



EMPLOYMENT TRIBUNALS

Claimant: Mrs Elaine Caldecott

Respondent: Liverpool University Hospitals NHS Foundation Trust

Heard at: Liverpool

On: 13, 14 and 15 February 2024

Before: Employment Judge Grundy
Mrs P Owen
Mrs L Heath

REPRESENTATION:

Claimant: Mr R Ross of Counsel

Respondent: Mr E Stenson of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims in respect of disability discrimination allege some discriminatory acts which were part of a course of conduct extending over a period of time that ended after the time limit ordinarily expired.
2. In any event, if that were incorrect, the Tribunal declares that it is just and equitable to extend the time in relation to the hearing of the claimant's complaints and to allow the claimant's amendments to her ET1.
3. Further, it is declared that the respondent by its relevant staff could reasonably be expected to know that the claimant was disabled by her cervical radiculopathy at the relevant times.
4. That the claimant was a disabled person by reason of her cervical radiculopathy was conceded by the respondent therefore it is declared that the claimant was a disabled person as defined by s6 Equality Act.
5. The claim for direct disability discrimination under section 13 of the Equality Act 2010 fails and is dismissed.
6. The claimant's claim for discrimination arising from disability under section 15 of the Equality Act 2010 fails and is dismissed.

7. The claimant's claim that the respondent failed to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 fails and is dismissed.
8. The claimant's claim in respect of discrimination by harassment by LR under section 26 of the Equality Act 2010 fails and is dismissed.
9. The claimant withdrew her claim in respect of harassment by ST and the same is dismissed.
10. The claim in respect of victimisation under section 27 of the Equality Act 2010 fails and is dismissed.

REASONS

List of Issues

1. The List of Issues determined by the Tribunal is as follows. This was contained at page 463 of the bundle and, as indicated, the claimant withdrew her allegation at paragraph 24 and 26(a). The List of Issues is as follows:

Disability Status

- (a) The respondent accepts that the claimant was a disabled person at the relevant time of her allegations in 2022 and 2023 for the purposes of section 6 of the Equality Act 2010 by reason of cervical radiculopathy.
- (b) Did the respondent know, or could it reasonably have been expected to know, that the claimant was disabled for the purposes of the Equality Act 2010 by reason of cervical radiculopathy, and if so, when?

Time Limit

- (1) When did the allegation that forms the basis of the claimant's claim take place? The respondent will say that the Tribunal does not have jurisdiction to hear any allegation dated earlier than 6 July 2022.
- (2) Is the claimant's allegation part of conduct extending over a period? If so, when did it end?
- (3) If the claimant is alleging a failure by the respondent to do something, when was that alleged failure by the respondent? Specifically, when did the decision maker at the respondent decide not to do something?
- (4) Did the claimant notify ACAS of early conciliation within three months and one day of the allegations?
- (5) If the Tribunal concludes that there was conduct over an extended period, did the claimant notify ACAS of early conciliation within three months and one day at the end of the period of conduct?

- (6) If the Tribunal concludes that there was a failure by the respondent to do something, did the claimant notify ACAS of early conciliation within three months and one day of the failure by the respondent?
- (7) Is it just and equitable for the Tribunal to extend time for presentation of the claimant's claim?

Direct Discrimination

- (8) On 5 January 2023 did Louise Rice say to the claimant that she had had enough of staff with medical conditions, that she wanted staff who were fit and that because of the claimant's shoulder injury she would be reluctant to accept the claimant on a permanent basis?
- (9) If so, was that less favourable treatment of the claimant because of her disability? Alternatively, was it a reasonable and supportive conversation in which Ms Rice advised the claimant about some of the physical demands of the role?
- (10) By reason of the alleged comments by Louise Rice, did the respondent treat the claimant less favourably compared with a hypothetical non disabled comparator, namely a nurse of the same experience and pay grade?

Discrimination arising from disability

- (11) Did Naomi Davies and/or Sheena Tolan know, or could they reasonably be expected to know, that the claimant was disabled at the material time?
- (12) Was there "something" arising from the claimant's disability, namely sickness absence? The respondent will say that the claimant has incurred sickness absence for various reasons during her employment, some of which are unrelated to her disability. If that "something" did exist, did the respondent treat the claimant unfavourably because of it, namely the application of the respondent's attendance management procedure which resulted in the claimant going into a half pay situation and facing a final review meeting?
- (13) Alternatively:
 - (a) Did the claimant exhaust her entitlement to sick pay and accordingly half pay was fair, reasonable and in line with national NHS terms and conditions?
 - (b) Did the claimant exceed the sickness absence triggers for a final review meeting, but a final review meeting was not held?
 - (c) Has the respondent's application of the attendance management policy been fair, reasonable and lenient?

