Case No: 3312410/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Nontembiso Mfefa	v	Cambridge University NHS Foundation Trust

Heard at: Cambridge **On:** 2, 3, 4, 5, 6 and 9 November 2020

Before: Employment Judge Ord

Members: Ms J Costley and Mr S Holford

Appearances:
For the Claimant: Mr Jack Nkala, Lay Representative
For the Respondent: Mr Richard Hignett, Counsel

JUDGMENT having been sent to the parties on 30 November 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant in this case was born on 1 June 1981 and she has been continuously employed by the Respondent since 23 February 2015 as a Therapy Radiographer. Following a period of Acas Early Conciliation which began on 4 February 2019, the Early Conciliation Certificate being dated 4 March 2019, the Claimant presented a single claim form to the Tribunal on 11 March 2019.

2. In that form the Claimant raised complaints that she has been the victim of unlawful discrimination, relying on the protected characteristics of disability, race and religion or belief. An earlier complaint of detriment following the making of a protected disclosure was withdrawn.

3. At a Preliminary Hearing held on 10 December 2019, the Tribunal identified the precise complaints which the Claimant makes in these proceedings and identified the issues to be determined by the Tribunal. No application to alter or add to those issues was made by either party and at the commencement of the Hearing, the Tribunal confirmed that the issues as set out in the Case Management Summary sent on 28 December 2019, remained the issues for determination; save for the

issue of whether or not the Claimant was a disabled person as defined in Section 6 of the Equality Act 2010 and the issue of knowledge of disability, details of which are set out later in this Judgment.

4. The complaints and the legal tests to be applied were as follows:

4.1 First, the Claimant says that she was subject to direct discrimination contrary to s.13 of the Equality Act 2010, on the protected characteristic of her race. She says this happened first on 8 March 2018 when Sue Tabor asked her to cancel some of her holiday days to accommodate a leave request from Maria Hayler, when the Claimant had already made a leave request in accordance with the Respondent's policy and which had been accepted by the Respondent. The Claimant relies upon Maria Russo as a comparator.

4.2 Secondly, on 6 June 2018, Jemma Chapman was said to have refused to allow the Claimant to remain in the Prosoma Team instead of rotating to the Floor Team. The Claimant relies upon Grant Bennett as a comparator.

4.3 Thirdly, on 16 July 2018, the Claimant says that a leave request which she had made to Ms Tabor for more than two weeks' leave during the summer was refused. Ms Tabor allegedly saying that the Respondent's policy required her to allow the Claimant no more than two weeks' leave. The Claimant says this was incorrect because the policy applied to front line staff only and the Claimant's colleagues had been allowed to have more leave than two weeks on previous occasions during the summer months. The Claimant relies upon Rachel Lane as a comparator.

4.4 The Claimant says she suffered direct discrimination contrary to s.13 of the Equality Act 2010 because of her religion or belief; the Claimant is a CHOSA Christian. The Claimant says that she was subjected to direct discrimination on the basis of that religion or belief on 16 July 2018 in the same circumstances as relied upon in relation to the third act of direct discrimination on the protected characteristic of race, i.e. the refusal of additional summer holiday leave.

5. In respect of each of those allegations of direct discrimination, the questions for the Tribunal to determine are as follows:

5.1 First, has the Respondent subjected the Claimant to the alleged treatment?

5.2 Second, if so, was the treatment less favourable treatment? In other words, did the Respondent treat the Claimant less favourably than it treated or would have treated others in circumstances which are not materially different?

5.3 Thirdly, if so, was this because of the Claimant's race and / or because of the protected characteristic of race more generally, or because of the Claimant's religion or belief?

6. The Claimant says that the Respondent failed to make reasonable adjustments in respect of her admitted conditions of dyslexia and dyspraxia, contrary to their obligations under s.20 and s.21 of the Equality Act 2010.

7. The Claimant identifies two provisions, criteria or practices and the Respondent does not dispute that they operated those PCPs. The first PCP was that there was an interview process for promotion from Band 5 Therapist to Band 6 Radiographer. The second was that staff were required to rotate between the three departments of Prosoma, Data and Treatment Floor on a regular basis.

8. The Claimant says that the first of those PCPs put her at a substantial disadvantage in comparison with persons who are not disabled because it was difficult for her as a person suffering from dyslexia and dyspraxia to be able to provide all necessary information during the interview due to the nature of her condition which made it difficult to process information and respond to all questions asked.

9. The Claimant says that the second PCP disadvantaged her because her admitted disability, arising from an injury to her left ankle, made it difficult for her to be mobile, so that she could not work on the Treatment Floor.

10. Although a claimant is not required to do so, at the Case Management Hearing the Claimant advanced three adjustments which she said could have been made. In particular, she said that the Respondent should have first conducted the interview in a way which made it easier for her to process the information and respond appropriately; secondly, she said the Respondent should have adjusted the emphasis of the selection process so that practical work played a greater role in the assessment; and thirdly should have adjusted the practice of rotation so the Claimant would only have to work in the Prosoma and Data sections.

11. The issues for the Tribunal to determine, disability and the knowledge having been admitted and the operation and application to the claimant of the PCPs also being accepted by the Respondent, were as follows:

11.1 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

11.2 If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at any such disadvantage?

11.3 If so, were there steps that were not taken that could reasonably have been taken by the Respondent to avoid any such disadvantage?

