why the Respondent's Emergency Department was structured as it was regarding shift patterns and, specifically, the requirement for nurses to work their share of night shifts. These included:
  - 30.1. There was no drop off in work during night shifts and the same number of staff were required; night shifts could in fact be busier and more stressful than day shifts, particularly at weekends.
  - 30.2. Any gaps in shifts (day or night) had to be filled either by staff picking up extra shifts (the bank) or use of agency staff, which was expensive and had cost implications for an already tight budget.
  - 30.3. Night shifts were more likely to be filled by agency staff, who were less familiar with the department, since additional night shifts were unpopular with existing staff. The Emergency Department had little control over the experience or calibre of agency staff.
  - 30.4. It was easier to fill gaps in day shifts from the bank, as staff were more likely to want to do extra days rather than extra nights.
  - 30.5. The use of non-Emergency Department bank and agency staff had a detrimental impact upon the efficiency and effectiveness of the department.
31. In her oral evidence, Ms Hooton explained how the nursing staff were organised when on a shift. As was repeatedly recounted in the Respondent's evidence, every nurse counted and Ms Hooton's evidence was a compelling and cogent explanation of why that was so in the Emergency Department at RLH (explaining, as it did, the various zones and the numbers of nurses allocated to each zone). Being down just one nurse had a significant impact on the effectiveness of the service and the safety of both patients and staff.
32. By way of example, Ms Hooton explained that two nurses were allocated to Zone D, referred to as 'fit to sit', the traditional waiting room area of the

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Emergency Department. It was the busiest area with the most instances of violence and aggression. A loss of one nurse was 50% of the Zone D workforce.

33. The Claimant had been offered the post of nurse in the Emergency Department on the basis of being exempted from working nights. However, as detailed above, that decision had not been communicated to the Emergency Department's management or leadership team, either prior to the unconditional offer of employment or at any time thereafter.
34. Had the Emergency Department been aware of the restriction on the Claimant's ability to work night shifts, they would have questioned her suitability for the post (see, for example, Paragraph 11 of Ms Fox's witness statement, Paragraphs 9 & 10 of Ms Hooton's witness statement, Ms Hooton's email to HR of 5 October 2022 at [226] of the Bundle and Mr Bursey's email of 20 January 2022 at [255]).
35. In contrast, the Claimant had been offered the post by the Respondent (as opposed to the Emergency Department) in the knowledge that she was unable to work night shifts.
36. Both the Claimant and the Emergency Department had expectations which were contrary to each other. It was an unfortunate set of events which, ultimately, led to these current proceedings.
37. Upon being made aware of the Claimant's recommended exemption from night shifts, Hannah Ward, an Emergency Department senior sister, emailed the Respondent's HR department on 19 July 2022, setting out the department's concerns and seeking further advice (at [205] – [206] of the Bundle).
38. In addition, Ms Fox requested further information from OH and informed Ms Hooton. In particular, Ms Fox wanted to find out more about the Claimant's health condition, find out what adjustments could be made to accommodate the Claimant's proposed exemption from night shifts and also explore what support might be available to enable the Claimant to work nights without adversely affecting her health (per Paragraphs 8 & 9 of Ms Fox's witness statement). Whilst those enquiries were on-going, Ms Fox arranged for the Claimant to work day shifts only.
39. The Claimant was absent from work from the end of August 2021 until October 2021, due to an unrelated rib injury. In the run up to her phased return to work, enquiries were made by the Emergency Department of what had actually been agreed with the Claimant during the recruitment process. This included an email on 5 October 2022 from Ms Hooton to HR, which made the following request (at [228] of the Bundle):

I was not made aware that [the Claimant] wished to be except form [sic] nights until she had started. If I was I would have either withdrew the offer or requested that she complete a flexible working request for my consideration.

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Can you have a look through her recruitment correspondence and clarify what's happened.

40. Later on 5 October 2022, HR reported back that the decision to proceed with the Claimant's recruitment, despite being aware that she was unable to work night shifts, was made by Ms Ward (at [227] of the Bundle). However, this was denied by Ms Ward, again in an email on 5 October 2022, as follows (at [225]):

I have no recollection of agreeing to this and am confident I wouldn't have. I have been unable to find any emails pertaining to this situation and usually am emailed if there is a query with a candidate RE money/shifts etc. ... we are very happy to support flexible working but this would require a form and a discussion with us in the department with support from OH.

There is nothing in her contract about her exemption from nights, and neither Amy [Hooton] nor I agreed to it at interview.

41. Ms Hooton also voiced her concern at the suggestion by HR that Ms Ward had made the decision to proceed with the Claimant's recruitment, notwithstanding her inability to work night shifts, per an earlier email of hers from 5 October 2022 (at [226] of the Bundle):

This is concerning, Hannah [Ward] has not agreed to this. When queries come to be regarding shift patterns I request that a flexible working form be completed or will consider withdrawing the offer if the request can't be accommodated.

Please understand that I am not opposed to flexible working in the slightest but it is imperative that the correct process is followed or I could end up hiring a workforce that are unprepared to cover the service.

Gill [Fox], has [the Claimant] been able to provide anything in writing from recruitment that states in her contract she is except form working nights?

42. Ms Fox responded to Ms Hooton's query, also on 5 October 2022, as follows (at [225] of the Bundle):

[The Claimant] only showed me on induction a medical exemption from nights form she had from OH clearance.

Hannah [Ward] recently looked at her contract and I don't believe it stated exemption from nights on this.

43. In addition, it was Ms Fox's evidence that Ms Ward was not, in any event, authorised to agree to such an arrangement that involved a change to a prospective employee's terms and conditions (per Paragraph 11 of Ms Fox's witness statement). It was Ms Hooton's evidence that Ms Ward would not have proceeded with such an arrangement without first consulting her (per Paragraph 9 of Ms Hooton's witness statement). Both witnesses confirmed that Ms Ward denied she had ever agreed to the Claimant's recruitment in the circumstances alleged by HR.