Discrimination arising from disability – objective justification

- (14) If the claimant was unfavourably treated by the respondent because of something arising in consequence of her disability, was it objectively justified? Specifically, did the respondent have legitimate aims of:
- (a) using public money efficiently;
 - (b) managing employee attendance at work?
- (15) Is reducing sick pay for employees after six months' sickness absence in line with national NHS terms and conditions, a proportionate means of achieving a legitimate aim (at (14)(a) above)?
- (16) Is holding review meetings to consider employee attendance, discussion solutions to absence and to try and support a return to work for an employee a proportionate means of achieving the legitimate aim at (14)(b) above?
- (17) Was applying an attendance management procedure to employees incurring sickness absence during which employee attendance is kept under review solutions to absence or discussed and employees are supported to return to work, a proportionate means of achieving the legitimate aim at (14)(b) above?

Failure to make reasonable adjustments

- (18) Was there a PCP of:
- (a) requiring the claimant to return to the full range of her duties;
 - (b) requiring the claimant to have no further days of sickness to avoid generating absence resulting in the application of the respondent's attendance management procedure which resulted in the respondent continuing to manage the claimant under their attendance management procedure?
- (19) Was the alleged PCP at (18) a one-off act and therefore not a PCP?
- (20) Did either PCP place the claimant at a substantial disadvantage, namely being more likely than a non-disabled person to be unable to meet the alleged requirements set out at paragraph 8 of the Grounds of Claim?
- (21) Did the respondent know, or could the respondent be reasonably expected to know, that the claimant was likely to be placed at the alleged substantial disadvantage?
- (22) If so, what was the date of the actual or constructive knowledge?
- (23) Did the respondent fail to take such steps as it was reasonable to take to avoid the alleged substantial disadvantage? The claimant's further particulars document alleges that the following adjustments would have been reasonable:

- (a) administrative or light work;
- (b) frequent breaks;
- (c) workstation assessment; and
- (d) reset of absence triggers.

The respondent's position on each alleged reasonable adjustment is set out in the further amended response.

Harassment

(24) Deleted

(25) Was there unwanted conduct of Louise Rice telling the claimant on 5 January 2023 that she had enough staff with medical conditions, wanted staff who were fit and that because of the claimant's shoulder injury she would be reluctant to accept the claimant on a permanent basis?

Alternatively, was there a reasonable and supportive conversation in which Louise Rice advised the claimant about physical demands of the role.

(26) Did the allegation above have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The Tribunal will consider the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Alternatively, did Louise Rice have a reasonable and supportive conversation which did not therefore have the purpose or effect as alleged?

Victimisation

(27) The respondent accepts that the claimant did a protected act within the meaning of section 27(2)(a) of the Equality Act 2010 in bringing these proceedings by way of an ET1 dated 2 December 2022.

(28) Was the claimant subjected to a detriment by the respondent of cancelling her scheduled grievance meeting on 21 June 2023 and refusing to hear her grievance thereafter because of her Tribunal claim?

Alternatively, was it a fair and reasonable step to postpone the grievance hearing because the respondent needed to consider how best to proceed?

Remedy

(29) Remedy issues do not apply at this juncture.

Background

2. The Tribunal heard oral evidence over two days and as professional representation of both parties provided the opportunity for written submissions to be filed on day three which both Counsel spoke to, the Tribunal has had most of the third day for adjudications and judgment. As there were a number of issues traversed the Tribunal reserved its judgment and took further time for writing up.
3. Within the time frame of the hearing the Tribunal has made reasonable adjustments to the sitting pattern to hear evidence and submissions by granting breaks of 15 minutes every hour to accommodate the claimants disability.
4. The list of issues before the Tribunal is at page 463 of the bundle of documents repeated for clarity below.
5. The issue of the claimant being a disabled person was conceded by the respondent, the disability relied upon is a physical impairment specifically "cervical radiculopathy."

Evidence before the Tribunal

6. The Tribunal had a Bundle of documents containing over 600 pages. Further we were provided with a bundle of medical records of claimant which we were not taken to containing over 300 pages.
7. On day two of the hearing there was an application by the respondent to adduce 2 emails in rebuttal of oral evidence given by the claimant, regarding the issue of the extent of work done by the claimant in the vascular clinic. This was refused by the Tribunal. It was not an issue we considered we needed to spend undue time upon.

Witnesses

8. The witnesses who gave oral evidence to the Tribunal were as follows-

Claimant Elaine Caldecott, Band 5 specialist dialysis nurse

Respondent – Mrs Naomi Davies – Deputy Ward Manager

Louise Rice – Head nurse for the Outpatients ward

Sheena Tolan –retired Human Resources advisor

Alice Wood -Human Resources Business partner

9. The Tribunal in broad terms found that the claimant notwithstanding that she was under stress, was pointedly critical of the respondent. Overall, where the respondent's witnesses' evidence was at odds with that of the claimant, the respondent's witnesses' evidence was preferred. Their evidence was consistent as a piece and as individuals was not detracted from by the exaggerations found within the claimant's evidence.