12. The next complaint which the Claimant brings is an allegation that she was the victim of harassment contrary to s.26 of the Equality Act 2010, relying on the protected characteristic of disability relating to her ankle injury. The Claimant relied upon the following as constituting acts of harassment:

    12.1 That Maria Hayler, possibly on the instruction of Jemma Chapman, threatened to write a statement against the Claimant because she took a phased return to work during the period April 2018 until May 2018;

    12.2 On 1 May 2018, or thereabouts, Jemma Chapman required the Claimant to complete Breast Planning Competencies by the end of May, which was something that would not normally be asked of staff;

    12.3 Sue Tabor on 6 August 2018, in what was said to be a *"demanding and commanding"* tone, insisted that the Claimant sign a flexible working document which she did not want to sign and which was different to the version she had originally completed; and

    12.4 On 13 August 2018, Maria Hayler discussed the Claimant and her refusal to sign that form with colleagues when the Claimant was not present, which caused Rachel Lane to complain to Kevin Skilton about what had been said.

13. In relation to the allegations of harassment, the questions for the Tribunal to answer are as follows:

    13.1 Did the Respondent engage in the alleged conduct?

    13.2 If so, was that conduct unwanted?

    13.3 If so, did it relate to the protected characteristic of disability, in particular to the Claimant's ankle injury?

    13.4 If so, did it have the purpose, or, taking into account the Claimant's perception, the circumstances of the case and whether it is reasonable for the conduct to have that effect, the effect of violating the Claimant's dignity creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

14. The Respondent accepts that at all material times the Claimant was a disabled person within the meaning of s.6 of the Equality Act 2010, by virtue of her dyslexia and dyspraxia and by virtue of the complex regional pain syndrome she suffers consequential to her ankle injury. On the basis of the claims as brought, the Respondent accepted that it had constructive knowledge of the disability relating to dyslexia and dyspraxia from late 2016 and actual knowledge of the disabling ankle injury, at all relevant times.

15. There is one further issue for the Tribunal to determine in this case which is the question of whether or not the Claimant has brought her claims within the time limits specified in s.123(1) of the Equality Act 2010, which specifies that,

> "Proceedings on a complaint may not be brought after the end of-
>
> (a) the period of three months starting with the date of the act to which the complaint relates, or
> (b) such other period as the Tribunal thinks is just and equitable."

16. The Tribunal is cognisant of the fact that under s.123 sub-section 3,

> "(a) conduct extending over a period is to be treated as done at the end of the period; and
> (b) failure to do something is to be treated as occurring when the person in question decided on it."

17. Further, under s.123 sub-section 4,

> "In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-
>
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

18. In this Judgment, we have considered the Claimant's complaints on their individual merits and then dealt with the issue of time limits.

19. At the Hearing, the Claimant gave evidence and the Respondent called five witnesses, namely:

- Sue Tabor, Associate Manager Head of Managerial Operations;
- Maria Hayler, Senior Radiographer Band 7;
- Jemma Chapman, Professional Head of Radiotherapy;
- Kevin Skilton, previously Operational Head of Radiotherapy from January 2016 until 1 October 2018; and
- Graham Cone, Senior Radiographer Band 7.

20. The Claimant also called evidence from Maria Overhill, formerly Russo. That witness is overseas and arrangements had been made for her to give her evidence for 12 noon on the fifth day of the Hearing, via CVP (Cloud Video Platform). By that time, the evidence had concluded, indeed it was concluded at the end of day four and the parties made closing submissions in advance of hearing from Ms Overhill and were thereafter able to make further submissions as required. The matter proceeded in this way to maximise the use of the Tribunal's time and neither party raised any complaint about it, nor did they ask for any other alternative process to be followed.

21. The Respondent had also submitted two statements from Tracey McClelland, Associate Director of Operations for Division B and Claire Holmes, Operation Manager. Those witnesses did not give evidence and their statements have been given the appropriate weight by the Tribunal.

22. Based on the evidence we have heard, we have made the following findings of fact.

The Facts

23. The Claimant began her employment with the Respondent on 23 December 2015 as a Band 5 Therapy Radiographer and she remains in that post today. On 4 August 2017, the Claimant suffered injury when cycling; she broke three bones in her ankle which required her to have surgery two weeks later. The Claimant returned to work on 30 October 2017.

24. Because of the Claimant's injuries, she was unable to work on the Treatment Floor where she would be required to be standing for most, or all, of her working time. She had a discussion with Ms Chapman who placed the Claimant in the Prosoma Team where the Claimant could be trained in Planning and Developing Treatment Plans.

25. The job description for a Band 5 Therapy Radiographer requires the post holder to,

> *"…rotate through all areas of the department, working in both pre-treatment and treatment areas according to local rota."*

26. This means that a Band 5 Radiographer will normally work in each of the three areas of the department; namely the Treatment Floor, Data and Prosoma.

27. In February 2018, the Claimant applied for promotion into a Band 6 role and she was interviewed on 9 February 2018.

28. The Respondent interviews candidates for any advertised post, be those applicants internal or external and the Respondent accepts that its practice of doing so amounts to a provision, criterion or practice.

29. In August 2016, the Claimant had been examined for the purpose of a diagnostic assessment report by the Dyslexia Assessment and Consultancy operated by Katherine Kindersley and Associates. This report had been commissioned by Ms Tabor. The reporting physician was Karen Cameron. The report was requested because the Claimant had made a small number of errors in her work which she attributed to dyslexia or dyspraxia.

30. The report identifies converging evidence that the Claimant had specific learning difficulties combining the features of dyslexia and dyspraxia. Ms Cameron identified significant weaknesses in verbal and visual short term and working memory. The report made a number of recommendations

suggesting that a Workplace Needs Assessment should be organised for the Claimant and that she might use the assistance of technology to support areas such as reading, proof reading, note taking, time management, working with spread sheets and with the planning, organisation, composition and structure of written documents. Timed examinations and assessments whether in professional or academic settings should be adjusted so that the Claimant was allowed extra time with 25% being said to be standard. Ms Cameron said that such matters should enable the Claimant to demonstrate her competence more fully.