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44. Upon her return to work, it was agreed that the Claimant would trial twilight shifts (as oppose to night shifts), which ran from 2pm – 2am. It was hoped that this would accommodate the Claimant’s health issue, whilst simultaneously ensuring that the Emergency Department had cover for all its shifts.
45. The Claimant worked two twilight shifts but reported that her ability to sleep after the first shift had been compromised and she had felt unsafe working the second shift. As a result, the Claimant did not work any further twilight shifts and her rota was again varied to day shifts only, whilst further enquiries and investigations were undertaken as to other adjustments that could be offered.
46. On 15 November 2021, the Claimant met with the Emergency Department matrons, Ms Hooton and Mr Bursey, to discuss the issue of night shifts. There followed an exchange of emails between Mr Bursey and the Claimant (a [244] – [246] of the Bundle), wherein Mr Bursey:
  - 46.1. Reiterated that the recruitment team acted without authorisation from the Emergency Department in making the unconditional offer of employment in the knowledge that the Claimant was unable to work nights and offered an apology for that error;
  - 46.2. Restated the requirement for all Emergency Department nurses to work day and night shifts; and
  - 46.3. Upon advice from HR, offered the Claimant the option of redeploying to the Emergency Department’s sister service, Ambulatory Care (which operated between 8am – 8pm only).
47. The Claimant expressed her view that she had been open with the Respondent in the recruitment process, had liaised with OH and had been offered her current post in the full knowledge of the OH recommendation that she should not work night shifts. She wished to remain in the Emergency Department, with the reasonable adjustment that she not been given any night shifts.
48. At this stage, Ms Hooton sought the involvement and input of Mr Moeller (who, at that time, was the Respondent’s Associate Director of Nursing) in trying to find a solution which was acceptable to all parties. Around this time, the Respondent explored recruiting an additional nurse who would work only night shifts (to complement the Claimant working only day shifts). However, despite advertising the position for two months, there were no applicants.
49. A further OH report was obtained on 11 January 2022, which contained the following recommendation (at [252] – [253] of the Bundle):

Based on the information that has been provided to me during the consultation, I am of the impression that [the Claimant] is fit to remain at work with adjustments. I would advise that she does not work night/twilight shifts as this is likely to impact negatively on her sleep and psychological wellbeing.

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50. A number of other options were explored, as captured in the letter sent by Mr Bursey to the Claimant on 17 February 2022 (at [259] – [260] of the Bundle), including:

50.1. Re-offering redeployment to Ambulatory Care (with the additional option of working day shifts in the Emergency Department through the bank system); and

50.2. A reduced hours rota pattern which would enable periods of adequate sleep after night shifts.

51. The Respondent proposed seeking the advice of OH as the viability of both options. At the same time, the letter of 17 February 2022 also informed the Claimant of the following (at [260] of the Bundle):

The most recent OH report advises that you should avoid night duties on medical grounds. While this is accepted, unfortunately our service is not in a position to support this recommendation. This is due to the nights being our busiest time and your absence from these duties is having a significant effect on our ability to deliver emergency care to our patients and on the wellbeing of your colleagues who are having to work additional night shifts to cover your absence. While we have been able to support you for the last six months, this arrangement is no longer sustainable, for the above reasons. Therefore from the rota period starting 11th of April 2022 nights and Twilights will be included in your rota.

52. The Claimant sought the advice and support of the Royal College of Nursing ('RCN'), who emailed Ms Hooton and Mr Bursey on 28 February 2022, which included the following (at [263] – [264] of the Bundle):

As you are likely aware, [the Claimant] has a disability in line with the Equality Act which has been addressed in numerous OH reports...One such OH report was obtained by the [Respondent] as soon as [the Claimant] disclosed her disability during the recruitment process. The [Respondent] advised [the Claimant] at the time that advice/approval would need to be sought from "the manager" – Amy [Hooton], as you were part of the recruitment process, please advise whether you were this "manager" who advised HR to obtain the OH report?

... [The Claimant's] reasonable adjustment, as set out in the OH reports, is that she is permanently exempt from night duty...Your proposal therefore to try and enforce her to work night shifts is a worry, and on the face of it, is discriminatory on grounds of a disability.

...

53. Ms Hooton responded to the RCN on 9 March 2022, which included the following (at [262] – [262] of the Bundle):

I can confirm that I am the recruiting manager and interviewed [the Claimant]. [The Claimant] did not disclose that she was unable to work nights at interview which is an essential requirement for our service and this is detailed in the job

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advert and description. We would have been unable to offer her a position should this have been disclosed.

[The Claimant] disclosed her inability to work nights to the recruitment officers after we had offered her the post, I was not made aware of this disclosure, the referral to OH or the recommendations until after she had started in her position. We have apologised to [the Claimant] for recruitments error and explained that they were not in a position to authorise such a request. The hiring department should have been made aware of these recommendations so that [the Claimant] could have been in the position to understand what adjustments we could reasonably make in order to accommodate her wish to work here. Unfortunately we are not in a position to permanently exclude staff from nights. These are our busiest periods and the way in which we work and manage the department is very different during these hours, a nurse will be unable to develop as a senior member of the team without the exposure to this way of working. We can also not sustain the cover for her colleagues that will have to work more nights as the Emergency Nursing team have to work 50% of their shifts as nights due to the activity in the department at these times.

We are not refusing to make adjustments at all but we are unable to achieve this particular request. As [the Claimant] is not able to work any form of night shift or twilight at all redeployment to our sister service Ambulatory was offered.

...

54. It was subsequently alleged by the Claimant (via the RCN) that she was being discriminated against and harassed by the Respondent's failure to accommodate her request to be permanently exempted from night shifts, a request which was, in the words of the RCN representative, "*a reasonable adjustment request*" which could be accommodated by a trust the size of the Respondent (per the email of 11 March 202 at [261] – [262] of the Bundle).
55. In response, Ms Hooton explained the following (in her email of 11 March 2022, at [261] of the Bundle):

I have confirmed with HR that the error has been escalated to our recruitment lead and the person concerned advised that they acted in error. The leads will ensure that learning takes place to reassure us that this cannot be repeated.

I disagree that [the Claimant] is being discriminated against or harassed. Barts Health is indeed a large enough trust to be able to accommodate no night working but the Emergency Department itself is not. Other reasonable adjustments have been offered. Maria has been advised with sufficient notice of the requirement to work nights. Despite putting the service and her colleagues at a disadvantage I am prepared for her line manager to remove her from night duties while alternative working arrangements can be made elsewhere in the Trust if ambulatory care is not something Maria wants to consider, I can make this offer in the short term only. Can Maria please make it clear which other service she will consider as this extension of no nights can only be made for one further rota due to service and staffing pressures.

