



EMPLOYMENT TRIBUNALS

Claimant: Dr Hannah Delmas

Respondent: NHS England (formerly Health Education England)

Held at: East London Hearing Centre (by CVP)

On: 29, 30 November, 1 December 2023 &
5 February 2024 (in chambers)

Before: Employment Judge S Buckley

Members: Ms A Berry
Mrs M Legg

Representation

For the claimant: Miss David (Counsel)

For the respondent: Miss Smith (Counsel)

JUDGMENT

1. The respondent's name is amended to NHS England.
2. The claim under section 15 of the Equality Act 2010 (discrimination arising from disability) is dismissed.
3. The claim under section 21 of the Equality Act 2010 (failure to make reasonable adjustments) is dismissed.

REASONS

Delay in promulgation of the judgment

1. The tribunal apologises for the delay in promulgation. The panel originally arranged to meet to deliberate on 20 December 2023. Unfortunately, due to an administrative error, the panel were only informed on 19 December that the 20 December 2023 was a non-sitting day. At that stage the first available date for all three panel members was 5 February 2024.

Claims

2. The Claimant brings the following claims:
 - 2.1. Discrimination Arising from a Disability;
 - 2.2. Failure to Make Reasonable Adjustments.

Identity of the respondent

3. This was not addressed in the hearing. The tribunal noted during its deliberations that the respondent's witness statements name NHS England as the correct respondent. The tribunal understands that Health Education England ('HEE') has been subsumed by NHS England and we therefore substitute NHS England as respondent. If any party objects they may do so by way of a request for a review of the judgment.

4. Agreed list of issues

DISABILITY

1. The Claimant relies on the condition of cancer as a deemed disability under the Equality Act 2010.
2. The Respondent became aware of the Claimant's disability on 30 March 2021.

A. DISCRIMINATION ARISING FROM DISABILITY

3. It is accepted that the Claimant's 5-month absence from training to undertake cancer treatment arose in consequence of the Claimant's disability.
4. Did the Respondent treat the Claimant unfavourably by:
 - a. Requiring that the Claimant to undertake a further period of F1 training on her return from sickness absence?
5. It is accepted that this treatment was because of the matter arising in consequence of the Claimant's disability.
6. Was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:
 - a. Ensuring that the Claimant was adequately supported and prepared to make the transition from an F1 to F2 doctor, in view of the increased responsibility and autonomy with which F2 doctors practice, to ensure no disadvantage to the Claimant on progression to F2; and

- b. Ensuring that the Claimant did not progress to F2 without sufficient clinical exposure, as a means of ensuring that the Claimant's professional skills and knowledge were sufficiently consolidated and matured, ultimately as a means of protecting patient safety.
7. Was the treatment a proportionate means of achieving those aims?

B. FAILURE TO MAKE REASONABLE ADJUSTMENTS

8. Did the Respondent have the following PCPs:
- a. The 1-year time based requirement of the F1 training programme;
or
 - b. The requirement that the Claimant had to remain in F1 after 1 year had elapsed due to her sickness absence exceeding 20 days.
9. It is accepted that the respondent had a PCP that where a doctor's absence goes above 20 days, it will trigger a review of whether they need to have an extra period of training.
10. Did the PCPs put the Claimant at the following substantial disadvantage when compared to someone without the Claimant's disabilities?
- a. The Claimant asserts that the relevant substantial disadvantage is that her completion of F1 was delayed.
11. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at that disadvantage?
12. What steps could have been taken to avoid the disadvantage? The Claimant suggests:
- a. That she ought to have been permitted to proceed to F2 without any period of additional time at F1.
13. In the circumstances, was it reasonable for the Respondent to have to take those steps?
14. If so, when would it have been reasonable for the Respondents to have taken those steps?
15. Did the Respondent fail to take those steps?

C. LIMITATION

16. Are any of the Claimant's claims out of time?
17. If so, do the relevant acts alleged amount to conduct extending over a period within the meaning of s123(3)(a) EA 2010?

18. If not, is it just and equitable to extend time?

The law

5. Section 39(5) Equality Act 2010 applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20 Equality Act 2010 which provides as relevant:

- “(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.”

Section 21 Equality Act 2010 provides as relevant:

- “(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”

6. Section 15 Equality Act 2010 provides that:

- “(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.”

Evidence

7. We heard evidence from the claimant and, on behalf of the respondent, from Dr Keren Davies, Foundation School Director (at the relevant time) and Dr Gary Wares, Postgraduate Dean for North Central and East London.