31. There is no reference in the Report of the Claimant having difficulty in an interview setting, nor are there any recommendations of adjustments to an interview setting made.

32. The Respondent says that questions which they pose in the interviews are put singularly so that there are no multiple questions. A template of the questions typically asked at interview was produced and those questions were single questions, not multiple or complex ones.

33. In her application for promotion, the Claimant specifically asked that questions would be broken down in to single questions. In answer to the question,

> *"Do you consider yourself to have a disability?"*

She had answered yes. And when asked whether there were any special arrangements that she would like the Trust to make for her interview, she said that,

> *"It would be very helpful if multi part interview questions are broken down into single parts as my disability makes it impossible for me to fully answer such questions".*

34. Long after the conclusion of the evidence in this case, we were directed by the Claimant's representative to a document prepared by the Claimant and stated to be feedback from the Band 6 interview which she subsequently had on 4 February 2020. That interview was not part of the complaints which the Claimant brings in these proceedings. The only interview about which she complained in respect of a lack of reasonable adjustments was the interview in February 2018.

35. The Claimant has had other interviews for promotion which post date the Application to the Tribunal and they are not part of the case before us. No Application to Amend to include those matters has been made.

36. The Respondent says that the practice of asking single questions at interview is their standard practice and thus the thing that the Claimant was asking for would take place in any event. Having seen the Interview Template and based on the evidence of Mr Cone, the only one of the Respondent's witnesses who was asked about this and who said that the Claimant did ask for questions to be repeated and asked for them to be broken down in the interview, which he says the Respondent would have done in any event, and further on Mr. Cone's evidence that the Interview

Panel tried to make the questions as clear as they would be, and his further evidence that if the Claimant had asked for questions to be repeated, broken down or asked in a different way, this would have been done, we find as a fact that those things were done and that the particular adjustment which the Claimant asked for in her application for promotion and which she identified as being the adjustment for which she attended the Case Management Hearing, was in place and that the interview was conducted in accordance with the Claimant's request.

37. The Claimant also suggested that the Respondent should have assessed her for promotion, whether on this occasion or some other occasion it is not made clear, without interview and based on her performance at work. The Respondent's witnesses, in particular Ms Tabor, stated that this would not be possible because it would mean that external candidates could not be fairly assessed against internal candidates. We accept that evidence and we do not consider that it would be a reasonable adjustment for the Claimant to be a part of a selection process where she was not interviewed when others were.

38. We also find that the Claimant has failed to establish that she suffered substantial disadvantage as a result of being interviewed. There is no indication that that would be the case in the report of Karen Cameron, although she does identify other circumstances such as timed assessment when the Claimant would suffer disadvantage.

39. In March 2018, a problem arose around leave during the period of the Easter Holidays. The Claimant had applied for and received approval for leave for the period 2 – 13 April 2018. The Claimant's colleague Maria Russo also had leave approved for the week 2 – 6 April 2018. Towards the end of 2018, Maria Taylor asked for leave from 10 – 13 April 2018. Under the Respondent's Leave Policy, leave must be booked in advance and approved by a relevant Manager and leave is given on a first come, first served basis. Ms Tabor's evidence, which we accept as he was not challenged on this point, was that she and other Managers would seek to be flexible in the operation of the Leave Policy.

40. On that basis, knowing that she could not approve Ms Hayler's request as it stood, she suggested that Ms. Hayler speak to both Ms. Russo and the Claimant to see if an arrangement could be made with one of them, or between them, to alter the leave periods. Ms. Russo was not sufficiently experienced to be left in the Prosoma Team working alone for a period of one week and she confirmed in her evidence that this had never occurred. Ms Russo confirmed that there was a conversation between Ms Hayler, the Claimant and herself about this. Ms Russo was returning home to Canada and had flights booked, so her leave period could not be adjusted. She confirmed that there was a discussion between all three individuals and it is a matter of record that after this discussion which took place on 30 or 31 January 2018.

41. The Claimant's leave for the second week (9 to 13 April) was cancelled on the holiday system and was rearranged for an earlier week. The Claimant's complaint here is that she was required to alter her leave, or that it was cancelled without her consent. She says that this was an act of

direct discrimination because of race because Ms Tabor had asked her to cancel some of her days holiday to accommodate Ms Hayler.

42. In fact, the adjustment to the Claimant's holiday took place at the end of January 2018. Ms Tabor says that after the discussion between the Claimant and her colleagues, the Claimant herself came to Ms Tabor and confirmed that matters had been resolved. The Claimant denied this and said that she was instructed to cancel her holiday. Ms Russo said that she did not hear the Claimant being made to cancel holidays and did not know whether any agreement had been reached.

43. The Claimant made no complaint about this contemporaneous leave and did not raise the issue until she lodged a second grievance in September 2018. An earlier grievance raised in July 2018 did not mention this matter at all.

44. We find as a fact, on the balance of probabilities based on the evidence that has been provided, that Ms Hayler engaged in discussion with the Claimant and Ms Russo, as a result of which an agreement was reached that the Claimant would adjust her holidays so that Ms Hayler could have the week beginning 9 April 2018, Monday 9 being Easter Monday and a Bank Holiday, as leave and the Claimant's leave was taken in an earlier week. We reach this conclusion on the basis of the evidence of Ms Russo who confirmed that such discussion has taken place, Ms Tabor's evidence that it was the Claimant who advised her that agreement had been reached, our acceptance of that evidence and the absence of any contemporaneous complaint or comment from the Claimant whatsoever.

45. Further, the Claimant's complaint regarding the change of holiday is said by her to be an act of direct discrimination because of race. No evidence was called by the Claimant and no questions were asked in cross examination which established any causal link between the matters in question and the Claimant's race. This was not put to the Respondent's witnesses at all.