Findings of Fact

10. In dealing with the evidence, the Tribunal will set out a chronology of its findings of fact. The Tribunal has not found it necessary to determine every issue of fact that has been put before it but only those upon which it is necessary to determine in order to reach conclusions as to the claimant's claims.

11. The claimant was employed by the respondent as a Specialised Dialysis Nurse, band 5, from 17 February 2014. The claimant brings claims on the basis of disability relating to direct discrimination, discrimination arising from a disability, a failure to make reasonable adjustments, harassment related to a disability and latterly victimisation.

12. Insofar as the claimant's history is concerned, there has been a moving target relating to her alleged disability status. When the trial began disability was conceded on the basis of cervical radiculopathy. The chronology of the claimant's difficulties is set out in part in a list of conditions at page 60. The cervical radiculopathy and chronic pain is the first condition relied on and is accepted by the respondent. The claimant also lists "restless leg syndrome, depression and anxiety, migraines, plantar fasciitis and Morton's neuroma, arthritis and lumbar radiculopathy and asthma." The claimant contends that she suffered pain in her neck, upper back, left armpit and left arm since a road traffic accident 28 years ago and suffers pain in her nerves in her upper back and shoulder blade. As indicated in the respondent's sickness management report, the claimant has had numerous sicknesses over the course of her employment.

13. The document which sets out the claimant's absence report commences from page 233 and sets out a lengthy list of conditions from 7 April 2014, on occasion musculoskeletal issues but also has psychiatric illnesses, headache and migraine, back problems, gastrointestinal problems, dental and oral problems, and these matters run over into "other musculoskeletal".

- On 12-13 October 2020 the claimant was absent with headache and migraine.
- On 19-20 October 2020 other musculoskeletal.
- On 12 November 2020 dental and oral problems.
- On 26 November 2020 gastrointestinal problems.
- On 18 February – 19 February sickness.
- On 22 February 2021 to 21 March 2021 anxiety and stress, depression/ other psychiatric illnesses and other musculoskeletal.
- On 29 April 2021 to 15 August 2021 musculoskeletal (581 hours) including the rotator cuff injury related to a manual handling issue.
- Within the chronology out with the document from 15 August 2021 there was to be a phased return to work in an administrative role with the renal secretaries.

- From 7 September 2021 she was then to return to the dialysis unit with observations and doing light duties.
- The claimant was absent from 15 October 2021 to 18 October 2021 on other musculoskeletal issues to do with the shoulder and neck.
- From 1 December 2021 to 5 December was the same issue, back problems.
- From 17 January 2022 to 28 January 2022 musculoskeletal issues relating to a back and groin issue.
- On 28 January 2022 (239) there is described a newly diagnosed back complaint. – other musculoskeletal
- At page 240 the absence is from 14 March 2022 to 18 March 2022 with shoulder pain. (234 other musculo skeletal)
- On 23 March to 25 March 2022 the issue is shoulder pain.
- On 19 April to 25 April 2022 the issue is migraine.
- On 4 May 2022 it was shoulder pain.

14. On 14 April 2022 Occupational Health (B205) diagnosed the claimant to be unfit as a dialysis nurse. There was a conversation about ill health retirement. The Tribunal finds the impetus for that was from the claimant rather than from Ms Williams.

15. The sickness management report at page 237 refers at page 241 to a number of reasons for sickness. It does not mention cervical radiculopathy as a label but the relevant documentation talks about the claimant having musculoskeletal issues and migraines. The claimant has been doing adjusted duties and has been off from 4 May 2022 in respect of shoulder pain by this time.

16. From 22-30 June the claimant was also absent and on 15 June she (having been absent for over six months) moved to half pay.

17. At page 210 from 30 June to 15 July 2022 the claimant was not fit for work and it is believed was considering redeployment or medical retirement.

18. At page 212 it was said she was not suitable for medical retirement as the shoulder issue was temporary.

19. There was a phone call in early July in which Naomi Davies wanted to see the Occupational Health report and there was a discussion about whether the claimant could do a non clerical or non clinical role, and the manager wanted to obtain specialist advice. The determination of a “non clinical role” is at page 212. Naomi Davies appointed an administrator on 20 June 2022.

20. In the letter from the claimant on 21 July 2022 the claimant asserts that her shoulder injury was temporary as distinct from the cervical radiculopathy.