Findings of fact

8. The following facts were found by the tribunal on the balance of probabilities. The facts were found on the basis of the oral evidence of the witnesses and the written evidence in the bundle.
9. Dr Delmas graduated from Plymouth Medical School in April 2020 and undertook a FiY1 placement at Russells Hall Hospital for over 6 weeks during the summer of 2020.
10. Dr Delmas began medical training as an F1 (Foundation Year 1) trainee on 27 July 2020 with Barts Health NHS Trust.
11. She was due to progress to F2, the next stage in her medical training, twelve months later. Dr Stuart Graham was the claimant's educational supervisor. Dr Keren Davies was the Foundation School Director. Dr Gary Wares was the Post Postgraduate Dean for North Central and East London.
12. There is no doubt that the claimant was an extremely able FY1 doctor. For example, she received the following reference from Dr Suyaju Jigajinni, clinical lead for perioperative medicine:

“... what set her apart from any of her peers (past and subsequent) was the level at which she performed. As a department, we agreed that Dr Delmas very early on was operating both clinically, and with maturity, at the level of a non-airway trained SHO in critical care - i.e. the level of our HDU fellows (now termed Junior Critical Care fellows). These posts are for FY3 equivalent doctors and we appoint every 6 months, however Dr Delmas was able to act up in this role on several occasions. She was, at all times, immediately supervised by the consultant, and senior registrars in anaesthesia and ICU, but she demonstrated the ability to perform at this high level in a way we have not seen before, and at a time where the acuity and demands on critical care were at their highest.”
13. Dr Delmas has similar references from many other doctors with whom she has worked during FiY1 and FY1.
14. In March 2021 the claimant was diagnosed with a Germ Cell Tumour, a rare form of cancer. The respondent became aware of this on 30 March 2021. She was admitted to hospital on 31 March 2021 for immediate treatment. She is recorded as being on sick leave from 7 April 2021 until 6 September 2021.
15. On 30 March 2021 Dr Graham informed Dr Keren Davies of the situation by email. On 14 April 2021 Dr Keren Davies replied stating, inter alia, ‘Clearly she

may be absent for some time and we would have to review her training once she is absent beyond 20 days’.

16. The following General Medical Council (GMC) position statement entitled ‘Absences from training in the Foundation Programme’ dated June 2013 explains the reference to 20 days. The GMC position statement states materially as follows:

“Background

The Foundation Programme is a two-year generic training programme forming the bridge between medical school and specialist/general practice training.

Doctors with provisional registration and a licence to practise in the first year of the Foundation Programme (F1) are required to meet the learning outcomes for full registration in The Trainee Doctor, which are mirrored in the Foundation Programme curriculum. They must also satisfactorily complete 12 months training (full time equivalent) in an approved foundation programme before they are eligible for a Certificate of Experience and to apply for full registration.¹

...

Absence from training other than for study (including foundation taster weeks) or annual leave may have an impact on a doctor’s ability to demonstrate the learning outcomes.

Position

The GMC has determined that 20 days (when the doctor would normally be at work) is the maximum permitted absence within each 12 month period of the Foundation Programme (F1 and F2). Where a doctor’s absence goes above 20 days (when a doctor would normally be at work), this will trigger a review of whether they need to have an extra period of training.

The administration of the absence and any extension to training will be undertaken by the relevant postgraduate deanery/foundation school. The GMC support deaneries implementing this guidance flexibly to reflect the nature and history of absence, the timing and the affect (*sic*) of the absence on the individuals’ competence. The decision and the reasons for the decision must be documented.”

17. By 27 April 2021 the claimant had been absent beyond 20 days, and a review should have been triggered. No review was carried out at that stage. It is not entirely clear to the tribunal who should have carried out the review after 20 days. The tribunal understands from the 2013 position statement that the administration of the absence and any extension to training will be undertaken by the relevant postgraduate deanery/foundation school.

¹ Section 10A(2)(e) of the Medical Act 1983 allows the GMC to determine the arrangements for certification that a person has satisfactorily completed a programme for provisionally registered doctors.

18. The evidence of Dr Wares was that a substantive ARCP review could not be carried out while a junior doctor remained on sick leave. His evidence was that where an ARCP review is carried out while a junior doctor is on leave the only permissible outcome is 'N'.² It was his evidence that the review which determines whether or not a junior doctor needs to have an extra period of training can only be carried out when the doctor returns to work.
19. If it is the case that although a review is triggered after 20 days it is only carried out on the individual's return to work, that leaves the individual on long term sick leave in a very uncertain position.
20. On 5 May 2021 Dr Graham wrote again to Dr Davies as follows:

"I need your advice on this FY... She remains an excellent FY, who had her portfolio pretty much ready for ARCP. - I used her as an example in my ES teaching recently.