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56. A further report was received from OH on 6 April 2022. It set out the following additional information, consistent with the letter of 17 February 2022 (at [267] of the Bundle):

I understand from the referral that you are seeking for me to advise you whether [the Claimant] could reduce her hours to enable her to work night shifts and then get sufficient rest after working nights. The most effective way to manage the condition is for her to work day shifts.

I have checked [the Claimant's] occupational health records pre and post starting her current role. [The Claimant] was assessed in occupational health prior to commencing her role with you and you were given appropriate advice that she should not work night shifts.

57. The report went on to provide the following recommendations (at [267] – [268] of the Bundle);

Following the occupational health assessment I [sic] of the opinion that [the Claimant] is fit to remain at work with adjustments. I would advise that she is exempted from working nights. This needs to be a permanent adjustment.

I would advise that you discuss this case with your HR Officer.

*Manager's questions*

*Further advice following on from previous referral to see if there is a possible reduced hours rota pattern that would enable adequate sleep for [the Claimant] after nights in order to rest appropriately when working in [Emergency Department].*

Please note as advised above the most appropriate way to manage her condition is not to work night shifts.

*Whether redeployment opportunity to sister service ambulatory care is a viable solution to medical need as would only be required to work day shifts.*

[The Claimant] expressed that this is not an appropriate option regarding her career progression.

58. On 20 April 2022, Ms Hooton emailed her leadership colleagues and Vanya Arbuah of the Respondent's HR team, enclosing the OH reports received to date. Ms Hooton's email included the following (at [289] of the Bundle);

Ali [Burse] and I are very confident that we have tried everything we can in order to make reasonable adjustments but are unable to budge on permanently excluding staff from [sic] nights.

59. In her response of 25 April 2022, Ms Arbuah recommended that clarification be sought from OH on the following (at [288] of the Bundle):

What we need to understand from OH if redeployment to a service that only operate days and can accommodate [the Claimant's] needs to only work days is a suitable alternative.

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60. The Claimant was due to work night shifts on 18, 19, 20 and 21 April 2022. What happened next was succinctly recalled in Ms Fox's witness statement, at Paragraph 23:

[The Claimant] was then due to work night shifts on 18, 19, 20 and 21 April 2022. During [the Claimant's] shift on Saturday 16 April [the Claimant] approached senior staff to request she be removed from the night shifts. As the senior team were not involved in [the Claimant's] management, they removed [the Claimant] from 18 April bank holiday Monday night shift and requested that she contacted matrons on Tuesday morning regarding the issue. [The Claimant] had indicated that she would not intend to turn up for these shifts and, indeed, she failed to do so. She was accordingly recorded as having taken unauthorised absence on those subsequent days. As a result, she was not paid. [The Claimant] contacted myself on Thursday 21 April via email to enquire if she was required to call the nurse in charge to report she would be absent for each shift, I advised to follow protocol and call the nurse in charge as you would with any absence, so that the shifts can then be put out to bank in order to be filled.

61. Consistent with that recollection, Ms Fox emailed other members of the Emergency Department team on 22 April 2022 to confirm that the Claimant had been "*made aware that she should be calling the [Nurse In Charge], as you would for any absence*" (at [281] of the Bundle).
62. However, it was also agreed that, provided the Claimant did contact the Nurse In Charge ('NIC') ahead of any scheduled night shifts, she would be marked down as on 'medical suspension' (as opposed to 'unauthorised absence'). That ensured that the Claimant was paid for the night shifts which were allocated to her but for which she was unable to perform (per Paragraph 20 of Ms Hooton's witness statement).
63. From there on, that is what happened. In addition to being paid for her night shifts, the Claimant was also able to supplement her income by undertaking additional day shifts (in addition to the usual day shifts allocated to her as part of the Emergency Department rota).
64. On 23 April 2022, the Claimant emailed Mr Moeller and raised a formal complaint against Ms Hooton and Mr Bursey regarding the on-going issue of night shifts (at [287] of the Bundle) and completed and submitted a Request for Resolution form under the Respondent's Dignity at Work policy (at [424] – [430]).
65. Mr Moeller met with the Claimant in early May 2022 and, following advice from HR, explored resolving the Claimant's concerns by way of a facilitated discussion with Ms Hooton and Mr Bursey (at [305] – [308] of the Bundle). He also asked Ms Hooton and Mr Bursey to make enquiries of the Respondent's other hospitals' emergency departments to see if they were able to accommodate the Claimant's request for day shifts only (at [301] of the Bundle). They were not (per Paragraph 23 of Ms Hooton's witness statement and Paragraph 9 of Mr Moeller's witness statement).

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66. On 13 May 2022 and following the advice of Ms Arbuah, Ms Fox emailed OH as follows (at [311] of the Bundle):

In the report supplied I just wanted to expand on some further details.

It was asked if redeployment to our sister service ambulatory care would be a suitable option. In the report it states this isn't something [the Claimant] would want.

What we are looking to understand is, if you feel redeployment to a service that only works days such as this would be a suitable alternative to offer.

67. On 25 May 2022, OH responded that redeployment to a service that only worked day shifts was "*an option that can be considered*" and that the Claimant had been "*referred...to our physician as they have to finalise on advice regarding redeployment*" (at [311] of the Bundle). On 27 May 2022, OH confirmed that offering the Claimant a role in Ambulatory Care, which could accommodate no night working, would be "*a reasonable request by management to make this base change to accommodate this reasonable adjustment on health needs*" (at [309]).

68. Also on 27 May 2022, Mr Moeller wrote to the Claimant (at [316] – [317] of the Bundle). The letter recorded the Claimant's decision not to pursue the option of a facilitated discussion but to have her concerns resolved via a formal process:

Your case was presented at the HR triage panel where it was recommended to resolve the issues through facilitated discussion. I understand from talking to the HR team that you no longer regard a facilitated discussion as a viable option and you now wish the case to be resolved via a formal process. It is for this reason and in accordance with the with the Trust's Dignity at Work Policy that I wish to invite you to a formal meeting in order to work together to find a reasonable solution to resolve your complaint

69. The proposed meeting was scheduled for 10 June 2022. On 7 June 2022, a further OH report was provided (at [332] – [334] of the Bundle). There was no material change to the recommendations previously made, save that "*[M]anagement may wish to consider restricting [the Claimant] from working night shifts on a permanent basis*" (at [333]).