21. There was a telephone call in summer 2022 with Naomi Davies and a discussion about updating the claimant's condition.
22. On 11 August 2022 (page 568) there was a conversation about redeployment and necessary adjustments.
23. The claimant's fit note expired on 12 August 2022. The claimant was claiming an update as to whether she was fit, and the respondent was considering whether there should be a final review pursuant to the sickness policy.
24. On 12 August 2022 the claimant wrote an email at page 216 to Naomi Davies regarding postponement of a final panel of the sickness review panel.
25. The Tribunal has considered the sickness policy and in particular the trigger levels at page 377-8, which the claimant had at this time surpassed.
26. The policy begins with "informal, confidential advisory" where there is 3 occasions of absence or 10 working days sickness absence in a retrospective rolling 12 month period. It moves to first formal review meeting where there is again 3 occasions of absence or 10 working days, single or cumulative sickness as aforesaid, or an unacceptable pattern of absence, or one occasion of long term absence equalling 4 weeks or more. There is a period for monitoring. The second formal review meeting takes place when a trigger point, again as defined above, is reached with further monitoring.
27. The final sickness review meeting is triggered when a trigger point as defined above, is reached again. Then at this stage consideration will be given to termination of employment if, based on the facts of the case. The manager may deem dismissal is not appropriate. There can be an occupational health referral prior to formal review for both short and long term sickness absence.
28. The claimant was critical of the respondent for sending emails to her personal email address whilst responding from either her personal email address or her work address, notwithstanding that her work address would not continue to be live if she was absent for more than a month, which she had been.
29. The claimant was eager to avoid a final review and Ms Lewis informed the claimant on 12 August 2022 **that the final review would be stood down and the respondent would look at other options. This has remained the position to date.** The respondent therefore paused its sickness trigger procedure.
30. The claimant attended an Occupational Health appointment on 1 August 2022 and there are emails at page 492 regarding the Occupational Health report.
31. On 5 August 2022 the claimant saw her GP. At page 215 the advice from the Occupational Health is that from 1 August 2022 the claimant was fit to continue with administrative type work and a phased return.
32. On 19 August 2022 (page 560) the respondent agrees the electronic notes to the meeting that took place. At paragraph 81 of the claimant's statement she was indicating it was first time she had met Nicola Davies but she had spoken to the claimant about her injury before that.

33. Nicola Davies put in another Occupational Health referral and the claimant continued to be on a period of sickness from 12 August to 12 September 2022 and had her further consultation on 20 September 2022.

34. It is recorded by Occupational Health that she may be fit for some work with adaptations and reasonable adjustments from the shoulder pain (page 226). In a letter on 24 August it said that Occupational Health had not been able to fit her in sooner (according to Nicola Davies) but she did not want to rush her back and cause more harm.

35. On page 231 Dr Sarangi, the Occupational Health Consultant had indicated that there could be temporary redeployment with an adjustment of sickness targets, stating "Elaine is fit for training as long as it is in keeping with the above restrictions and adjustments".

36. At page 229 the claimant asked to book annual leave from 22-30 September. In this email she talks about driving her father (who suffers from dementia) and her mother (who has sight and mobility problems) to the Lake District and whilst there, "accompanying them" and "getting shopping etc".

37. There is no meeting between the respondent and the claimant until 13 October as the union representative was not available. Louise Rice agreed that the claimant could be redeployed temporarily to Outpatients.

38. As per page 514, the claimant was temporarily moved to a post on Band 5 in Outpatients per the email offering her the post from Sheena Tolan on 13 October 2022. In late October the claimant commenced work at Outpatients on a phased return undertaking light clinical duties. The claimant claims she worked in the vascular ward, which the respondent denies. The extent of that work would have been dependent on the claimant's return undertaking only light duties in any event.

39. At page 576 on 22 November 2022 the claimant asked Sheena Tolan if she could move permanently to the Outpatients Department. Sheena Tolan did not reply and a follow-up email in January 2023 was not replied to.

40. On 5 January 2023 there was a further email (569) to consider whether that post could be made permanent.

41. The Tribunal makes specific findings about the conversation between the claimant and Louise Rice on 5 January 2023. At page 471 the claimant sent a what's app/ text message that evening after the conversation and it is evidenced by a written record that the claimant said to her friend (who is unidentified), "just been told to my face tonight that Outpatients don't want me to be made permanent because they already have enough staff with disabilities and they want fit people now". Later that night at 22:02 she sent an email to Sheena Tolan and her Union representative (page 472) saying, Louise Rice had said she was reluctant to accept her as she has "*a bad shoulder and already enough staff on the department with medical issues. She needs nurses who are fit and listed all the medical problems her staff had*".

42. The Tribunal finds that there was a conversation between the claimant and Louise Rice about the role of a nurse in the Outpatients Department. The Tribunal

does not find that within that conversation (as stated by the claimant) Louise Rice said that she was fed up of staff being redeployed and she was fed up of sick nurses being dumped on her and that she only wanted young staff. The Tribunal finds those matters were embellished by the claimant and in her reference Louise Rice using “dangerous language”.

43. The conversation was about the advertisement for a band 5 nurse in the Outpatients Department. It was about the role. There was said and stated by Louise Rice that she was concerned that the claimant might struggle in the role. She told her she “might struggle in the role”. She warned her about the physical element of the work in the context of what she knew of the claimant’s abilities. The Tribunal finds there was discussion about “being fit enough to do the job” and this was the other side of the “you will struggle” coin in terms of the conversation with the claimant, the claimant being on adjusted duties at that time and having previously had lengthy time off. We accept that Louise Rice did not say she wanted staff who were fit and because of the shoulder she would be reluctant to accept the claimant on a permanent basis.