The issue is going to be around her time off. She remains desperately keen that she continues on without a need to have more time. She had an FiY post before the Fy1 year which she wonders, could be taken into account - it isn't local to here, however. She's also keen to contribute remotely when she is feeling ok between chemo.

From an ES point of view, she easily meets the ARCP requirements now, and from an FYTPD point of view, I have no issues in her continuing, but I know that she will fall foul of the 20-day rule - and she may be doing herself a disavour, as I suspect she will need more time off than she thinks. I also expect she will appeal an outcome that suggests extra time.

do you have any thoughts on what to do in her situation?"

21. Dr Davies replied on 5 May 2021 as follows:

"Thanks for update this is difficult as time as FiY1 does not count and this was clearly stated by UKFPO as it would have lead (*sic*) to a disadvantage for those unable to take up FiY1 posts

The GMC is clear that F1s must do 12 months as F1 to gain full registration The 20 days triggers a review of training but when this figure is much higher then extra time will be needed – so the total time out will be important

Virtual working for F1 has to be meaningful for achieving ongoing competencies

Its (*sic*) seems as though she may make her health worse by trying to work when not really fit between treatments which is not what we want I would encourage her and OH to think about this and whether she should be working at this difficult time

² Code N1 is 'Trainee on long-term sickness or other health issues have impacted on ability to complete the year of training being reviewed' p 796

The ARCP should be conducted against the guidance including looking at time out

Sorry there is not a lot more that I can say at this point”

22. The tribunal notes that Dr Davies did not appear to see any difficulty in the ARCP being carried out while Dr Delma was on sick leave.
23. On 8 June 2021 the claimant was reviewed under the Annual Review of Competencies Progression (ARCP) Panel. This was the annual review which would have taken place at this time in any event, even if the claimant had not been absent. The purpose of the review is to assess if the junior doctor has met the requirements of the curriculum and can progress to F2. Once the Panel has completed the assessment, the ARCP information is sent to the Foundation School. The final decision is made by the Respondent.
24. The ARCP Panel originally gave an outcome 1, which confirms that the requirements of the curriculum have been met and the claimant could have progressed to F2 as planned in August 2021.
25. On 11 June 2021 Dr Stuart James Graham completed the Educational Supervisor’s End of Year Report. He reported no areas of concern and stated that the claimant had met or exceeded the minimum expected level of performance in each of the 20 professional capabilities. In that report under ‘details of concerns/investigations’ Dr Graham stated:

“Prior to her third placement, she found that she has cancer, and has undergone 4 rounds of chemo. She has an operation in the offing. Whilst she has a TOOT of 50, she had pretty much completed her portfolio by the time of her diagnosis and has managed to work on and off remotely during cycles of chemo, to help the team. I have discussed her as her ES, with the other TPDs and HEE. My view as her ES is that she should be signed off as satisfactory to proceed as HEE tell me the 20 day limit is not a rule, but guidance. However, I would keep the health concern flag on her ARCP, and I will, as her TPD, discuss her with the TPD at BHRUT, as she may need to be more realistic over her year next year” (p.164).
26. On 15 June 2021 the claimant received an email from the Foundation Programme Administrator entitled ‘ARCP’ which stated ‘Dear all, Congratulations! You have now been signed off. Please log in to Horus and add your signature’. (p165)
27. There is a quality assurance process built into the ARCP process. The Trust sends a list of outcomes to the respondent along with the evidence submitted and the respondent undertakes a review for the purposes of quality assurance. Dr Davies goes through the list and checks the outcome in relation to any trainees that the respondent has been made aware of, plus a random sample, to check that everyone is following the national guidance.

