EMPLOYMENT TRIBUNALS

Claimant: Havovi Anklesaria

Respondent: Trinity College, Cambridge

Heard at: Cambridge Employment Tribunal **On:** 29, 30, 31 January, 1, 2 and 5 February 2024
(6 February 2024 in chambers)

Before: Employment Judge R Freshwater
Tribunal Member B Smith
Tribunal Member A Hayes

Representation

Claimant: Mr A Nicklin (counsel)
Respondent: Mr J Cook (counsel) and Mrs M Lyne (solicitor)

RESERVED JUDGMENT

1. **The claimant's claim for direct race discrimination is not well-founded and is dismissed.**
2. **The claimant's claim for indirect race discrimination is not well-founded and is dismissed.**
3. **The claimant's claim for victimisation is not well-founded and is dismissed.**

REASONS

Introduction

1. The claimant is Dr. Havovi Anklesaria. The respondent is Trinity College, which is a college of the University of Cambridge.

2. The claimant has worked for the Respondent since 1994 in the Library. She started invigilating examinations in 1996.

3. The claimant brings three claims against the respondent:

    3.1. Direct race discrimination
    3.2. Indirect race discrimination

3.3. Victimisation

4. One of the issues in the case is the extent to which the various parts of the claims are within time and, if not, whether the tribunal should extend time.

Hearing and procedure

5. The hearing took place in person. It had been agreed between the parties and an earlier tribunal that the time estimate for the case was 7 days. By the time of this hearing, it was listed for 5 days. This was because it was thought by the listing office that a panel was not available for 7 days. On the first day, the tribunal asked the parties if they knew that the case had been allocated 5 days. The parties had not been informed of the reduction. The tribunal made arrangements for the hearing to be extended by 2 days.

6. At the start of the hearing, the tribunal decided that it would deal with the issue of liability only as there did not appear to be sufficient time to also deal with remedy, even in 7 days. A separate remedy hearing would be listed if necessary.

7. The tribunal was referred to a documentary bundle of 859 pages, a witness statement bundle of 140 pages, a proposed reading list prepared on behalf of the claimant, and an agreed chronology and cast list.

8. The tribunal heard oral evidence from the claimant.

9. The tribunal heard oral evidence on behalf of the respondent from: Dr Nicholas Bell, Mrs Janet Procter, Mr Steven Archer, Mr Andrew Speak, Mrs Sally Prior, Professor Kusukawa and Mrs Sian Gardiner.

10. The tribunal received closing submissions in writing, which were expanded upon orally, from counsel on behalf of the claimant and the respondent.

11. The tribunal reserved judgment and deliberated in chambers on the final day of the hearing.

The claim and issues

12. The tribunal was referred to an agreed list of issues (pages 61 – 66 in the bundle). That list is inserted into this judgment as set out below. The paragraph numbers have been amended from the original list, so that they fit in with those in this judgment.

13. The claimant applied to amend the schedule of issues to include a new comparator in respect of one part of her claim. This was the addition of Elisa Palmitessa at paragraph 21.1.3 below. The application was not opposed by the respondent.

Jurisdiction

14. Insofar as any of the claimant's claims are found to be out of time, do those claims form part of conduct extending over a period, including at least one well-founded allegation that is in time, for the purposes of s.123(3)(a) Equality Act 2010?

15. If not, would it be just and equitable for the tribunal to extend time?

Direct Race/Nationality Discrimination (ss. 13 and 39 Equality Act 2010)

16. The claimant relies upon her nationality as a protected characteristic. Her nationality is Indian.

17. The claimant relies upon the following factual allegations:

17.1. P45s were issued to the claimant on 2 December 2017, 28 November 2018, and 2 December 2019 and she was treated by the Respondent as a leaver, having previously always received P60s each year since commencing employment with the respondent in or around 1993. The claimant avers that, in contrast to her treatment, colleagues on casual contracts were issued with a P60 at the end of each financial year rather than a P45.

17.2. The respondent refused to offer the claimant a permanent / flexible contract for 9.00am to 5.00pm from mid-April to mid-December each year on a salary. The claimant was instead offered casual work on an hourly rate basis. The claimant alleges that she was refused a permanent contract on the following occasions:

17.2.1. By Janet Procter in November 2018.

17.2.2. By Dr Nicholas Bell (telling the claimant to wait until a new HR Manager was appointed) and Sandy Paul (who suggested there were legal impediments to agreeing such a contract) in April 2019.

17.2.3. By an email from Dr Nicholas Bell (to Cathy Yearsley, University of Cambridge & Colleges Branch of Unison) dated 3rd August 2020, on the basis that the respondent did not give such contracts to employees who move away or go abroad.