44. It is not consistent with the claimant working with Louise Rice as her line manager that she then applied for the job if she was upset and distraught by the conversation. Louise Rice did not say she had enough staff with medical conditions or something to that effect. Louise Rice (by the Tribunal’s findings) is sensitive to her busy environment and does not use dangerous language.

45. The claimant applied for the post in Outpatients having checked that Louise Rice was not on the panel. Louise Rice did say she should apply in any event. It is inconsistent for the claimant to apply for the role, and contend Louise Rice made comments which have upset the claimant as one would expect that she would not have wanted to apply as a result of the comments if they were genuinely said.

46. The claimant did so even though the role turned out to be part-time and it was the matter of the part-time application which caused the claimant to withdraw from the interview process on the day of the interview on 10 February 2023. The Tribunal finds that the statements of Louise Rice were intended to be supportive and encouraging rather than damaging to the claimant.

47. The claimant relies on what’s app messages sent to a friend at 471,481-7 to advance her case, these are on any view the claimant’s personal and subjective view of the conversation and possibly incomplete which the Tribunal rejects as evidence helping us to determine facts. They are slightly different to the email sent to Ms Tolan.

48. On 14 March 2023 the claimant submitted a grievance B266 to Head of Human Resources and her union representative. That was to Stephen Richardson. That was acknowledged the next day, but no action was taken whatsoever about the complaint until it was referred on to Alice Wood in May 2023. There is no excuse for the delay and no explanation has been given to the Tribunal for the delay between 14 March and 26 May, which is wholly out with the respondent’s grievance procedure and does them no credit in a procedural sense.

49. Alice Wood considered the position in relation to the grievance on 26 May 2023 and emailed to suggest a meeting to the claimant's representative scheduled

then for 22 May 2023. She indicated she would review the position and having done so, and having had a number of challenging personal issues between that time, she had determined that it was inappropriate to proceed with a meeting as it would prejudice the Employment Tribunal dealing with the claim of the claimant for her grievance to be heard, it having overlapped in some particulars but not all, in relation to the matters requiring investigation.

50. By 27 September 2023 there is a note that Alice Wood was asking whether or not the claimant wished to proceed and the claimant indicated that she did want the matter to be heard.

51. Thereafter no steps were taken by either the claimant or the respondent to continue the grievance procedure and indeed the grievance has not been heard as matters currently stand in February 2024. There has been a substantial delay in implementing the grievance procedure one way or another

52. The Tribunal has also considered the reasonable adjustments policy at page 314 particularly at page 325. Where it is said, “ *if an employee is absent from work due to the Trust’s delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be considered a further reasonable adjustment for the employer to make. As this would be due to the trust not putting adjustments in place, it would be discounted from sickness counted towards sickness triggers for warnings under the Managing sickness policy*”..

53. To return to the findings on the issue of knowledge, the respondent’s key witness statements on this issue from Louise Rice and Naomi Davis are cut and pasted to include almost exactly the same wording. Louise Rice did make reference in her own statement to knowledge of the claimant having physical limitations relating to shoulder pain. Also Ms Rice was aware there were things she could not do and that she was on adjusted duties and that she was awaiting surgery. And there were different roles to which the claimant was allocated, her having been redeployed to the outpatient department. Sheena Tolan was aware of a background of a number of sickness absences and references to Andrea Williams with whom the claimant had dealt earlier in the chronology.

54. Given the claimants history with occupational health and sickness absence the respondent managers above were on notice that the claimant had some kind of physical impairment which lasted for longer than 12 months and was affecting in a substantial way her normal day-to-day activities. By means of the chronology of absences and adjustments the respondents by Louise Rice and Sheena Tolan and Naomi Davis had constructive notice that the claimant was at all material times a disabled person. The specific condition is not necessary to know and was not known by them.

Submissions

Claimant’s Submissions

55. The claimant’s Counsel Mr Ross provided submissions in writing which are incorporated by reference from page 8-22.

56. In his exposition of the applicable law he referred the Tribunal to the ECHR code paras 5.14, para 6.2, 6.28, 4.5, and the following authorities : **City of York Council v Grossett [2018] EWCA Civ 1105, A Ltd v Z [2020] ICR 199, Pnaiser v NHS England [2016] IRLR 170, Archibald v Fife Council [2004] ICR 954, Sanders v Newham Sixth Form College [2014] EWCA Civ 734** approving the EAT in **Environment Agency v Rowan [2008] ICR 218, Noor v Foreign and Commonwealth Office [2011] ICR 695, Southampton City College v Randall [2006] IRLR 18, Northumberland Tyne and Wear NHS Foundation Trust v Ward UKEAT/0013/19/DA, Reed and Bull Information Systems v Stedman [1999] IRLR 299, Shamoon v Chief of RUC [2002] IRLR 285, W A Goold (Pearmak)Ltd v McConnell [1995] IRLR 516, Matuszowicz v Kingston upon Hull City Council [2009] EWCA Civ 22, Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640, Galilee v Commr of Police of the Metropolis [2018] ICR 634, Jones v Sec of State for Health and Social care [2024] EAT 2.**