28. At some point between 11 June and 21 June, the ARCP spreadsheets submitted to the respondent were discussed with Dr Davies and Stuart Morris from HEE. A HEE officer sent the following email to the Trust on 21 June:
- “Hannah Delmas has received an outcome 1 even though she has had 50 days out of training, we have had to remove the signatures from the form, we will be discussing this with you in our meeting with you on Thursday”
29. Dr Delmas was not informed of this change in outcome by the respondent or the Trust. The first that the claimant knew of this was on or about 23 June 2021 when the claimant received an e-mail from the GMC saying that the claimant’s medical school had recently told them that the claimant was not due to complete F1 until 5 October 2021 (p 113).
30. Dr Davies discussed the matter with Dr Wares at some point before 2 July 2021. Dr Wares’ view, that he repeated to the tribunal, was that when a doctor remains on sick leave a substantive ARCP review cannot be carried out, and the only permissible outcome of the ARCP review in those circumstances is no outcome with an ‘N’ code.
31. In an email dated 2 July 2021 to Stuart Morris, Dr Davies stated:
- “I have spoken to Gary about Whipps Cross and Hannah Delmas given she was on long term sick at time of ARCP he thinks she should be issues (*sic*) with another code and extension due to the sick leave
Can we do this please”
32. Dr Davies determined that Dr Delmas should have been given an ‘N’ code by the ARCP review panel. This is in accordance with Dr Ware’s view, which is supported by the documents in the bundle, that an ‘N’ code must be issued if an ARCP review is carried out while the trainee is on sick leave.
33. The ARCP review documentation was amended on 6 July 2021 to give ‘no ARCP review/outcome’ and given two ‘N’ codes: N1 – Trainee sick leave and N13 other. In the notes to N13 the form states ‘Excellent FY1 with a superb record – 50 days plus off sick due to a health concern. We have no concerns about any other part of her portfolio.’
34. Under ‘transfer of information between F1 and F2’ in a box for summarising known unresolved areas of concern, the form states ‘Hannah has been a high flying FY1 trainee engaged in not only the portfolio but also other aspects of her training, but recently has had ill health, for which she needed to take time off her treatment. (50 days so far) the plan is to hand this over to FYTPD at BHRUT’.
35. The claimant made attempts during this period to find out if it was possible to appeal the outcome of the ARCP, but struggled to receive clear information as to whether and how an appeal could be made. As part of this correspondence she was informed on 30 July 2021 by an administrator at HEE that it was ‘not possible to appeal a decision to withhold the issue of the

Foundation Year 1 Certificate of Completion (F1) due to non-statutory leave in excess of the permitted 4 weeks' (20 days) contingency unless the amount of time of non-statutory leave itself is being contested'.

36. The claimant did not receive an explanation of what had happened until 30 July 2021 when she received the following email from the Foundation School Director, Dr Keren Davies:

“The Foundation school reviews all ARCP outcomes issued by the Trusts.

You were issued an outcome 1 by the Trust, which given they sent us your sickness note as signed off from April to October 2021 was inappropriate as the Gold Guide states in section 4.3.

The foundation programme (including the academic foundation programme (AFP)) is time and outcome-based. Provisionally registered doctors with a licence to practise must complete one year (full-time equivalent) in an approved foundation programme to be eligible to apply for full registration with the GMC. A complete foundation programme takes two years (full-time equivalent) to complete.

So given the absence submitted to us you have not completed 1 year of training. The school advised a change in outcome to another code to reflect your ongoing health problem and will arrange posts for the remainder of your training”

37. Section 4.3 of the Gold Guide (p 618) includes the paragraph quoted by Dr Davies above.
38. Paragraph 1.11 states: “The Guide is not a contractual document and will not cover every eventuality. There are occasions where it may be necessary to derogate from the guidance defined in this Guide” (p 569)
39. In the email of 30 July Dr Davies offered to meet Dr Delmas to discuss the issue.
40. There were email discussions about Dr Delmas between Dr Davies and Dr Wares in July 2021. Dr Davies wrote to Dr Wares on 30 July 2021 as follows:

“My understanding is by law a F1 has to complete 12 months training no matter whether they are able to demonstrate competence (please see attached- I think she is also trying to count interim F1 period as well)”

41. Dr Wares reply was as follows:

“Agree, GMC clear and interim year 1 doesn't count. We stand our ground”

42. The meeting between Dr Davies and Dr Delmas took place on 2 August 2021. At the conclusion of the meeting Dr Delmas was told that she could appeal to the postgraduate Dean, Dr Wares.
43. An occupational health report dated 3 August 2021 noted that the claimant had had surgery 2 weeks ago and that she should be able to return to work in September, if her workload was lighter than normal and that she was not asked to undertake any additional duties and that she was provided with easier access than normal to a supervisor.
44. On the same day the claimant was sent an induction pack for her start with the Barking, Havering and Redbridge University Hospitals NHS Trust ('BHRUT') on 4 August 2021. The claimant informed them that she was on sick leave till October 2021. They responded to say that she should remain on her current trust's payroll while on sick leave and that the training record had been updated to show a new start date of 6 February 2022. This was confusing for the claimant as she was aware that she had already been replaced by new F1s so there was no role for her at her previous trust.
45. On 3 August 2021 the claimant's BMA representative asked for written reasons for the decision to extend the training in the light of the GMC position statement cited above.
46. The claimant submitted an appeal to Dr Gary Wares on 4 August 2021.
47. The claimant's BMA representative sought some guidance from the GMC and received a letter dated 11 August 2021, which stated:

"During the pandemic, we have provided advice to the UKFPO regarding the disruption to training and the flexibility in the absences from training position.