17.2.4. By Steven Archer (Sub-Librarian) in a letter of 23rd April 2021 (not upholding the claimant's grievance) and an email dated 13th July 2021. The claimant was told that there were legislative requirements to be fulfilled (as regards a permanent contract) but such requirements were not identified.

17.2.5. By Dr Nicholas Bell at the appeal hearing on 20th July 2021.

17.3. As a result of the claimant's contract having been terminated in December 2019, the respondent did not furlough the claimant between March 2020 and September 2020. The claimant says that a message to this effect was conveyed on behalf of Ms Procter by Dr Nicholas Bell.

17.4. From October 2020 the claimant was treated as a "new employee". As a consequence, she was deprived of access to enhanced rates of pay for "unsocial hours, lone working and security" and/or

Sunday working which no longer applied for new employees after October 2020 but continued for existing employees at the time.

17.5. From October 2020 the claimant was treated as a "new employee". As a consequence she was deprived of an additional annual leave entitlement.

17.6. In July 2021, when the respondent regularised hourly remuneration for evening and weekend desk supervisors, the claimant was treated as a new employee and was not offered compensation for the revised pay structure.

17.7. In September 2021 the claimant was offered a permanent contract for three hours per week or 13 hours per month during term time (and not less than 156 hours per annum) by Janet Procter (outside of the Library's core hours of 9am-5pm). The claimant avers that this prevents any extended travel to India for family reasons owing to the monthly term time minimum requirement and that obligation affecting her flexibility to swap shifts. Until December 2019 she worked approximately 1000 hours per annum, including during the Library's core hours but without any monthly minimum.

18. Did these matters occur as alleged by the claimant?

19. If so, did they amount to less favourable treatment?

20. If so, was the less favourable treatment because of the claimant's nationality?

21. Insofar as the claimant relies upon actual comparator(s), were the circumstances of those comparator(s) the same as the claimant's in all material respects apart from the protected characteristic of nationality? The comparators are:

    21.1.1. Anna Kibort, Mustapha Ongan and Aaron Masters (paragraph 14.1, 14.3, 14.4, 14.5, 14.6, 14.7)

    21.1.2. Paula Woolf, Kevin McGheoghan (paragraph 14.2)

    21.1.3. Elisa Palmitessa (paragraph 17.3)

22. Alternatively, if the tribunal finds that any of the above comparators are materially different, the claimant will rely on a hypothetical comparator.

Indirect race/nationality discrimination (section 19 and 39 Equality Act 2010)

23. Did the respondent operate the following provision, criterion or practice ("PCP"):

    A policy or practice of not offering permanent and flexible contracts to employees who took breaks from work or moved away for travel purposes.

24. If the respondent did operate this PCP, did the respondent apply this PCP to the cflaimant? The claimant says that this was applied to her because she was treated as a leaver each year after 2017.

25. If the respondent did operate this PCP, did the respondent apply this PCP to employees who were not of Indian nationality or would it have done so?

26. If the respondent did operate this PCP, did this PCP put persons with whom the claimant shares her nationality at a particular disadvantage when compared with employees not of Indian nationality? The claimant says that the particular disadvantage was that other persons did not need to travel so far or for so long in order to visit family at home meaning such persons were at a lower risk of suffering any detriment from the respondent's alleged policy or practice.

27. If the respondent did operate this PCP, did this PCP put the claimant at that disadvantage? The claimant will rely on the factual allegations at paragraph 14, above.

28. Did the respondent have the following legitimate aim(s):

    28.1. Ensuring adequate and/or consistent staffing and service levels for students and other library users, particularly during University term-time;
    28.2. Maintaining high standards of service for library users;
    28.3. Saving costs and/or the efficient distribution of limited resources;
    28.4. The equitable treatment of employees;
    28.5. The efficient distribution of work amongst library employees;
    28.6. Compliance with applicable legal obligations including those relating to the furlough scheme?

29. If so and if the respondent did operate the claimed PCP, was the application of the PCP a proportionate means of achieving those aim(s)?

Victimisation (section 27 and 39 Equality Act 2010)

30. The respondent admits that the claimant's ET1, presented on 20 December 2021, was a protected act for the purposes of s.27(2)(a) Equality Act 2010.

31. Did the respondent do the following:

    31.1. On a date between April to September 2022, decide that it will no longer offer the claimant any examination invigilation work (via the tutorial office) to assist students who needed to be isolated for an examination and/or who required additional time because of a special need. The claimant will say that she had been offered such work (and performed the same) consistently between 1996 and April 2021.