46. The Claimant alleges that in April or May 2018 Ms Hayler threatened to "write a statement against her" because she had elected to take a phased return to work during the period April to May 2018 which is said to be an act of harassment on the ground of disability relating to the Claimant's ankle injury. It is common ground that Ms Hayler wrote a file note which she copied to Ms Chapman. That file note is dated 26 April 2018. It states that the Claimant had been told by her surgeon that he wished to sign her off work for a full 6 weeks, but that the Claimant had refused. Ms Hayler noted her suggestion that the Claimant should reconsider as her ankle was not improving and the position was affecting her work and mental well being. Ms Hayler notes that she suggested a reduced working week to three days if the Claimant felt that she could not be at home for six weeks. The note also records the Claimant mentioning that she felt depressed about being at home for six weeks and that Ms. Hayler suggested that the claimant consult her General Practitioner to assist with mental health.

47. The Claimant says that the *"threat"* of writing this note was an act of harassment. The Claimant does not dispute that the surgeon suggested she take six weeks off work. The concept of a reduced working week was an alternative. We accept Ms Hayler's evidence that the note accurately recorded her understanding of what the Claimant was telling her at the time and further that when she reported the conversation to Ms Chapman, Ms Chapman told her to make a note to record what had been said.

48. We find on the balance of probabilities that the Claimant was told by Ms Hayler that the note would be made. But the making of that note was a straight forward and sensible managerial act in the face on an employee who on the understanding of the Manager, was proceeding against medical advice.

49. We also find as a fact that the Claimant did not inform Ms Hayler that the surgeon had suggested the alternative of a shorter working week. We reach that conclusion because the note records that possibility as being a suggestion from Ms Hayler and had the Claimant told Ms Hayler that this had been offered and that she was intending to follow that proposal, there would have been no need for any note at all.

50. Chronologically the next complaint which the Claimant brings was that she was required to complete her competency for Breast Cancer Planning by Jemma Chapman on 4 May 2018, the competency to be complete by the end of May 2018.

51. This again is said to be an act of harassment relating to disability based on the Claimant's ankle injury. There was dispute on the evidence as to whether this was an instruction or a target. The evidence was that the Claimant had been working in the Prosoma Team for approximately seven months by this stage and Breast Planning is a competency which is usually signed off after approximately four months. The Respondent's witnesses confirmed that other employees had had similar conversations when they were not making progress towards being signed off in an appropriate time scale. Signing off is important because it improves the work flow in the department as it means that plans produced do not have to be checked before being counter signed.

52. The process for being signed off involves the individual having those who had checked or counter signed plans confirm the competency of the individual and the onus for doing this rests with the individual employee themselves. The Claimant in fact, was able to achieve this competency in two weeks rather than the four suggested by Ms Chapman. She did not indicate at the time or as far as we have been able to see at any time that this created a difficulty or problem for her. Nor did she give any evidence which indicated that this had anything whatsoever to do with her ankle or her related disability.

53. We found as a fact that the Claimant was encouraged, but not instructed, to complete her competency in Breast Planning within a month given the circumstances of her work in the Prosoma department and further that she was able to take this step within a very short time scale. The reason why the Respondent asked the Claimant to make progress was to assist the

flow of work in the department. It had nothing at all to do with the Claimant's ankle injury, or the disability arising from it.

54. The Claimant's next complaint is that in June 2018 the Respondent failed to make reasonable adjustments by applying in the PCP of requiring staff to rotate between the three departments of Prosoma, the Floor and Data on a regular basis. At the Case Management Discussion in December 2019, the Claimant said that the Respondent should have taken the step of adjusting the practice so she would work only in the Prosoma and Data sections. The Respondent accepts that it had the relevant PCP and the Claimant accepts that after she returned to work following her ankle injury, she was not required at any stage to work on the Treatment Floor. She has only worked in the Prosoma and Data sections from her return to work in October 2017 and that remains the case today.

55. After working for approximately 10 months until July 2018 in Prosoma, she was then rotated to Data. She subsequently made a request for the rotations to be short term because she says she could not retain information when she was working in one department for a long period due to her dyslexia and / or dyspraxia and she was therefore having to *"start again"* when she rotated between the two departments. That is not the case before us, not the case which the Respondent was required to meet in these proceedings, but in any event the Respondent has made that adjustment to the Claimant's rotation subsequent to the claimant's request, after the commencement of these proceedings. The PCP contended for and accepted in these proceedings has been adjusted by the Respondent.

56. We note that this is identified as a reasonable adjustment required in respect of dyslexia and dyspraxia, but the reason why the Claimant told the Respondent she could not work on the Treatment Floor was because of her ankle injury, and that is why the change was made. There was no evidence that the Claimant was substantially disadvantaged as a result of dyslexia or dyspraxia by the requirement to work on the Treatment Floor.

57. The Claimant's next complaint in time is said to be an act of direct discrimination because of her race. She says that on 6 June 2018 Jemma Chapman refused to allow her to remain in the Prosoma Team and instead rotated her to the Treatment Floor. She refers to Mr Grant Bennett as being the appropriate comparator.

58. On the Claimant's own admission, she did not work on the Treatment Floor in June 2018, nor at any time since. The Respondent accepts that Ms Chapman told the Claimant she would be required to rotate to Data and we note that this was the adjustment to rotation which the Claimant contended for in her previous complaint. Mr Bennett worked in the Prosoma Team from June 2015 to May 2016, a period of 11 months. The Claimant's work in Prosoma ran from October 2017 to July 2018, 9 or 10 months. At the end of his period in Prosoma, Mr Bennett was employed in a specific role exclusively within Prosoma as a Band 6 Radiographer. He was permanently assigned to that Team as a result of his new role.