The GMC determination is that F1 (programme for provisionally registered doctors PPR) is 12 months but the policy has allowed flexibility in the 12 month requirement with the position on absences from training <https://www.gmc-uk.org/education/standards-guidance-andcurricula/position-statements/absences-from-training-in-the-foundation-programme> - where an absence is greater than 20 days it should trigger a review of progression to date, with the intent of determining if an extension to training is required. When looking at how to manage absences within that timeframe, the review should be of competencies and outcomes for the trainees, rather than a focus only on time. We have advised the UKFPO that the total impact of the disruption on progression should be factored in to discussion and decision about the need to extend training at the end of F1. In that way, the review can be focused on the support – and time – required for trainees to be able to evidence that they have met the curricular requirements, whilst the 20-day trigger can remain a helpful prompt to manage any disruptions. If a trainee does then require a short extension to successfully complete the F1 competencies, it would be possible for this extension to carry into their

F2 training with the appropriate supervision because F2 does not have a regulated length of training.

...

I hope this clarifies the guidance we've provided, however the final decision on progression is for the foundation school."

48. On 10 August 2021 Dr Wares wrote to Dr Davies as follows:

"I have reviewed this and taken advice.

I am of the opinion that the recommendation of the ARCP panel was incorrect, and that Keren (on my behalf) is not able to sign off completion of FY1.

The GMC legislation is clear that FY1 is of 12 months duration and that absence over 20 days should trigger a review, which I have done. I believe 50 days TOOT is excessive and not equitable to other trainees who are required to complete the necessary 12 months of training.

...

If it needs to go to appeal, then let it do so."

49. Dr Davies emailed Dr Wares on 17 August 2021 stating that "Dr Delmas has said she wants to appeal the ARCP "other" code long term sick we converted her outcome to but my understanding is only 3 and 4 outcomes can be appealed against So I am not sure where we stand"
50. In August 2021 Dr Davies agreed with Caroline Curtin (presumably from BHRUT) that the claimant would return to a vacant psychiatry post at F1 level and transition to F2 in December. The claimant's original first F2 placement was intended to be psychiatry.
51. In response to chasing emails from the claimant's BMA representative Dr Wares emailed him on 1 September 2021 stating that he was awaiting details of the total time out of training before making a decision on the grounds of appeal. He stated that he would then make a decision on the date of completion of Foundation Year 1.
52. The claimant was fit to return to work from 1 September 2021. On 2 September 2021 Dr Davies informed the claimant that she would commence in psychiatry initially as an F1, pending the outcome of the appeal,
53. In early September 2021 the claimant received an email from the medical staffing coordinator for paediatrics at BHURT about her F1 rota in paediatrics starting in December 2021. The claimant's BMA representative responded on 8 September 2021, informing them that even if the claimant's absence was added on to her F1 training, she should be starting F2 in December 2021.
54. The claimant returned to work as an F1 at BHURT on 6 September 2021.
55. On 9 September 2021 Dr Wares provided the following response to the appeal:

“The UK foundation programme is both competency-based, and time bound in its nature, Foundation year 1 being of a minimum 12 months duration. A period of absence of over 20 days would trigger a review and a decision whether additional training time would be required.

I have been informed that Doctor Delmas statutory leave commenced on 15 April 2021 (from Barts’ Health) and ended on her return to work on the 6th September 2021 at BHRUT. This is a period of 5 months out of the Foundation Year 1 programme. I do not believe it proportionate or aligned to the requirements of the legislation for this time to be counted towards training. The step from provisional registration to full registration is a significant one for patient safety and learner well-being which although Dr Delmas received satisfactory reports on competency attainment there is still a 5-month period of clinical exposure to be considered to further develop her decision-making skills and the opportunity to mature her professional capabilities before Full Registration can be awarded.