32. Did this conduct subject the claimant to a detriment? The claimant will say that she had been consistently offered this work which was better paid than her regular desk supervision role. By not offering the work, the claimant has lost income.

33. If so, was it because the claimant did the protected act of bringing proceedings?

The law

Direct race discrimination

34. Direct discrimination is provided from in Section 13 of the Equality Act 2010 [EA 2010] which provides as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

35. The test for direct discrimination is objective. The fact that the claimant may subjectively believe that she has been treated less favourably because of a protected characteristic is not a factor that the tribunal may consider (Burrett v West Birmingham Health Authority [1994] IRLR 7, EAT).

36. It is not sufficient, for a direct discrimination claim to succeed, for the claimant to show that she has been treated differently. The treatment must be "less favourable" (see Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL per Lord Scott at paragraph 76).

37. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 at paragraphs 7-8, Lord Nicholls explained that frequently Tribunals will apply a two-stage test in direct discrimination claims. Firstly, it is necessary to ask whether the claimant has been treated less favourably than an appropriate comparator and then secondly whether any less favourable treatment was because of the relevant proscribed ground. However, Lord Nicholls continued that a two-stage approach will not necessarily be appropriate in every case, and sometimes it may be that the less favourable treatment issue cannot be resolved without, at the same time, resolving the reason why issue.

38. Shamoon also confirms the principle that, for a comparator to be appropriate, the circumstances of the comparator must be the same as those of the claimant, in all material respects, save for the protected characteristic (see paragraphs and 10.)

Indirect discrimination

39. Section 19 of the EA 2010 can be summarised as follows:
    - 39.1. The respondent applies to the claimant a Policy, Criterion or Practice [PCP].
    - 39.2. The respondent applies, or would apply, the PCP to persons with whom the claimant does not share the protected characteristic.
    - 39.3. The PCP puts, or would put, persons with whom the claimant shares the protected characteristic at a particular disadvantage in comparison with persons who do not share the protected characteristic.
    - 39.4. The PCP puts or would put the claimant at that disadvantage.
    - 39.5. The respondent cannot show that the PCP is a proportionate means of achieving a legitimate aim.

Victimisation

40. Section 27 EA 2010 can be summarised as followas:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act

41. The causation test is one of "significant influence", which requires the Tribunal to evaluate the conscious and sub-conscious thought processes of the alleged discriminator.

Findings of fact

42. The claimant has worked for the respondent as an evening and weekend desk supervisor in the library since November 1994. This was on the basis of a varierty of contracts. During the time in question, none were permanent. This was not in dispute between the parties.

43. The claimant is an Indian national with Indefinite Leave to Remain in the United Kingdom. She returned to India annually, from mid-December to mid-April. The reason for this was so that she could care for her parents and spend time with family.

44. The claimant worked under a series of contracts during a similar period each year and was not ususally treated as a leaver between contracts before December 2017. Her evidence was that she was issued with a P60 at the end of each financial year and we accept this was usually what happened.
45. The pattern changed when the claimant was issued with a P45 on 2 December 2017, 28 November 2018 and 2 December 2019. However, it is not the case that she had always been issued with a P60 in previous years. The documentary evidence shows that she was issued with a P45 on 28 September 2000. However, that is not materially important to the case.

46. The claimant was issued with a P45 in December 2017 as a result of changes within the Human Resources department of the Respondent. These changes were put in place by Mrs Grubb, who was the HR manager from roughly March 2017 until June 2018. The changes included the introduction of a digital HR system called 'Cascade'. In October 2017, it was decided that there would be a new leavers process. Previously, the arrangements for staff working under casual contracts were that the relevant manager in each department would issue the contracts and inform payroll of any changes. HR were not involved as a matter of course and Mrs Grubb wanted to achieve a more centralized approach to HR. This was the evidence of Mrs Proctor, which we found to be credible. Mrs Proctor has worked for the respondent in HR since 2008 and was able to expain the changes over time and what they meant on a practical basis. Essentially, Mrs Grubb brought order to what what appears to have been an inconsistent approach (between the various departments of the respondent) to dealing with those on casual contracts.

47. Between October 2017 and December 2017, data from the existing HR system (which was mainly paper records) was transferred to Cascade. Cascade sent out reminders to managers to enter data on the system, such as when an

employee leaves. Many of the paper files were destroyed on the instruction of Mrs Grubb.