59. As a fact we find that Mr Bennett was no longer therefore an appropriate comparator. The reason why Mr Bennett remained in Prosoma was due to his role. The reason why the Claimant was required to rotate was because of her role and had nothing whatsoever to do with race. Given that the Claimant could not work on the Treatment Floor, she was rotated to Data.

60. A second issue regarding holiday arose in Summer 2018. The Claimant says that what happened amounted to an act of direct discrimination because of religion and belief and / or because of race. The events are as follows.

61. The Claimant took leave of 10 days commencing Monday 13 August 2018 to return to South Africa. The Monday after her return was a Bank Holiday and thus the total time for the trip including weekends and that Bank Holiday was 17 days. She was due to return to work on Tuesday 28 August 2019. The Claimant, however, booked flights returning to the UK on 29 or 30 August and leaving on 10 August, the last working day before the holiday began. One of the purposes of the trip was for a healing ceremony under the Claimant's religion to assist with her recovery from injury.

62. The Claimant did not request any additional leave until mid July 2018 when she asked for three additional days, the 28th 29th and 30th August. That additional request was refused by Ms Tabor. In an email to the Claimant she said, quoting extracts from the Respondents Leave Policy,

> *"…annual leave requests should be approved before holiday and flights are booked and a maximum of seven staff would be allowed on holiday in the department at any one time and except in exceptional circumstances in the months of July and August, leave is limited to two weeks per person."*

There is also the provision in the Policy that leave is booked on a first come, first served basis.

63. The Claimant's initial case was that this refusal is incorrect because the Policy only applied to Front Line staff; but it is clear that the Policy applies to all staff in the department. The Claimant's case in this regard is primarily based around her desire to attend a healing ceremony based around her beliefs. The Claimant brings this complaint as an act of direct discrimination. The Claimant would therefore have to establish that she was treated less favourably than others, were treated or would have been treated because of the protected characteristic of her race or religion and belief.

64. We are satisfied on the facts that the reason why the leave was refused was because of the application of the Respondent's Leave Policy. The Claimant had booked flights outside of the leave period and that was why she required extra time off work. According to the evidence of Ms Tabor, which we accept, she asked the Claimant whether the ceremony would still take place if the Claimant had to return to work in accordance with her original leave request and she was told that it would. She also says that

she asked the Claimant on her return whether the ceremony had taken place and the Claimant confirmed that it had.

65. Because of the number of people who were already on holiday during that period, the request for additional leave could not be accommodated. The Claimant refers to Rachel Lane as a comparator and says that Rachel Lane regularly took more than 10 days leave during the July / August period. We accept Ms Tabor and Ms Chapman's evidence in this regard. They both indicated that the Policy was applied flexibly where possible. If someone requested additional leave days at the time which could be accommodated, it would be granted. We also note that in 2016, the Claimant had 12 days leave in the relevant period, so that flexibility operated in her favour as well.

66. We find as a fact that the principal reason why the Claimant's request for additional leave was refused, was because of the number of people who had already booked leave in the relevant period, so that the additional period of leave could not be accommodated. The Claimant had booked flights outside the period of agreed leave and we note that she made no attempt to change the leave period.

67. The next complaint in time, is that on 6 August 2018, the Claimant says Ms Tabor is said to have *"demanded"* that the Claimant sign a flexible working document which she did not agree with. This is said to be an act of harassment related to disability.

68. The facts as we find them are these. The Claimant's submitted a flexible working request in May 2018. She wished to adjust her finishing time on a Thursday. The Respondent understood that this would be a request for a permanent change in her contractual terms as those are the provisions of the flexible working regulations. Had the request been granted as it stood, this would have had a detrimental impact on the Respondent's activities when the Claimant was rotated to the Treatment Floor. At the time, this was before the Claimant suffered any injury. The request was made prior to her ankle injury and at a time when the rotation was expected.

69. The Claimant then suffered her injury and was absent from work for some time. On her return she worked a four day week as a phased return; taking each Thursday off. When the Claimant's period of phased return came to an end, it was still hoped that in due course the Claimant would be able to return to the Treatment Floor and therefore the flexible working request as made would have been rejected. This was because an early finish on Thursdays could not be accommodated on the Treatment Floor. Accordingly, the Respondent drafted what they call a form of 'local agreement', permitting the Claimant to take the reduced hours that she asked for in her original request, but only for so long as she was working in only Prosoma or Data. This was set out in the document which Ms Tabor asked the Claimant to sign. The Claimant says she refused to sign it because it was not the form that she had completed and we accept the evidence of Ms Tabor that she may have become impatient with the Claimant about this. The Claimant took the document away, but presumably after further consideration of it, did not return it duly signed.

70. As a result Ms Chapman took advice from Human Resources and sent the Claimant a letter acknowledging the flexible working request, confirming that it had been reviewed and granted, but only whilst the Claimant was working in the Data or Prosoma areas and stating that should the Claimant's health improve to allow her to return to the full range of duties, she would be expected to return to 37.5 hours per week on a fully flexible basis, although she could at that stage submit a further flexible working request for review.

71. The Claimant was being asked by Ms Tabor to sign a document which gave her exactly the change in hours which she had asked for in her flexible working request. Further, the flexible working request and thus the document and the request to sign it, related to the Claimant's childcare arrangements and had nothing to do with her ankle injury. That was the reason why the Claimant made her flexible working request.

72. Chronologically, the Claimant's final complaint relates to a discussion held between Ms Hayler and others when Ms Hayler was said to have been discussing the Claimant and her refusal to sign the flexible working document. This is said to have been an act of harassment relating to disability.