I am of the decision based on the above that there are no grounds for appeal in this situation and that Dr Delmas should continue in the current placement to complete the time-based requirements of the foundation programme. I will ask Dr Davies to ensure that an appropriately timely ARCP is undertaken in the next 2 months to define the date for the Certificate of Completion of Foundation Year 1.”

56. In response to an email from the claimant’s BMA representative, Dr Wares wrote a further letter dated 24 September 2021:

“I have now had the opportunity to discuss this with the GMC and my conversations yielded the same guidance as your conversation did, namely:

“The determination of the ARCP outcome and issue of FY1 Certificate of Completion are matters for the foundation school; and a medical school, or designated representative in a foundation school, will then issue a Certificate of Experience, which is required by the GMC for the purpose of granting full registration.”

The ARCP outcome is a recommendation to the Postgraduate Dean, and that, as I have laid out in my previous correspondence, Dr Delmas should continue in the current placement to make up some of the time-based requirements of the Foundation programme. To reiterate, this is to mature her overall professional capabilities before full registration can be awarded. Dr Delmas was awarded an Outcome 1 which I am prepared to accept towards the curriculum competencies.

As already set out by the GMC and other published guidance, the decisions around competency-based training and time-based training remain with the Postgraduate Dean. I have already set out my reasoning why a 5-month absence from the Foundation Year 1 programme will

require Dr Delmas to undertake a period of training due to her extended absence from the programme.

As Dr Delmas is currently on an Outcome 1 there is no recourse to appeal this decision in either the Gold Guide V8 and the GMC guidance on Foundation Year 1 has been applied in the context in which it was written.

I would anticipate, although the decision rests with the ARCP panel, that Dr Delmas will meet the requirements for successful completion of Foundation Year 1 following the current 4-month placement at Barking Havering and Redbridge NHS Foundation Trust.”

57. Dr Wares confirmed his decision by letter dated 11 October 2021 and by email dated 21 October 2021.
58. There was a dispute between the respondent and the claimant about the number of days the claimant was absent. Dr Wares set out his calculations in a letter dated 18 October, in which he concluded that the claimant was absent for 101 working days from which he deducted the allowable 20 days and annual leave of 10 days. This left a total of 71 days away from training.
59. The claimant disputes this on a number of grounds, which are considered in our discussion and conclusions below. For the purposes of our findings of fact we note that the claimant’s recorded absence began on 7 April 2021, she was ready to return to work on 1 September 2021 and returned on 6 September 2021 and that her F1 year was due to finish on 3 August 2021 (see p 429).
60. The claimant submitted a complaint about her treatment on 6 October 2021 and the outcome was provided in November 2021.
61. A further ARCP took place on 19 November 2021. The decision of the panel was that the claimant had successfully completed F1 and she was able to proceed to F2 on 1 December 2021. She completed F2 on 22 July 2022.
62. From the evidence we find that the following differences exist between F1 and F2. F2 is full registration as a doctor rather than provisional registration. There are certain things that you are allowed to do in F2 that you cannot do in F1 that reflect the greater degree of clinical experience. There is less supervision in F2, although there is always someone to escalate a matter to if needed. An F2 can have a rotation in a GP surgery. An F2 is allowed to carry out locum work where an F1 is not. Locum work involves going into an unfamiliar area without the level of supervision in place as there would be in F1, and in a place that has not necessarily been assessed as suitable for an F1 placement.
63. The claimant asserted that she missed out on the opportunity to apply for anaesthetics specialty training. We accept on the basis of the respondent’s evidence that the claimant could, in theory, have applied for anaesthetics specialty training in any event and asked for a deferral. However, we find that a lack of clarity and clear communication with the claimant combined with the

ongoing dispute, meant that the claimant was not, in practice, in a position to be able to do so at the relevant time.