Respondent's Submissions

57. The respondent's Counsel Mr Stenson provided submissions in writing which are incorporated by reference.

58. The respondent relied upon the following authorities:- **Pathan v South London Islamic Centre EAT 03/13, Adedeji cited above, South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168, Fernandes v Department for Work and Pensions [2023] EAT 114, Sheikholeslami v University of Edinburgh [2018] IRLR 1090, British Telecommunications plc v Robertson EAT 0029/20, Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, Derbyshire and ors v St Helens MBC and Ors 2007 ICR 841, BMA v Chaudhary 2007 IRLR 800.**

Exposition of the relevant law

59. In relation to time- limits the Tribunal was cognisant of s123 Equality Act and the requirement to bring claims within 3 months, (starting with the date) of the discriminatory act or alternatively within 3 months of the final date of a continuing act and the just and equitable test.

60. The Tribunal considered the relevant provisions of the Equality Act 2010, in particular section 13 of the Equality Act, subsection 1, which provides:

“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.”

The test of what amounts to less favourable treatment is an objective one. The fact that a claimant honestly considers she is being less favourably treated does not of itself establish that there is less favourable treatment.

61. The Tribunal considered s15 of the Act

“ A person discriminates against a disabled person if:

He treats the disabled person unfavourably because of something arising from or in consequence of that disabled person's disability and he cannot show that the treatment is a proportionate means of achieving a legitimate aim and he knew or could reasonably have been expected to know that the disabled person had the disability"

S 15(2) Section 15(1) does not apply if R shows that R did not know and could not reasonably have been expected to know that the claimant had the disability.

62. Reasonable adjustments law -section 20

S20 Imposes a "requirement "on the employer (1) whose provisions criteria or practices put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled s 20(3).

A substantial disadvantage is one that is "more than minor or trivial".

The PCP relied upon-is set out in the list of issues above para 18 a and b.

The duty is to take such steps as it is reasonable to have to take to avoid the disadvantage. *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 EWCA Civ 640.

63. In relation to indirect discrimination, section 19(1) provides:

"A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

A applies or would apply it to persons with whom B does not share the characteristic;

It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

It puts or would put B at that disadvantage;

and A cannot show it to be a proportionate means of achieving a legitimate aim."

64. In relation to the allegation of harassment per section 26 of the Equality Act 2010, the Tribunal considered that the definition of harassment is as follows:

"(1) A person (A) harasses another (B) if –

a A engages in unwanted conduct related to a relevant protected characteristic; and The conduct has the purpose or effect of –

(i) Violating B's dignity; or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

65. In relation to victimisation, section 27 of the Equality Act 2010 provides that:

“A person (A) victimises another person (B) if A subjects B to a detriment because –B does a protected act; and A believes that B has done or may do a protected act.”

66. The only matter which could conceivably be covered within section 27(2) which is as follows: “Each of the following is a protected act –“Bringing proceedings under this Act;

That the claimant brought these Tribunal proceedings is accepted by the R to be a protected act.

67. The Tribunal also considered the numerous authorities to which we were referred as cited above and the references to the ECHR Code.

Conclusions

Time Limits

68. In relation to time- limits the Tribunal was perplexed that the respondent sought to argue out of time points at this final hearing, when at the case management hearing which was conducted by EJ Whittaker on 26 May 2023 (page 49), it was recorded on page 50 under the heading “time limits” “although this had been raised by the respondent it was confirmed today by Mr. Loftus that there are no time issues to be determined by the Tribunal.

69. There is no explanation that has been given by the respondent as to why that concession was then removed. It strikes us that we should therefore give some leeway to the claimant when considering what is just and equitable as the claimant would in May 2023 believe that she had a green light to bring all claims then in existence at least.

70. In terms of the overall time limits, the Tribunal does not have to identify the exact dates around when a claim ought to have been made per **Matuszowicz**.

71. Here the relevant matters mainly start to arise in July 2022. The claimant relies on a failure to do something from 15 July 2022 onwards, whilst the respondent argues in submissions that the attendance management procedure was first applied in March 2021. In this regard we take the view the claimant certainly in respect of reasonable adjustments has established a continuing state of affairs.

72. If we are in error about that then the Tribunal considers it is just and equitable for the time limit to be extended so that the claimant can bring all her claims to the Tribunal to be heard because in the first instance the respondent conceded the time limit point and certainly there are claims which fall in time in any event.

73. In respect of the amendments brought by the claimant: firstly on 23 February 2023 amendment at 44-45 dealing with 5 January 2023 allegation re Louise Rice since the claimant could have issued a further ET1 the amendment is allowed seems sound and the claim can proceed.

74. In respect of the amendment 10 August 2023 page 85 this deals with the victimisation claim that there was a failure to hear the grievance and email correspondence which confirmed that was 19 June 2023 in the same vein as the previous amendment the same applies regarding a further ET1 and the claim may proceed.