73. The allegation is that this took place on 14 August 2018. The uncontested evidence which was on that date Ms Hayler was in fact on holiday, so the discussion was on a different day. The claimant says that the conversation caused Rachel Lane to complain to Kevin Skilton about what had been said. Mr Skilton's evidence was that he was in fact approached by Louise Barnes rather than Rachel Lane. He said he went to the Prosoma office with Ms Barnes and that Lauren Kirten and Rachel Lane were both present. They said there had been a discussion between Ms Hayler and Ms Tabor which was to do with time keeping when Maria Russo was also present.

74. The complaint was that that discussion should have been held in private. The point about time keeping was that on the Friday before the Claimant began her holiday, she left early and this was one day after a team meeting when the importance of proper time keeping had been emphasised.

75. Maria Russo, now Overhill, in her evidence said that there was also a complaint raised by Ms Tabor about the Claimant not signing the flexible working request document. We accept that evidence; we are satisfied that the subject did arise. But that did not relate in any way to the Claimant's ankle injury or any other aspect of her disability. We repeat that the reason why the Claimant made a flexible working request, was to do with childcare arrangements. The reason why the Claimant was being asked to sign the document was because the flexible working request could not be accommodated on a permanent basis. As and when the Claimant was able to return to work on the Treatment Floor, she would have to revert to full hours.

76. Ms Tabor's frustration was based upon the Claimant's refusal to sign a document which gave her exactly what she was seeking. That frustration and the whole conversation had no connection whatsoever to the Claimant's status as a disabled person.

77. In relation to time limits, the Claimant's complaints relate to events in February 2018, March 2018 and April, May, June, July and August 2018. The last events about which she complains took place on 6 and 14 August 2018. If we were satisfied that all these events constituted a series of events stretching from the first to the last, the Claimant should have commenced Acas Early Conciliation by not later than 13 November 2018; three months after the last event. She did not begin Acas Early Conciliation until 4 February 2019. It is right to point out that the Early Conciliation certificate is dated 4 March 2019 and the Claimant presented her claim form promptly thereafter on 11 March 2019.

78. The only argument advanced by the Claimant in support of an Application for and Extension of Time on the basis that it is just and equitable to do so, was presented in cross examination. Her witness evidence gave no explanation for delay whatsoever. Under cross examination she said that she had contacted the Citizens Advice Bureau who had told her that she should wait whilst the Respondent dealt with her internal grievances.

79. The Claimant's first grievance was presented on 24 July 2018, this related to the allegation of writing a statement against her and the need to complete competencies by the end of May 2018 and an alleged demand that the Claimant rotate onto the Treatment Floor.

80. The Claimant's second grievance was raised on 12 September 2018, in which she referred to the February 2018 interview, the issue around leave in March / April 2018 and the summer holiday request in July 2018. In cross examination, the Claimant accepted that she had been represented by a Trade Union Officer during the grievances and said that she had told the Trade Union Official what the CAB had told her but received no contrary advice.

The Law

81. Under the Equality Act 2010,

    82.1 Under Section 4: disability, race and religion or belief are protected characteristics.

    82.2 Under Section 9: race includes colour, nationality and ethnic or national origins.

    82.3 Under Section 13: direct discrimination, 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.

    82.4 Under Sections 20(3) of the Equality Act 2010: where a provision criterion or practice of [an employer] puts a disabled person under

substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that employer must take such steps as is reasonable to have to take to avoid the disadvantage.

82.5 Under Section 21: a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments; and an employer discriminates against a disabled person if they fail to comply with that duty in relation to that person.

82.6 Under Section 26: a person (A) harasses another (B) if A engages in unwanted conducted related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

82.7 Under Section 26(4): in deciding whether conduct has the effect referred to, each of the following must be taken into account –

a. the perception of B;
b. the other circumstances of the case; and
c. whether it is reasonable for the conduct to have that effect.

82. In the case of Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR434, the Court of Appeal established that when Employment Tribunals consider exercising the discretion to extend time on the basis that it is just and equitable to do so, there is no presumption that they should do so unless they can justify a failure to exercise the discretion, rather a Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule.

The Conclusions

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83. Based on the evidence and the facts as found, and applying the relevant Law, we have reached the following conclusions.

84. The Claimant's complaint that the Respondent failed to make reasonable adjustments in relation to the interview process for a Band 6 role, is not well founded on its merits.

85. The Claimant complained that the PCP of interviewing more candidates, which the Respondent accepts applies, operates to her substantial disadvantage because it is difficult for her to provide the necessary information during the interview because of the nature of her condition making it difficult to process information and respond to all the questions asked. The expert report prepared by Karen Cameron in August 2016 identified difficulties which the Claimant had with short term memory and working memory. The areas of activity which the Claimant would find it difficult, or where she required assistance, were identified.

86. Ms Cameron did not identify an interview situation as being one where the

Claimant would have difficulty. There was a subsequent report from the British Dyslexia Association in May 2020. In that report there was no finding of disadvantage in an interview process. Only reportage of the Claimant's statement that she had difficulties in an interview scenario. In those circumstances, the BDA report did not suggest any adjustments to an interview process, but rather suggested strategies for the Claimant to overcome the difficulties of which she said she had.

87. When the Claimant was asked at the Case Management Hearing how the process could have been adjusted, she referred to the breaking down of questions into single questions. The Respondent's witnesses confirmed this was done in any event. On behalf of the Claimant, Mr Nkala, said that doing something they already did meant that the Respondent did not make any adjustments. That overlooked the fact that the very thing which the Claimant was asking for, was given. Further, if there is no further reasonable adjustment required, or no further reasonable adjustment which can be made, an employer is under no duty to make any further adjustment. That does not mean that the employer has failed in its duty. The thig the claimant sought was already in place and no further adjustment was appropriate.

88. Accordingly, we do not find that the Claimant was at substantial disadvantage as a result of the interview process. There is no evidence to support that, other than the Claimant's own complaint and the two experts' reports to which we have been directed do not support that contention.