Decision

64. For the purposes of both these claims the tribunal is considering the substantive decisions made by the respondent. The tribunal is not concerned with the fairness of the procedure adopted by the respondent.
65. We stress this at the outset because there are a number of issues that would have caused us significant concern, if they had been within our remit.
66. The GMC position statement makes clear that there is a discretion not to extend the length of training where absence exceeds 20 days, and that the postgraduate deanery/foundation school must undertake a review to decide whether there is a need for an extra period of training. The GMC position statement also makes clear that the guidance should be implemented flexibly to reflect 'the nature and history of absence, the timing and the effect of the absence on the individuals' competence'. This allows for reasonable adjustments to be made in the case of an individual with a disability. That decision and the reasons for that decision must be documented.
67. This process for dealing with long term absence and the question of to what extent there is discretion not to extend F1 where absences exceed 20 days to F2 does not seem to be clearly understood by the decision makers nor does it seem to have been clearly communicated to the individuals affected.
68. Dr Davies, in particular, gave evidence that suggested that that there was no discretion to allow an individual to progress to F2 where there was in excess of 20 days absence without an extension of training. That does not appear to the tribunal to accord with the GMC position statement, nor with the duty to consider reasonable adjustments in the case of absences due to disability. If the 20-day period is applied as a 'red line' then the respondent will open themselves up to claims under section 16 EqA or of a failure to make reasonable adjustments, particular where the disability-related absences are significantly shorter than the one in issue in this case.
69. Further, in our view the claimant (and others including BHURT) were not kept adequately or clearly informed of the processes or the decisions that were being taken in a timely manner.
70. We hope that the respondent will reflect on the need to ensure that there is a clear process by which reasonable adjustments can be considered where those with a disability have absences in excess of 20 days, and that this process is understood by the decision makers and clearly communicated to those affected.

Time limits

71. The claim form was submitted on 22 December 2021. Where any claims are out of time we have determined that it is just and equitable to extend time. The precise date on which the respondent took the relevant decisions is unclear.

Dr Wares was asked about this in evidence and his response was unclear. It was certainly unclear to the claimant. This is as a result of the issues that we have identified above: a lack of a clear process and a lack of clear communication.

72. Miss Smith submitted that there were multiple decisions. The first was to change the outcome of the ARCP, the second was that the claimant needed to come back and complete her F1 year and the third was the length of time that she would need to spend in F1 on her return before progressing to F2. Miss Smith submitted that our focus should be on the second of those decisions which was taken on 20 June 2021 and so the claim is out of time.
73. We agree, but this was only apparent to us on having heard the submissions of Miss Smith. It was certainly not reasonably apparent to the claimant. We find that the question of when the time limit expired was very unclear at the relevant time. Further, it is clear from the evidence in the bundle that the claimant was not properly informed of that decision until 30 July 2021 and that since that date she has been heavily involved in trying to challenge the decision through all available channels. We accept that the reason for the delay is not explicitly addressed in the claimant's witness statement, but it is, in our view, sufficiently clear from the evidence before us.
74. We do take into account the length of the delay, but the respondent's witnesses had a clear recollection of the matters that had occurred, assisted by contemporaneous emails and minutes. In the circumstances there is fairly limited prejudice to the respondent.
75. For those reasons we have decided that it is just and equitable to extend time.

Failure to make reasonable adjustments

What PCPs did the respondent have?

76. We accept that the respondent had a practice that if an F1 doctor had a sickness absence of over 20 days they would be required to remain in F1 after a year had elapsed. This was clear from Dr Davies' evidence who explained that, in general, where the absence exceeded 20 days she would add the number of days in excess of 20 days onto the end of the F1 training period.
77. We accept that the F1 training programme has a time-based requirement and that this amounts to a PCP.
78. Finally, the respondent accepts that it had a PCP that where a doctor's absence goes above 20 days, it will trigger a review of whether they need to have an extra period of training.

Did the PCPs put the claimant at a substantial disadvantage when compared to someone without the claimant's disabilities?

79. We find that the PCPs did put the claimant at a substantial disadvantage when compared to someone without the claimant's disability. The claimant's disability

meant that she had to have a significant time off work. As a result of the application of the PCPs this resulted in her commencing her F2 year later than those F1s who had not had to have time off work due to a disability. In our view, remaining in F1 in September, October and November 2021 while all her peers had moved on to F2 amounted to a substantial disadvantage to the claimant.

80. We also find that the fact that the claimant was put at a substantial disadvantage because of our finding that, in practice, she was unable to apply for anaesthetic specialty training.

Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at that substantial disadvantage?

81. In our view, the respondent could reasonably have been expected to know that delaying the progression of an F1 to F2 would put them at a substantial disadvantage as set out above.

What steps could have been taken to avoid the disadvantage?

82. We accept that it would have avoided the disadvantage to allow the claimant to proceed to F2 without any period of additional time at F1.

Was it reasonable for the respondent to have to take those steps?

83. We have concluded that it was not reasonable for the respondent to allow the claimant to proceed to F2 without any period of additional time at F1. We have reached this decision for the following reasons.

84. However the specific number of days are counted or calculated, it is clear that the claimant, as a result of her cancer, had had to take a very significant period of time out of her F1 training year. She was absent for the whole of April, May, June and July. Her F1 year would have ended in August and so she would have been absent in August in any event.