70. The Claimant met with Mr Moeller, as arranged, on 10 June 2022, accompanied by Ms Arbuah from HR and the Claimant's RCN representative (the minutes of the meeting were at [335] – [337] of the Bundle). It was agreed that the Claimant would submit a flexible working request and until that process had been completed, the Claimant would continue to be exempt from working night shifts. Further, it was agreed that any appeal against the outcome of the flexible working request would be considered by a manager wholly independent of the Emergency Department. It was also agreed that the formal complaint process would be paused pending the outcome of the flexible working request.

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71. As a result, the Claimant was rostered for 50% of the time on day shifts in the Emergency Department and 50% of the time in Ambulatory Care (per Mr Moeller's letter to the Claimant of 16 June 2022, at [339] – [342] of the Bundle).
72. On 12 July 2022, the Claimant submitted her flexible working request. On 13 July 2022, Ms Hooton notified the Claimant of her decision on that request (at [344] – [346] of the Bundle). The Claimant had asked to temporarily reduce her hours from 37.5 to 24 per week (for a period of six months) and to be permanently excluded from night shifts in the Emergency Department.
73. Ms Hooton agreed to the Claimant's request to temporarily reduce her hours but was unable to agree to the permanent exclusion from night shifts, as follows (at [345] – [346] of the Bundle):

I have carefully considered your request but unfortunately I am unable to accommodate a permanent exclusion from night shift for the following reasons:

- unreasonable burden of additional costs – shifts are being covered by agency at night carry unsocial hours premium.
- detrimental effect on the ability of the service to meet service demands - 27% of bank shifts remain unfilled meaning nurses are unavailable for service provision when absent.
- detrimental impact on the provision of continuous standards of care to patients - 27% of bank shifts remain unfilled leading to a reduced standard of care.
- inability to reorganise work among existing employees – we have made requests for volunteers to offset your request but have had insufficient volunteers of people willing to work permanent nights.
- inability to recruit additional staff - we have asked recruitment to advertise night only contracts but this has been unsuccessful.
- detrimental impact on quality or performance – we have demonstrated a direct link between performance and gaps in staffing as part of our internal performance review.

74. On the same day as Ms Hooton's decision, the Claimant began ACAS Early Conciliation.
75. The Claimant was afforded a right of appeal against Ms Hooton's decision, which she exercised on 19 July 2022 (at [347] – [349] of the Bundle). As previously agreed, that appeal was considered by someone wholly independent from the Emergency Department, namely Mr Smith who, at the time, was the Associate Director of Nursing at Newham University Hospital (another of the Respondent's hospitals).
76. The Claimant met with Mr Smith on 6 September 2022 (the minutes of the meeting were at [379] – [382] of the Bundle). Also attending the meeting were

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Ms Hooton, Denise Semple of HR and the Claimant's RCN representative. After the meeting, Mr Smith made some additional enquiries of the recruitment team, following on from a point raised by the Claimant as to what she had been told during the recruitment process (at [383] – [384] of the Bundle).

77. On 9 September 2022, the Claimant presented her ET1 to the Tribunal.
78. On 16 September 2022, Mr Smith notified the Claimant of his decision (at [393] – [395] of the Bundle). So far as relevant, Mr Smith informed the Claimant as follows:

...

I contacted the Recruitment Co-ordinator who dealt with your on boarding. He was very clear that not only did he not recall any such conversation, that he would not have taken such a decision and would have directed any candidate to their Recruiting Manager for any such requests as he is not authorised to make such decisions.

I also asked [Ms Hooton] to check again if she had received any communication from the Recruitment Team regarding the requirement for you to work days only and she confirmed that she had not.

I am aware that your own account differs, and because there are no written records of any such communications, I have to assume that this was perhaps a misunderstanding or miscommunication on your part. Nonetheless, members of the Recruitment Team are not authorised to make decisions that would vary the offer of employment made.

I am mindful of your desire to work in [the Emergency Department], and your concerns about the possibility of disability discrimination. However, I believe this is not the case. I have considered your needs, and the balance between the needs of the service with patient safety, with the wellbeing of all team members being paramount.

Having carefully considered all the points raised by your representative and yourself and the results of my additional investigations my decision is to uphold the decision made to decline your flexible working request.

The reasons for this were as follows:

- The Emergency Department is a 24-hour service and can only operate effectively and efficiently with specific shift patterns. Fixed day or night patterns simply cannot be accommodated, and this is without exception.
- I believe your manager has taken all reasonable steps in trying to attempt to accommodate your request, in exploring several alternative options, including the option of employing a 'nights only' worker explicitly to facilitate your own roster. She was unsuccessful in finding staff that were prepared to work nights only.



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- I also believe that the previous offer made and being made to you again of a post in Ambulatory Medicine is a reasonable alternative offer. This post is a Band 6 and would therefore be a promotion.

This offer strikes a fair balance between your rights as an employee and the needs of the service. As such, I recommend you discuss this option and offer with your line manager at your earliest convenience.

...

79. It was proposed that the Claimant be redeployed into Ambulatory Care as maternity cover (at [396] of the Bundle). On 22 September 2022, the Claimant's RCN representative emailed Ms Hooton and included the following (at [399]):

Given the outcome and the [Respondent's] insistence that moving to Ambulatory Care is a reasonable adjustment for [the Claimant] (which we continue to dispute), in the interests of moving this matter along and showing [the Claimant] is willing to be amicable, [the Claimant] would be willing to move to Ambulatory Care on a temporary redeployment basis for the maternity cover as you suggest. However can you please confirm that [the Claimant] would be 'slotted in' to a role in Ambulatory Care (given the [Respondent's] insistence this is a "reasonable adjustment") instead of having to apply for a role, as you suggested in your email.

Please note that when [the Claimant] moves to Ambulatory Care, she will be working under protest whilst she explores her legal rights.

80. By a letter dated 13 October 2022, Ms Semple of HR informed the Claimant of the following (at [408] of the Bundle);

Following the outcome of the appeal hearing held on Tuesday 6 September 2022, I am writing to confirm the following:

That with effect from 1 November 22 to 30 June 2023, you will be redeployed on a temporary basis into a Band 6 post in Ambulatory Care. This is for a fixed period as it is to cover a maternity leave. Anna Workman will be contacting you to arrange your induction period.

At the end of this fixed period you will revert back to your substantive post.

81. As the flexible working request had not concluded fully in the Claimant's favour, her complaint of 23 April 2022 was considered under the Respondent's formal grievance process. The Claimant met with Mr Moeller on 7 October 2022 (the minutes of the meeting were at [508] – [510] of the Bundle).