75. If the Tribunal was wrong about this, we apply the just and equitable test and consider the respondent would suffer less prejudice than the claimant if we fail to allow the claims to proceed.

Knowledge

76. The Tribunal drew the following conclusions in relation to the matters applying the relevant law to the facts as found.

77. In our view the respondent's managers may not have known the exact disability that the claimant was suffering from, in terms of that being cervical radiculopathy and chronic pain. However, the respondent was on notice and could reasonably have been expected to know that the claimant was suffering from some matter which could amount to a disability relevant to her neck, back or spine from the musculoskeletal references in her medical records and sickness records which was one of the main reasons why she was often absent from work.

78. The other aspect which is pertinent to the respondent reasonably being expected to have knowledge of her disability is the claimant's inability to carry out work at the full physical level in terms of her post as a dialysis nurse, and that she had restricted movements and the respondent was engaged in making reasonable adjustments for her over a lengthy period not just post July 2022.

79. Although the Tribunal accepts that the label of cervical radiculopathy was not placed on the claimant's records until much later, and there is no reference to cervical radiculopathy in documents save for the claimant's impact statement, the reasonable conclusion if a person is suffering from pain in the area of their shoulder, neck and spine, which is of a musculoskeletal nature, is that the respondent would then be on notice that the claimant may be disabled by some kind of condition relating to neck, spine or shoulder. In this case it was cervical radiculopathy which to the layperson relates to nerves damaged in the neck. In the circumstances the Tribunal concluded the respondent ought reasonably to have known that the claimant was disabled by some kind of condition like this as supported by the findings above.

80. In our view the respondent had constructive knowledge of a physical impairment as above, that this was substantial given the input and references to time discussing arrangements and adjustments with the claimant and that it had long term effect given the period over which viewed as a whole the chronology of musculoskeletal complaints run.

81. The Tribunal reaches this conclusion overall having listened carefully to the claimant's evidence and the respondent's evidence, and the respondent's witnesses indicating that they did not know that the claimant was disabled by virtue of her cervical radiculopathy. We have considered what it was reasonable for the employer to know, doing all it reasonably can to find out if the employee is disabled and the

Tribunal accept that that label was not an easy part of the picture here, but the respondents were on notice by reason of the claimant's presentation. This is a case of constructive knowledge not actual knowledge.

Issues on substantive claims

82. Turning to the List of Issues in respect of the substantive claims, in relation to the allegation of direct disability discrimination by Louise Rice on 5 January 2023 the Tribunal made extensive findings above. We do not accept this was as stated by the claimant. Our conclusions follow on from largely accepting the evidence of Louise Rice.

83. The Tribunal considers the respondent through Louise Rice would have explained the physical aspects of working in Outpatients to an able-bodied individual applying for a post in Outpatients so that the respondent did not treat the claimant less favourably than a hypothetical non-disabled comparator who was applying for a post in Outpatients.

84. Whether the word "struggle" has a pejorative aspect to it or whether the claimant was being told "this is a job that requires a fit person to carry out the job" does not take the matter much further in our view. The conversation was to discuss what the job entailed. These were matters such as the necessary manual lifting, the potential for vascular bandaging (which could be heavier than Louise Rice anticipated the claimant would be able to carry out), and those are matters which the Tribunal considers would properly and reasonably be discussed with any job applicant.

85. The Tribunal also considers it significant that the claimant chose to apply for the job, checking whether or not Louise Rice was on the interview panel but nevertheless knowing that she was the Ward Nurse and therefore would be (whether everyday or not) her direct line manager. In our judgment it seems unlikely that she would want to apply for a job working under the direct command/structure of somebody whom she claims had treated her in a way which made her upset and ultimately she alleges amounts also to harrassment.

86. In conclusion we do not consider that there was less favourable treatment by Louise Rice. This claim therefore fails.

87. In respect of the questions of discrimination arising from disability, the "something arising" related to sickness absence. The sickness absence has inevitably been part of the claimant's employment history but for various reasons (some of which are unrelated to her disability per se or her disability, looking at that with a wider definition in terms of musculoskeletal matters).

88. There is a plethora of reasons given for the claimant's absence but often encompassing musculo skeletal or overlapping with that (migraines per the claimant). We conclude the respondent has in its application of the attendance management procedure applied this more than leniently in relation to the delay in going into a half pay situation and postponing the final review meeting.

89. Currently, the final review meeting could not take place until May 2023 because of the claimant's shoulder surgery, yet the claimant was originally facing

that meeting back in arguably January 2022 per page 240 of the sickness management report.

90. There has been a pause on a review for over 12 months when the procedure normally comes into effect after six months. Although it was argued that the triggers should have been reset, the pause has affected a reset in itself by means of there can be no final review until May at the earliest. It seems that that argument is dancing on the head of a pin. The Tribunal concludes that the claimant has a lenient employer in relation to the activation of the sickness absence procedure.