85. We accept that the first 20 days is usually discounted and also that the claimant was entitled, in any event, to be absent for the usual period of annual leave. Despite that, we find the fact that the claimant was continuously away from the clinical environment throughout that whole period remains relevant when assessing if it was reasonable to allow her to progress to F2 without any additional time at F1. We accept that there is a risk of 'skills drift' after this amount of time away from practice.

86. The claimant is clearly an extremely competent doctor and had done exceedingly well in her F1 year, before she started her sick leave. She had been exposed to clinical practice in her FiY1 placement. She had met all her competencies. However, even if the claimant's calculations are accepted, she was still absent for a significant proportion of the year. In our view, she has therefore missed out on a significant period of day-to-day clinical experience.

87. The claimant has not had the continuous length of exposure to clinical practice in F1 or the length of experience in F1 that her peers have had and that F1

doctors are supposed to have before they progress to F2. The importance that is placed on the length of exposure to clinical practice by the bodies in question is clear from the documents in the bundle and the importance of the time-based element to the F1 year.

88. We place particular weight on the differences between F1 and F2. F2 is full registration as a doctor rather than provisional registration. There are certain things that you are allowed to do in F2 that you cannot do in F1 that reflect the greater degree of clinical experience and the fact that there is less supervision in F2.
89. Whatever the claimant's personal intentions in relation to carrying out locum work, an F2 is allowed to carry out locum work where an F1 is not. Locum work involves going into an unfamiliar area without the level of supervision in place as there would be in F1, and in a place that has not necessarily been assessed as suitable for an F1 placement. All this is extremely important in an environment where patient safety is paramount.
90. Given the length of time that the claimant had been away from the clinical environment, and taking account of all the factors set out above, we do not consider that it was reasonable to allow the claimant to proceed to F2 without any period of additional time at F1.
91. For those reasons the claim for reasonable adjustments fails and is dismissed.

Discrimination arising from disability

Did the respondent treat the claimant unfavourably by requiring her to undertake a period of F1 training on her return from sickness absence?

92. We accept that this amounts to unfavourable treatment. The other F1 trainees that started at the same time as the claimant progressed to F2, as planned, in August 2021. The claimant would have done so if she had not been absent.
93. We also find that the fact that the claimant was treated unfavourably on the basis of our finding that, in practice, she was unable to apply for anaesthetic specialty training.

Was the respondent's treatment of the claimant a proportionate means of achieving legitimate aim?

94. The aims identified by the respondent are:
 - 94.1. Ensuring that the claimant was adequately supported and prepared to make the transition from an F1 to F2 doctor, in view of the increased responsibility and autonomy with which F2 doctors practice, to ensure no disadvantage to C on progression to F2; and
 - 94.2. Ensuring that the claimant did not progress to F2 without sufficient clinical exposure, as a means of ensuring that the claimant's professional

skills and knowledge were sufficiently consolidated and matured, ultimately as a means of protecting patient safety.

95. We accept that those aims are legitimate.
96. In considering this issue we have taken into account all the matters set out above in relation to whether it was reasonable for the respondent to allow the claimant to proceed to F2 without any period of additional time at F1. These matters are strongly supportive of the treatment being a proportionate means of achieving a legitimate aim.
97. F2 training does not have a regulated length. It is therefore possible to progress at the same time as your peers even if you have started F2 at a later date. That is what happened in the claimant's case. In those circumstances an extension to F1 does not necessarily cause any ongoing delay in progression, which in our view reduces its discriminatory effects, which is relevant to proportionality. In addition, the claimant was not required to carry out the full year, because she was allowed to progress to F2 at the beginning of December 2021, which reduces the discriminatory effects.
98. We have considered whether less discriminatory means of achieving those aims could have been adopted. We considered whether the respondent could have allowed the claimant to progress to F2 with, for example, additional supervision and an agreement that the claimant would not carry out locum work. Ultimately, we have concluded that this would not achieve the aims. A progression to F2 is a progression to full registration as a doctor and carries with it increased responsibility and autonomy. The respondent's aim is to ensure that individuals *do not progress to F2 before they are ready*. This would not be achieved by introducing extra supervision/restrictions to the F2 stage in an individual case.
99. For all those reasons we have concluded that requiring the claimant to undertake a period of F1 training on her return from sickness absence was a proportionate means of achieving the legitimate aims identified by the respondent.
100. For those reasons the claim for discrimination arising from disability fails and is dismissed.

Employment Judge S Buckley
Date: 5 February 2024