82. A grievance outcome letter was provided on 14 October 2022 (at [410] – [412] of the Bundle). Mr Moeller concluded that the Claimant had been offered reasonable adjustments by way of Ambulatory Care and that mediation had been offered (and remained available) regarding her complaints against Ms Hooton and Mr Bursey. That concluded her grievance. The Claimant was informed that she had a right of appeal against the decision.

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83. The Claimant was redeployed to Ambulatory Care with effect from 1 November 2022. For the sake of completeness, the Claimant tendered her resignation on 2 October 2023.

**Application of the Findings of Fact to the Law**

Time Limits

84. The Respondent claimed that any allegation of discrimination which occurred before 29 April 2022 had been brought out of time (per section 123 of the EqA 2010). That date was contained within the List of Issues agreed between the parties (Paragraph 1, at Annex 1).
85. With respect to the parties, that date is incorrect. As detailed above, ACAS Early Conciliation began on 13 July 2022 and ended on 23 August 2022. The Claimant presented her ET1 to the Tribunal on 9 September 2022.
86. The date of the earliest allegation of discrimination made by the Claimant was 19 April 2022. Ordinarily, she would have had to present her claim by 18 July 2022 in order to comply with the requirements of section 123 of the EqA 2010. However, the effects of section 140B of the EqA 2010 served to extend that time limit, as follows:
- 86.1. The Claimant began Early Conciliation before the three month time limit expired.
- 86.2. As the time limit expired during the period of Early Conciliation (that is, between Day A and Day B, per section 140B of the EqA 2010), the Claimant had a further month after the end of Early Conciliation in which to present her claim (i.e. until 23 September 2022).
- 86.3. She presented her claim on 9 September 2022 and, therefore, in time.

Disability Discrimination

87. It was not in dispute that the Claimant was disabled, as defined by section 6 of the EqA 2010, at the relevant time.

Discrimination arising from disability (s. 15 Equality Act 2010)

88. It was not in dispute that the Claimant's inability to work night shifts arose in consequence of her disability.
89. The Claimant relied upon two alleged incidences of unfavourable treatment because of her inability to work night shifts.
90. The first was requiring her to take unauthorised leave, which was unpaid, when she refused to work the night shifts of 19, 20 and 21 April 2022.

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91. For the reasons set out above, we found that the Respondent did not require the Claimant to take unauthorised leave when she refused to work the night shifts of 19, 20 or 21 April 2022. Rather, the Respondent required the Claimant to contact the NIC per its protocol to inform the Emergency Department that she would not be attending the shift. The Claimant did not do that and she was never informed that she did not have to continue following the protocol. That was the reason for why her absence for those three dates was recorded as unauthorised.
92. The Claimant submitted that the Respondent was fully aware by April 2022 of the OH recommendations that she should not work night shifts. In addition, it was not in dispute that from the start of her employment in July 2021, the Claimant had not worked any night shifts.
93. However, it was never the Claimant's case that her disability prevented her from following the protocol or telephoning the NIC. In any event, from 22 April 2023 onwards, the Claimant followed the protocol, rang the NIC in advance, her absence was no longer unauthorised and she was paid for the night shifts she was rostered for, even though she did not carry them out.
94. The Respondent was entitled to require adherence to the protocol, even when it was aware of the OH recommendations. The Claimant was able to comply with the protocol but chose not to on 19, 20 and 21 April 2022.
95. Not being paid for the night shifts of 19, 20 and 21 April 2022 was unfavourable treatment, but it had nothing to do with the Claimant's disability or anything arising from her disability. It was because the Claimant failed to follow the protocol. Once she adhered to the protocol, the unfavourable treatment abated. The Respondent treated the Claimant no differently to how it would treat any nurse who failed to contact the NIC ahead of a rostered shift, day or night.
96. For those reasons, we did not find that the events of 19, 20 and 21 April 2022 were because of something arising from the Claimant's disability. The complaint was not made out and is dismissed.
97. The second alleged incidence of unfavourable treatment because of the Claimant's inability to work night shifts was requiring her to complete a flexible working request before the Respondent would consider making a reasonable adjustment.
98. The Tribunal found that this allegation was factually incorrect. As detailed above, prior to the Claimant making her flexible working request in July 2022, the Respondent had explored, trialled and suggested various adjustments which it believed were reasonable, including:
  - 98.1. Trying twilight shifts;
  - 98.2. Offering permanent redeployment to Ambulatory Care;

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- 98.3. Trying to recruit a nights-only nurse to enable the Claimant to work day shifts full-time in the Emergency Department;
  - 98.4. Re-offering redeployment to Ambulatory Care (with the additional option of working day shifts in the Emergency Department through the bank system);
  - 98.5. A reduced hours rota pattern which would enable periods of adequate sleep after night shifts; and
  - 98.6. Treating the Claimant's absence from her rostered night shifts as medical suspension, so that the Claimant was still paid for those shifts (provided she followed protocol and contacted the NIC in advance) and still able to pick up additional daytime bank shifts (in addition to her existing day shifts in the Emergency Department).
99. It was simply not the case that the Respondent required the Claimant to make a flexible working request before it would consider any adjustments. The fact that the Claimant did not agree with the proposals advanced and explored by the Respondent was not, with respect, the issue. The Claimant's case was put on the basis, as detailed above, that making a flexible working application was the prerequisite to the Respondent making or considering any adjustments. It was not.
100. In addition, the option of making a flexible working request was raised by Ms Arbuah of HR at the meeting on 10 June 2022, in response the Claimant withdrawing from the proposed facilitated discussion. Ms Arbuah also explained that whilst the issue with night shifts had been raised at the outset of the Claimant's employment, a formal flexible working application had never been made. The idea of initiating a formal process was endorsed by Mr Moeller and agreed to by the Claimant (per the minutes of the meeting, at [335] – [337] of the Bundle).
101. We also found force in Ms Snocken's submission that requiring the Claimant to complete and submit a flexible working application form was not unfavourable nor caused her any disadvantage. Indeed, she was not required to submit the application at all. Rather, it was an attempt by the Respondent to move the issue onto a more formal footing in its continuing efforts to find a mutually agreeable solution.
102. For all those reasons, the alleged unfavourable treatment did not happen. It follows that the complaint was not made out and is dismissed.