89. In any event, the Respondent conducted the interview precisely in the way in which the Claimant asked for. The requirement to interview all candidates is a reasonable one and to allow an internal candidate for a post to be assessed by reference to their work could well operate to the detriment of external candidates, so that that adjustment would not in any event be a reasonable one.

90. The Claimant's complaint that she was asked to cancel some of her pre-booked leave to accommodate a colleague, said to be an act of direct discrimination on the grounds of race, fails on its merits. The problem arose because Ms Hayler was looking to take leave during the School Easter break and the Claimant had already booked that period of leave. The solution proposed by Ms Tabor was that the Claimant, Ms Russo and Ms Hayler discussed the matter between themselves to try to find an accommodation. Ms Hayler accepted that if no one had been able to adjust their leave, she would not have been able to take the leave she had requested.

91. Although the strict interpretation of the Respondent's Leave Policy is that leave is booked on a first come, first served basis, we accept that it was reasonable, and indeed good management, to allow some flexibility around this if the individual employees were content. Ms Russo was unable to adjust her leave because she was travelling to Canada and had booked flights. The discussion took place and the Claimant's second week of leave was cancelled and she rebooked an earlier week in its place, so that Ms Hayler took the week's holiday which had previously been the second week of the Claimant's leave.

92. We have accepted Ms Tabor's evidence that this was an agreement between the individuals which the Claimant herself reported to her. There was no demand or instruction to the Claimant; she agreed to the change in her leave arrangements. Therefore, that cannot amount to an act of less than favourable treatment.

93. In any event, the situation and the discussion related to a number of people seeking to take leave at the same time. We have heard no evidence that the Claimant was invited to consider moving her leave because of her race. The alleged comparator was Ms Russo who was, on the facts as found, also asked whether she could change her leave, but she could not.

94. The Claimant's next complaint that she was harassed on the basis of the ankle injury and the arising disability when Maria Hayler threatened to write a statement against her, fails on its merits. Ms Hayler understood what the Claimant had said was that the Claimant was acting contrary to the advice of her surgeon. In those circumstances, writing a file note confirming that the Claimant was proceeding contrary to medical advice, was a sensible and appropriate managerial step to take and cannot be considered to be an act of harassment.

95. If an employee advises her Manager that she is acting contrary to medical advice, to make a note of that cannot reasonably be felt to be a violation of the employee's dignity. Nor can it be said to create an intimidating, hostile, degrading, humiliating or offensive environment for the employee in question. The allegation is that the statement was to be written because the Claimant elected to take a phased return to work during the period April 2018 to May 2018. That is not why the statement was written and thus the allegation is not well founded on its facts.

96. In fact, the concept of a phased return was raised by Ms Hayler as is set out in the note. She suggested the Claimant return on a 3-day week. When the Claimant subsequently reduced her working hours as part of a phased return to a four day week, Ms Hayler's evidence, unchallenged, was that she was pleased that her advice had been followed.

97. The Claimant also complained that when, at the beginning of May 2018, she was required to complete competency in relation to Breast Planning by the end of May 2018, this was an act of harassment relating to disability arising from her ankle injury. That complaint fails on its merits.

98. We have found as a fact that there was no requirement imposed upon the Claimant, but rather she was invited to complete the competency by the end of May, given the length of time she had already spent in the department. The matter was to be reviewed at the end of May. The Claimant had already been in the relevant Team for seven months, while the average time to obtain the competency was four months. Not being signed off created a difficulty in work flow because it required every Plan prepared by the Claimant to be counter signed before final checking.

99. The Claimant was able to complete the steps required to obtain the competency within two weeks of the discussion. There is no connection whatsoever between this matter and the Claimant's disability. She was being asked to accelerate the process of obtaining signing off as competent because of the length of time she had already spent in the department and because her not being signed off delayed the work of the department generally. Not only was the discussion unconnected in any way with the Claimant's disability, it was not an act of harassment to invite an employee to take steps to obtain a competency which was well within her capabilities and in circumstances when it appeared to the department Managers to be entirely reasonable and that the process was overdue.

100. The Claimant's allegation that the Respondent failed to adjust the practice of rotation to allow her only to have to work in Prosoma and Data which she says amounted to a failure to make reasonable adjustments, also fails on its merits.

101. The Claimant returned from her period of absence following her ankle injury in October 2017. Since that time, she has only worked in the Prosoma and Data Teams. At all material times, the Claimant has had the adjustment which she seeks and it has been in place since, at the latest, July 2018 when she rotated from Prosoma to Data. She has not been required to work on the Treatment Floor since her return to work in October 2017 and the complaint is without merit.

102. The Claimant complains that in June 2018, Jemma Chapman refused to allow her to remain in the Prosoma Team and that this was an act of direct discrimination on the ground of race. That allegation also fails on its merits.

103. The Claimant was told by Mr Cone in July 2018, that she could not remain permanently in Prosoma and would be required to rotate to Data. The Claimant's position is a rotating role between Data, Prosoma and the Treatment Floor. But the Respondent has accepted that the Claimant cannot rotate to the Treatment Floor because of her ankle injury. There is no reason why the Claimant cannot rotate between Prosoma and Data.

104. The Claimant's alleged comparator Grant Bennett worked in the Prosoma Team for approximately the same length of time as the Claimant before being moved to a non-rotating Band 6 role based exclusively within the Prosoma Team. Thus, he was thereafter not an appropriate comparator.

105. The Claimant has not established any facts from which we could conclude that requiring her to fulfill those parts of her contractual duties which she could carry out, i.e. to work in both Data and Prosoma, was an act of race discrimination and / or that not allowing her to remain in the Prosoma Team ad infinitum, was an act of discrimination relating to race. We find no connection whatsoever between the reasonable management decision to require the Claimant to rotate between the two departments in which she could work, in accordance with her contract and the Claimant's race.