48. Some colleagues of the claimant (who also worked under casual contracts in the Library) were not issued with a P45 when their contracts ended. Dr Kibot is one of those. She had worked in the Libray since 2001 and was never issued with a P45. This included an occasion in 2017 when she did not work for a period of 3.5 months between July and September. We find that the reason for the gap in work was because Mr Paul (the sub-librarian at the time) had wrongly thought she was unavailable for work. He belived that Dr Kibot was, however, available for emergency cover during that time and therefore was not made a leaver on the system. We do not find this inconsistent with Dr Kibot's email dated 1 June 2017 in which she told Mr Paul that her timetable was complicated. She asked to work a small number of shifts in September 2017, before the new term started. Dr Kibot regularly had other gaps in her work, but these were for shorter periods of between 2 and 3 months during the summer vacation.

49. Mustapha Ongan and Aaron Masters were never unavailable for work for extended periods.

50. The respondent has never offered the claimant a permanent, flexible, contract enabling her to work between 9 am and 5 pm from mid-April to mid-December each year. This was not in dispute between the parties.

51. We do not find that Janet Proctor refused to issue the claimant with a permanent, flexible, contract in November 2018. Her letter to the claimant was simply recording the fact that the claimant was leaving before the end of the original contract of employment and that the P45 would be issued to reflect that change.

52. We do not find that either Dr Bell or Mr Paul refused to issue the claimant with a permanent, flexible, contract in April 2019. Dr Bell was aware that a new HR Director was going to be appointed, and we accept his evidence that he suggested to the claimant that any conversation about the issue of a P45 ought to wait until then. It is not ideal that the claimant's questions had to wait for so long, but this is not the same as a refusal to issue a permanent contract. Neither Dr Bell nor Mr Paul had any power to issue the contract. Instead, it was the respondent's Staff Committee that had the authority to do so. The claimant accepted that she had not asked for a permanent contract under specific terms.

53. The email from Dr Bell to Ms Yearsley (dated 3 August 2020) was not a refusal to offer the claimant a permanent, flexible, contract. It was an explanation as to why the respondent did not offer staff permanent contracts when they were away from the college and unable to work for an extended period.

54. In October 2020, the respondent began a consultation process about the creation of permanent desk supervisor posts.

55. Mr Archer did refuse to offer a permanent contract exactly on the basis that the claimant sought. He considered the claimant's flexible working request even though she had made it in the incorrect form. He took a pragmtic approach. The claimant wanted more flexibility than the respondent was prepared to accept.

56. Dr Bell also refused the claimant's application for flexible working which was renewed at the appeal hearing on the same basis as Mr Archer.

57. Dr Wolff was employed on a term-time only contract and under a flexible working arrangement. However, she was not permitted to be absent during term-time (or for an entire term).

58. Mr McGeoghehan's flexible working request enabled him to reduce his hours for a six-month period until his retirement. He was not permitted to be absent for an extended period during term-time.

59. Mr Masters resigned before permanent contracts were offfered to staff in July 2021.

60. No employee working for the respondent under a permanent contract is allowed to be absent from work for an entire term.

61. The claimant was not eligible for furlough because her contract was terminated in December 2019 and she was not on the payroll in March 2020. The Claimant had discussed her return to work in mid-April 2020 with Mr Paul. However, no start date had been agreed. The position in respect of Dr Kibot, Mr Ongan and Mr Masters was different. They were all employed by the Respondent in February and March 2020. Therefore, they were eligible for furlough.

62. Elisa Palmitessa (another colleage of the claimant) was furloughed, even though she left for Italy on 13 March 2020. The reason for this was because she had completed shifts before she left and was on the payroll in March 2020.

63. The claimant was treated as a new employee from October 2020. This meant that she did not receive the same enhanced rates of pay as those colleagues who had been continuously employed (Dr Kibot, Mr Ongan and Mr Masters). This was not in dispute.

64. The claimant did not receive additonal annual leave entitlement because she was treated as a new employee in October 2020. This was not in dispute.

65. The respondent regularised its pay struture in July 2021, the claimant was not offered compensation as she was treated as a new employee. This was not in dispute.

66. The claimant was offered casual work on an hourly basis. This would have enabled her not to work during December to April each year.

67. The claimant was offered a permanent contract in September 2021 which was backdated to 4 July 2021.

68. The respondent did not have a policy or practice of not offering permanent and flexible contracts to employees who took breaks from work or moved away for travel purposes. The basis of not offering employees such a contract was rather that permanent employees should not be able to take *extended* time away from work during term time.