Failure to make reasonable adjustments (s. 20 and 21 Equality Act 2010)

103. The Claimant relied upon the Respondent's provision, criteria and/or practice ("PCP") of the requiring the Claimant to work nights, including:
- 103.1. The practice of refusing to exempt the Claimant and Emergency Department staff from working nights; and

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- 103.2. The practice of rejecting flexible working applications requesting no night working.
104. In our judgment, there was a PCP operated by the Respondent that required the Claimant, and every other appropriately-graded nurse, to work night shifts if employed in its Emergency Department. Indeed, the requirement was included in the job description for the Claimant's post (at [65] of the Bundle and referred to earlier, above). We went on to consider the consequences of that finding more broadly, below.
105. However, before doing so, we considered the two specific elements of that PCP as set out in the agreed List of Issues and detailed above.
106. First, whilst the Respondent did have a PCP of requiring the Claimant (and all Band, 5, 6 and 7 Emergency Department nurses) to work night shifts, it was not the case that the Respondent refused to exempt the Claimant from working nights. Indeed, it was not in dispute that during the entirety of her employment in the Emergency Department, the Claimant did not work a single night shift. As set out above, the Respondent explored various adjustments and alternatives, during which time it did not compel the Claimant to work night shifts.
107. In reality, the Respondent did the opposite of what was alleged by the Claimant. It did, to all intents and purposes, exempt the Claimant from working night shifts, whilst it explored various ways of finding a solution which was acceptable to both the Claimant and the Emergency Department. What the Respondent did not do was agree to exempt the Claimant permanently from night shifts. Instead, it agreed to an on-going, temporary exemption whilst it endeavoured to find an outcome which would work for all.
108. To the extent that the example from the PCP relied upon was that the Respondent refused to exempt the Claimant (and Emergency Department staff) from working night shifts, we found it to be factually incorrect. The Respondent did, in practice, exempt the Claimant from night shifts throughout her employment within the Emergency Department. We say 'in practice' because, as found above, the Claimant was put back on the night shift rota from 19 April 2022. However, she did not work those shifts and had she followed the protocol and contacted the NIC in advance, she would have been paid for those three shifts as well. From 22 April 2022, whilst the Claimant was rostered to work nights, in practice she was exempt from doing so provided she followed the protocol (which she thereafter did).
109. If the example from the PCP refers to a permanent exclusion from night shifts, the evidence showed that the Respondent was prepared to consider permanently excluding the Claimant but only if it had been successful in recruiting a nurse prepared to work only night shifts (thereby complimenting the Claimant's days-only working pattern and ensuring that the corresponding night shifts were covered). In practice, that proposal was ultimately unsuccessful, as the Respondent was unable to recruit anybody. But

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importantly, and as an indicator of the alleged PCP, the Respondent actively considered and took steps to, in effect, accede to the Claimant's request to be permanently excluded from night shifts whilst remaining a member of the Emergency Department.

110. That conclusion adds an important qualification to the overall PCP of requiring the Claimant to work night shifts. Whilst there was a requirement for Emergency Department staff, the Claimant included, to work nights, the Respondent was prepared to be flexible and proactive in seeking to meet the Claimant's request to be permanently excluded from nights and remain working in the Emergency Department, with its own assessment of how to meet the demands of the department in an effective and efficient way.
111. The second example from the PCP referred to the practice of rejecting flexible working applications requesting no night working.
112. The difficulty with this allegation, as highlighted by Ms Snocken, was that we only had evidence pertaining to one flexible working request – the Claimant's. It was not in dispute that the Claimant's request, so far as it related to night shifts, was refused. But that alone did not evidence a PCP in the terms advanced by the Claimant. In addition, as detailed above, the Respondent had explored a number of other options before the Claimant submitted her flexible working request. It was the failure of those proposals to find an acceptable compromise between the parties which led to the request by the Claimant being put on a more formal footing, by way of the flexible working procedure.
113. Whilst the Respondent rejected the Claimant's request at the time it was made, had the request been made at a time when, for example, the recruitment of a nights-only nurse had succeeded, the Claimant's application may have been granted (on the basis that it was reasonable to conclude that, if the Respondent was prepared to go to the time and expense of seeking to recruit a nights-only nurse, it would have considered the Claimant's flexible working application differently if the recruitment exercise had been fruitful).
114. In effect, the Claimant had taken a single decision regarding the application that she made, which was rejected on the basis of what was available to the Respondent at the time and concluded that it was a PCP. In our judgment, and for the reasons set out above, it was not.
115. We therefore concluded that the PCP of requiring the Claimant to work nights was a PCP adopted by the Respondent and applied to the Claimant. However, we were unable to conclude that, within the operation of the PCP, the Respondent had practices of refusing to exempt staff from night working and refusing flexible working applications.
116. It was not in dispute that the application of the PCP would have put the Claimant to substantial disadvantage compared to someone without her disability, in that the Claimant was unable to work night shifts. The Respondent also accepted that it knew the PCP would place the Claimant at that disadvantage (not least, because of the OH reports).

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117. The Claimant was consistent throughout her employment and these proceedings that the Respondent could have avoided the disadvantage caused by the PCP by making her exempt from the PCP itself (namely, the requirement to work night shifts). In reality, what the Claimant was proposing was a permanent exemption, something which the Respondent was not prepared to do.
118. The Claimant was particularly keen to develop her skills and experience in the field of trauma. That was a motivating factor in her decision to seek employment at the RLH (as it was a major trauma centre). At the same time, the Respondent was consistently provided with OH recommendations that, as a result of the Claimant's disability, she should not work night shifts.
119. In addition, the Claimant had been offered the post after OH had recommended that she be exempt from working nights.
120. Was it reasonable for the Respondent to have permanently exempted the Claimant from working night shifts?
121. The parties were broadly in agreement on the legal principles which applied in determining this question. Whether a proposed adjustment is reasonable is an objective test, having regard to the circumstances of the particular case. The focus is on the practical effect of the measure proposed. Both parties relied, to some degree, upon the Equality & Human Rights Commission's Code of Practice on Employment in their submissions, specifically Paragraph 6.28, which states as follows:

**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.
122. Based upon the consistent and unchallenged recommendations of OH, exempting the Claimant from night shifts would have (and did) prevent the substantial disadvantage she would otherwise have suffered. To that extent, it would have ensured that she continued to be employed in the Emergency Department, which was her preferred option given her desire to gain experience in major trauma. It was also the reason she left her previous post at UCH for the RLH.