91. If the Tribunal is wrong about that and the claimant has been treated unfavourably in relation to half pay and a final review meeting, then the Tribunal considers that it was fair and reasonable for the respondent to pause and then put the claimant on half pay in June 2022 and as it remains the case that the claimant has not had a final review meeting, overall the application of the attendance management policy has been fair, reasonable, lenient and (in the Tribunal's view) generous.

92. On the question of objective justification, the respondent is using public money and is managing employee attendance, both of which (in a service like the NHS) is of importance. It is in line with NHS terms and conditions to reduce after six months but the claimant has had extensive leniency applied to this position. The review meetings have been postponed and so although the respondent has supported the claimant, it has been more than proportionate in its generous actions.

93. The Tribunal followed the general approach in Allonby to weigh the respondent's justification against the discriminatory impact. The conduct of the respondent was reasonably necessary for those reasons given in the preceding paragraph. This claim also fails.

94. In terms of the failure to make reasonable adjustments, the Tribunal concludes that there was a PCP of requiring the claimant to return to the full range of her duties – ultimately that has been the aim – and requiring the claimant to have no further days of sickness to avoid generating absence resulting in the application of the respondent's attendance management procedure, these have been ongoing.

95. However, the respondent has attempted to apply the policy to suspend the claimant's return to work because of surgery and there are ongoing considerations in terms of the pause to the triggers, in terms of the triggers for the review meetings, so the Tribunal concludes that the claimant has benefitted from the reasonable adjustments procedure and there are no grounds to consider that she has been treated unfavourably and placed at a substantial disadvantage, more likely than a non-disabled person, to be unable to meet the alleged requirements because of the reasonable adjustments that the claimant has been given.

96. The claimant asserts that reasonable adjustments would have been administrative light work, frequent breaks, workstation assessment and reset of absence triggers. It is correct that administrative and light work had been given at various times, and frequent breaks had been given at various times. The claimant rejected the workstation assessment, and the reset of absence triggers has been reset by the pausing, so overall it is not the view of the Tribunal that the claimant has been put to substantial disadvantage. This claim also fails.

97. As to our findings on the Louise Rice matter on 5 January, the overriding position in relation to harassment is that the conversation was reasonable and supportive and about the physical aspects of the role and therefore sensitive, and objectively viewed cannot be supportive of the claimant's stance. The strong words of the statute do not come into play and were not violated by the conversation that the Tribunal has found. The conversation has grown with the telling on the claimant's case but not on our findings. Louise Rice has a management role. It is not likely (in the Tribunal's view) that she would to speak in a dangerous way – that is only the claimant's view. It was reasonable for her to tell someone what was expected in a job role they were applying for. In our view Louise Rice behaved in a supportive rather than pejorative way.

98. On the victimisation claim, at the outset, it does seem that there should have been greater agency in consideration and communication relating to the claimant's grievance, and the respondent should consider this for the future. However, this seems a general issue re busy senior management rather than a causative aspect vis a vis the claimant's claim of alleged victimisation.

99. It is accepted by the respondent that a reason for the non -progression of the grievance brought by the claimant, was the presentation of ET1 raising the issue that the claimant did do a protected act by bringing the proceedings dated 2 December 2022, and the respondent paused the grievance procedure, cancelling the meeting on 21 June 2023 by reason of the bringing of the ET1. It is unusual, in the Tribunal's collective experience, for there to be a grievance brought post an ET1, rather than before presentation of the ET1 but we make no further comment on this.

100. However, although we have criticised the respondent for failing to advance the grievance in accordance with its own procedures, we find there is no evidence upon which we could consider the claimant has in fact suffered a detriment. Indeed when cross examined about "detriment" the claimant did not give any evidence upon which we could view there was a detriment caused by the failure to advance the grievance. The witness statement was silent and in terms of the evidence about detriment, her oral evidence degenerated into a complaint about the respondent using two email addresses, both her personal and employment email addresses.

101. In the circumstances we conclude that the claimant has not been subjected to a detriment by the non- progression of the grievance and by the cancelling of the scheduled grievance meeting on 21 June 2023. In balancing the respondent's consideration for the claimant's claim, which was to come forward and be heard in February 2024, which was then known at the time, having been listed when the case management hearing took place on 31 May 2023, the respondent per Chaudhary was within its rights to protect its position regarding potential litigation. The respondent was not acting in a way which could be viewed as undue pressure upon the claimant to give up the claim.

102. The claimant has suffered further ill health and could not have progressed the grievance in any event and has not indicated that she was complaining by correspondence to the respondent other than immediately following Alice Woods taking it over and the initial delay which we have considered above. In all the circumstances there is no causative evidence of a detriment to the claimant. It follows that the victimisation claim is not successful.

103. All of the claimant's claims are dismissed.

Employment Judge Grundy

Date: 18 March 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 March 2024

FOR THE TRIBUNAL OFFICE

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