69. Mr Speak's evidence was that the respondent was agreeable to the claimant having extended breaks each year, provided it is not for an entire term. He said that would apply to anyone of any nationality who is on a permanent contract with the college. We find his evidence to be credible. It is clear from the totality of the evidence that the respondent assessed a need for permanent members of staff were needed during term time. Nobody else is away from work for an entire term. Indeed, the claimant was offered a permanent contract that would have allowed her a continuous break of approximately 3 months over the summer. She did not accept it.

70. The respondent decided not to offer the claimant invigilation work between April and September 2022. The claimant had carried out that work consistently between 1996 and April 2021. As a result, the claimant lost income from that work.

71. The reason why the claimant was not offered the invigilation work was that a decision was taken by the Acting Senior Tutor (Professor Kusukawa) that Post-Doctoral members and postgraduate students should be prioritised for invigilation work. This instruction was passed on to admistrative staff who carried it out. Postgraduate volunteers covered all invigilation needs.

72. We found the evidence of Professor Kusukawa credible when she said she was unaware that the claimant had started Employment Tribunal proceedings at the time she made her decision, and that it was later on that she was informed the claimant had made a legal claim.

Conclusions

73. The claims were presented on 20th December 2021. The important ACAS dates are 23rd October 2021 and 4th December 2021. The last event relied upon (the provision of the contract on 10th September 2021) is an in-time event. We are satisfied that the previous events amount to a continuing act, given the events that occurred during the time in question. There was a delay in considering the P45 issue whilst the respondent appointed a new HR director, a grievance and appeal, and a consultation about the creation of permanent desk supervisor positions. The discrimination claims are in time.

74. It is just and equitable to allow an extension of time in respect of the victimisation claim. It was made promptly, at an early stage in the proceedings, and the prejudice caused to the respondent is outweighed by the impact on the claimant if she were not allowed to pursue the claim. There has been plenty of time for the respondent to collect evidence and the reasons why the relevent witness says her memory is blurred is not because of when the claimant applied to amend her claim.

75. The issues in this case stem from different interpretations about what happened and why.

76. The claimant was not offered a permanant contract with the terms that she wanted at any point. However, we do not find that she was treated less favorably than a hypothetical comparator. We do not find that the comparators

put forward by the claimant have circumstances that are materially the as the claimant.

77. Dr Kibot is, perhaps, the most obvious comparator to consider as she, like the claimant, had worked in the library since 2001. She was not issued a P45 in 2017, when she did not work for a period of 3.5 months, because of an error made by her manager at the time. Dr Kibot was available for work, but none was provided to her. The period of absence was over the long, summer, vacation. Each period of absence for Dr Kibot was over the long vacation. This is different from the claimant's position. The claimant was unavailable for work for a period of 4 months. The claimant's circumstances are not materially the same as Dr Kibot's.

78. Mr Ongan and Mr Masters are not good comparators either: they did not take extended breaks from work during term-time. The claimant's circumstances are not materially the same.

79. Dr Wolff and Mr McGeoghehan did not carry out the same work as the Claimant. They were Library Assistants. While there may be some overlap in the work of Desk Supervisors and Library Assistants, the latter undertake more specialist tasks as well. Dr Wolff had specific tasks relating to digital content, which was unique to her. The flexible working they were afforded was assessed as compatible with the business need of the college.

80. The claimant was, ultimately, offered a permanent and flexible contract. It was not one that she found acceptable. She would have been able to take breaks from work and move away for travel purposes, just not during an entire term. The respondent worked to find solutions for the claimant that included flexibility. The claimant was offered a contract that would have permitted her to have a break of 3 months over the summer. The claimant did not accept this because, in her view, she ought to have been offered a permanent contract that enabled her to take the same breaks from work that she had done under the casual contracts.

81. If we are wrong about that, we do not find that she was treated less favourably because of her nationality. We are not satisfied that a hypothetical comparator would have been treated any differently. The issue as to any difference in treatment stems from the business needs of the respondent and the fact that the claimant would be unavailble for work for 4 months, including an entire term.

82. Therefore, the claim of direct race discrimination is not well-founded and does not succeed.

83. We found as a matter of fact that the respondent did not operate a PCP of not offering permanent and flexible contracts to employees who took breaks from work or moved away for travel purposes. Therefore, the claim for indirect race discrimination is not well-founded and does not suceed.

84. The claimant was not offered invigilation work between April 2022 and September 2022, but it was not because she did the protected act of bringing proceedings. It was because the respondent decided to invite postgraduates to invigilate and managed to fill all necessary sessions in that way. Therefore, the claim of victiminsation is not well-founded and does not suceed.

Employment Judge **Freshwater**

Date 29 April 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 30 April 2024

FOR EMPLOYMENT TRIBUNALS

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