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123. Given the resources available to the Respondent, the Claimant also contended that the financial impact on the Respondent of having to find additional cover on the rota for the Claimant's exempted night shifts would be minimal. The Claimant's previous employer had permitted her to work only day shifts in its emergency department and there was no good reason why the Respondent could not do the same. Instead, the Claimant alleged, the Respondent wanted to dismiss her rather than change their PCP or, at the very least, refused to alter or adjust the PCP in the face of the consistent recommendations from OH.
124. In response, the Respondent contended that permanently exempting the Claimant from working nights in the RLH Emergency Department was not reasonable.
125. In her evidence, Ms Fox described the adverse impact on the rota system utilised by the Emergency Department (per Paragraph 6 of her witness statement):

The rota pattern in the emergency department at [RLH] is split and staff work 50% of their rota on days and 50% nights. We work in a team pattern so that we can ensure we support staff and help development. Night shifts are a very busy period and brings its own sets of challenges for the team working, Nights are an expectation of the role and all levels band 5, 6 and 7 work night shifts. We require the same number of staff on day shifts as the night shifts due to acuity, which is why staff are required to work this rota pattern.

126. The Respondents' witnesses explained how they would be forced to rely upon other staff (via the bank system) or external staff (via agencies) to fill the gaps left in the rota by the Claimant's exemption. This would have the effect of increasing costs and reducing the skill mix within the teams on duty. Ms Fox described the potential issues at Paragraphs 17 and 33 of her witness statement:

17. I was the band 7 lead for the rota for the whole emergency department staff. Rotas are complete two months in advance, so although I was able to allocate [the Claimant] into available day shifts it did mean there were gaps on the night rota for my team. This meant other staff picking up more night shifts, vacant shifts which would likely be filled with agency staff which is not cost effective and can reduce skill mix on shifts...

...

33. ...When staff members to [sic] not attend shifts, then agency workers often have to be brought in and this also places enormous cost pressures on an already stretched departmental budget.

127. Ms Hooton described how the "*department works in teams of set patterns so that we can ensure the shifts are evenly covered and that night and weekend work is spread evenly between the teams. Over the years we have analysed our staffing with the support of a psychologist as well as the analysis of activity*



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*and found that set team working remains the safest and fairest way to ensure that the department is covered and can continue to function. This means that when staff are absent from their set pattern we have to fill these shifts with staff bank and agency if bank are unable to fill...*" (at Paragraph 4 of her witness statement). As regards the costs implications of finding cover for night shifts, the generally antipathy towards working nights was reflected in the additional reliance on agency staff, which impacted on the delivery of care and overall costs (per Paragraphs 20 and 26 of her witness statement):

20. ...we were having to cover [the Claimant's] shift with agency workers and the longer the situation went on the more cost burden this was placing on our already stretched budget. The use of agency work, more importantly, means that shifts are not covered by a nurse that is familiar with our department, therefore the delivery of care is impacted. Agency more often than bank is mostly used on nights as our regular bank staff prefer not to pick up nights...

...

26. ... Not working nights simply means that these nights remain unfilled but without the budget to hire someone to fill the shift.

128. The challenges of upholding care standards and maintain budgetary constraints were echoed by Mr Smith (at Paragraph 21 of his witness statement):

... [Emergency Department] staffing is required to provide cover consistently twenty-four hours a day, seven days a week. If any single staff member is removed from providing an element of that cover, then other staff have to cover that shortfall: someone will have to do more than their 'fair share' of nights. If this can't be arranged (we can't compel staff to work more nights than is contracted, we can only ask) then this is a 'designed in' use of temporary staffing. Temporary staffing (Bank or Agency staff) is intended to be used only as a last resort, not only because of the expense but also because too high a reliance on temporary staffing reduces the ability of the [Emergency Department] leadership to ensure consistent training and practice. This in turn can impact on the consistency of care standards and patient safety.

129. There was consistent and compelling evidence of the difficulties in finding cover for unfilled night shifts, as compared with day shifts, over and above the attempts that were made by the Respondent to recruit a nights-only nurse. Ms Hooton described how nights were "*an unpopular shift with the team*" (at Paragraph 11 of her witness statement) and Ms Fox concurred, stating that "*[D]ay shifts are generally filled better than night shifts by staff picking up additional shifts with bank partners*" (at Paragraph 17 of her witness statement).

130. This difficulty in finding cover was, to a material degree, reflective of the challenges associated with working night time shifts. We saw and heard evidence pertaining to the adverse impact on other staff of working additional nights, given the physical and mental impact linked with night working (see, for example, Paragraph 20 of Ms Fox's witness statement, Paragraph 4 of

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Ms Hooton's witness statement, Paragraphs 4 & 5 of Mr Moeller's witness statement and Paragraphs 13, 21 and 28 of Mr Smith's witness statement).

131. All of these factors gave rise to the most compelling reason for why the Respondent maintained that the adjustment being sought by the Claimant was not reasonable. The challenges of finding cover for unfilled shifts, within a rota which was constructed to ensure that an effective service was provided 24/7, would have an adverse impact on the Emergency Department's ability to deliver patient care and maintain the safety of patients and staff alike.
132. Examples of this included the following:
  - 132.1. *"...the department could not accommodate a day's only pattern because of the strain that this would put on her colleague, the pressure that it would put on the staffing of the department generally and on the department's ability to deliver the required service to patients on a 24/7 basis..."* (Paragraph 20 of Ms Fox's witness statement);
  - 132.2. *"...it wasn't the fault of the Matrons and other managers that a day's only pattern was unworkable. That is the nature of the Emergency Department and nights are often the most busy and demanding shifts of all. It is imperative that they are adequately staffed otherwise patient safety is put at risk..."* (Paragraph 33 of Ms Fox's witness statement);
  - 132.3. *"...we have never been able to decrease the number of nights required and cannot offer staff the option of declining nights as they are so unpopular that our busiest and highest acuity shifts would not be safely staffed..."* (Paragraph 4 of Ms Hooton's witness statement);
  - 132.4. *"...I stand by my decision [to refuse the Claimant's application to be permanently exempt from night shifts] as I believe it supports patient safety..."* (Paragraph 36 of Ms Hooton's witness statement);
  - 132.5. *"...In services with a continuous demand which frequently peaks above the average, and that have only the bare minimum staffing resource, ensuring that safe staffing levels can be assured at all times has to remain the paramount concern for department leaders. As much as they may be sympathetic to and wish to support flexible working, they cannot do so if this reduces staffing ratios for all or some of a shift..."* (Paragraph 5 of Mr Smith's witness statement);
  - 132.6. *"...the core principle that the roster must ensure maximum available staffing within budget at busy times remains"* (Paragraph 12 of Mr Smith's witness statement);
  - 132.7. The Claimant's exclusion from night shifts *"would leave an avoidable staffing shortfall that could not be mitigated by other means, placing additional strain on the rest of the team and leaving patients with an insufficient resource to ensure their safe and timely care."* (Paragraph 13 of Mr Smith's witness statement); and

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132.8. Paragraph 21 of Mr Smith's witness statement, already reproduced above.

133. The Tribunal was able to place weight on those professional views from the Respondent's witnesses, who either held senior positions and/or had extensive experience in emergency medicine generally and the Emergency Department at RLH specifically. To the extent that the Claimant disagreed with any of the above assertions, we preferred the evidence of the Respondent's witnesses, because of that experience and knowledge.

134. It followed that exempting the Claimant permanently from night shifts and in the absence of a nights-only replacement, would constitute a threat to patient safety and undermine the effectiveness of the services provided by the Emergency Department.

135. Finally, the Respondent's witnesses expressed their concerns that exempting the Claimant permanently from night shifts would set a precedent which could be detrimental to the effectiveness and efficiency of the Emergency Department still further. According to Ms Hooton (at Paragraph 18 of her witness statement):

...In my opinion, which is based on significant analysis of our staffs feedback and psychological research, if we were to offer staff the option to decline nights, it would be widely taken up and make safely staffing the department out of hours impossible, this would certainly create a patient safety issue, who should be held accountable for this?

136. Mr Smith shared those concerns in his written evidence (at Paragraph 22):

There is also the issue of precedent. If a non-nights pattern is agreed without a mitigation (a 'night working partner', or shortened rather than no nights) then the agreed standard that all staff work a rotational roster to fairly even out unsociable working is removed, and there is then little to prevent other staff also insisting on not working nights on the basis of parity. The subsequent challenges in filling night shifts would present very real risk for which the departmental leaders would have no mitigation.

137. The Respondent's witnesses were at pains to make clear that whilst they had been able to accommodate days-only shifts for the Claimant on a temporary basis (which they did from July 2021 until her redeployment in November 2022), it was, for all the reasons detailed above, neither reasonable, practicable nor feasible to do so on a permanent basis.

138. The Tribunal fully accept that the Claimant had an understandable sense of grievance at the communication failures between the Respondent's recruitment team and the Emergency Department. It must have been highly embarrassing for her to arrive for her first day of a new job, only to discover that her colleagues and managers were wholly unaware of her disability and the OH recommendation that she should be exempted from working nights. Indeed, many of the Respondent's witnesses in these proceedings acknowledged that

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unfortunate course of events and expressed their sympathy for the Claimant's position.

139. At the same time, it appeared that the Claimant's terms and conditions of employment were not amended to reflect the OH recommendation prior to her signing it and accepting the unconditional offer of employment
140. However, in our judgment, if there was an answer to or a remedy for those errors on the part of the Respondent, it was to improve its communication, both externally to candidates and internally to those departments receiving newly appointed staff. It was not, without more, a basis for finding that the Claimant's preferred adjustment of permanently exempting her from night shifts was reasonable.
141. In addition, we were mindful of the fact that not being permanently exempt from nights would not, when considered in context of the proposed redeployment to Ambulatory Care, result in the Claimant being unable to remain in employment. Rather, it was the specific area of employment which was under threat (namely, in the Emergency Department of a major trauma unit). It is well-established that enabling disabled employees to remain in employment is central to the policy underpinning the duties on employers in section 20 of the EqA 2010. To that end, the Respondent was offering alternative employment in its sister department.
142. Whilst the Respondent did not consider the Claimant's request for permanent exemption to be a reasonable adjustment, it did actively explore, consider and propose other measures which addressed the substantial disadvantage (by removing the requirement for night shifts) and were objectively reasonable (most notable, the offers of redeployment).
143. For all those reasons, we found that it was not reasonable for the Respondent to have permanently exempted the Claimant from working night shifts and there was, as a result, no breach of the duty to make reasonable adjustments.

**Employment Judge S Povey**  
**Date: 8 February 2024**

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## ANNEX 1

### List of Issues

#### Time Limits

1. Given the date the claim form was presented and the dates of Early Conciliation, any complaint about something that happened before 29 April 2022 may not have been brought in time.
2. Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
  - 2.1. Was the claim made to the Tribunal within three months (plus any Early Conciliation extension) of the act to which the complaint relates?
  - 2.2. If not, was there conduct extending over a period?
3. If so, was the claim made to the Tribunal within three months (plus any Early Conciliation extension) of the end of that period?
4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
  - 4.1. Why were the complaints not made to the Tribunal in time?
  - 4.2. In any event, is it just and equitable in all the circumstances to extend time?

#### Discrimination arising from disability (s. 15 Equality Act 2010)

5. Did the Respondent treat the Claimant unfavourably by:
  - 5.1. Requiring the Claimant to take unauthorised leave which was unpaid when she refused to work the nights shifts of 19, 20 and 21 April 2022.
  - 5.2. Requiring the Claimant to complete a flexible working application before it would consider making a reasonable adjustment as per paragraph 24 of the Particulars of Claim.
6. Did the following things arise in consequence of the Claimant's disability:
  - 6.1. The Claimant's inability to work night shifts?
7. Was the unfavourable treatment because of any of those things?
8. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

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- 8.1. The smooth running of a 24-hour emergency department (which is a 24-hour operation that needs to be staffed accordingly).
9. The Tribunal will decide in particular:
  - 9.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;
  - 9.2. Could something less discriminatory have been done instead;
  - 9.3. How should the needs of the Claimant and the Respondent be balanced?
10. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Failure to make reasonable adjustments (s. 20 and 21 Equality Act 2010)

11. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?
12. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
  - 12.1. The Respondent's requirement for the Claimant to work nights including:
    - 12.1.1 The Respondent's practice of refusing to exempt the Claimant and emergency department staff from working nights; and
    - 12.1.2 The Respondent's practice of rejecting flexible working applications requesting no night working.
13. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant could not work night shifts?
14. Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
15. What steps could have been taken to avoid the disadvantage? The Claimant suggests:
  - 15.1. Making an exemption for the Claimant in terms of her not being required to work night shifts.
16. Was it reasonable for the Respondent to have to take those steps and when?
17. Did the Respondent fail to take those steps?