106. The allegation that the Claimant's request for additional leave in summer 2018 was an act of direct discrimination on the ground of race, or on the ground of religion and belief, also fails on its merits.

107. The Claimant had booked two weeks leave to go to South Africa and booked flights which required her to take an additional three days leave. She requested that extra leave, but it was refused for a number of reasons. There were already the maximum number of permitted people absent from the department at that time. The Respondent's Leave Policy limits the amount of time that can be booked during July and August to 10 days per employee, and thirdly, because the Claimant was told by way of reminder that she should not book holidays and flights before a leave request has been approved. The Claimant's allegation that this Policy only applied to Front Line staff is incorrect. The Claimant did not pursue the point that the Policy did not apply to her.

108. The Claimant says she required the additional leave in order that she could take part in a healing ceremony for her injury. She said in evidence before us that the ceremony might take a number of days and was to take place at the weekend at the very end of her period of leave.

109. We contrast that with the evidence of Ms Tabor in two important regards. First, the Claimant is said to have told Ms Tabor that if she could not extend her leave, the ceremony would still take place. Secondly and more importantly, her unchallenged evidence that the Claimant reported to her on her return to work that the ceremony had taken place. We accept that evidence. The Claimant did not challenge it, particularly the statement the ceremony had taken place.

110. The allegation is one of direct discrimination. The issue is therefore whether the refusal of additional holiday is because of the Claimant's race, or race generally, or because of her religion or belief. We have found on the facts that the reason for the refusal was because they were already the maximum number of permitted people absent from the department at the relevant time and because under the Policy, no more than 10 days leave should be taken during the July / August period. That part of the Policy was applied flexibly where additional leave could be accommodated, although we have not been directed to any occasion when an employee took more than 10 consecutive days in a year. In this particular case, there was no flexibility because of the number of people who had already booked leave at the relevant time. The refusal was unconnected to race, religion or belief.

111. The allegation that Ms Tabor demanded that the Claimant sign a flexible working document which she did not agree with, is said to be an act of harassment related to disability, fails on its merits.

112. The document which was given to the Claimant to sign gave her exactly what she wanted in terms of reduced working hours, in accordance with the flexible working request she had submitted some time previously. The flexible working request could not be approved as it stood because the Respondent hoped that the Claimant would in due course return to full

duties including rotating on to the Treatment Floor where a shorter working day on a Thursday could not be accommodated. Accordingly, the Respondent prepared a *"local agreement"* giving the Claimant reduced hours but limited to the period of time when she was rotating only between Prosoma and Data.

113. The Claimant refused to sign this document saying it was a different document to the flexible working request form she had filled in. As a result, after the Claimant took the document away but did not return it duly signed, the Respondent confirmed the arrangement in a letter to the Claimant. This arrangement we understand remains in place. We cannot see that it can possibly be an act of harassment to invite an employee to sign a document which confirms the change in arrangements which were precisely those which she had requested. Further and in any event, this does not relate in any way to the relevant protected characteristic of disability. The request for adjustment to hours was made because of childcare arrangements, the document was produced to allow the Claimant those reduced hours which could not be accommodated in the Treatment Room and therefore affording her them so long as she remained only working in Prosoma and Data.

114. The Claimant does not establish any connection whatsoever between what occurred and her ankle injury or the disability arising from it.

115. The final allegation is of harassment said to have occurred when Ms Hayler discussed with others the Claimant's refusal to sign the Flexible Working document. That also fails on its merits.

116. The primary element of the discussion about which the Claimant complains (she was not present), related to the Claimant taking an early departure from work on the last working day before her holiday. We accept that the subject of the Claimant's refusal to sign the Flexible Working document also arose. It did not take place on 14 August 2018 as alleged because on that day Ms Hayler was on holiday. We accept the discussion did take place at some other time.

117. However, in the same way as we have found that the request from Ms Tabor to sign the document was wholly unconnected to the issue of disability and for the same reasons the discussion about the Claimant's refusal to sign it had no connection to the issue of disability either. The purpose of the document was to satisfy the Claimant's flexible working request, the request was made for childcare reasons and it had been made prior to the Claimant suffering any disabling injury. The entire episode of the production of the document, her refusal to sign it and the subsequent discussion and the sending of the letter to the Claimant confirming the arrangements in exactly the same terms as the unsigned document, are wholly unconnected to the Claimant's disabling injury.

118. Accordingly, and for the reasons stated, all the Claimant's complaints fail on their merits.

119. In those circumstances it is not strictly necessary for us to deal with the issue of jurisdiction or time limits, but we do so for the sake of

completeness.

120. On the face of them, all the Claimant's complaints are out of time. The most recent complaint is dated 14 August 2018, although that date is incorrect. The Claimant did not begin Acas Early Conciliation until 4 February 2019. By which time that final claim was already one day short of 12 weeks out of time.

121. The Claimant has not, to our satisfaction, established that these complaints are a series of connected events. We accept that the request to sign the flexible working document and the discussion about the failure to do so, were a connected sequence of two events, so that if that second complaint had been brought in time, this would have saved the complaint regarding the request to sign at least in terms of time limits.

122. The fact that whether the complaints had been brought in time was a specific issue between the parties was set out as the first issue in the list of those matters to be determined by the Tribunal in the Case Management Summary dated 10 December 2019. That recorded that the issue to be determined was whether the Claimant's complaints were presented within the time limits set out in the Equality Act 2010 which could involve consideration of subsidiary issues including whether there was a sequence of events extending over a period and whether time could be extended on a just and equitable basis.

123. The Claimant, in her evidence in chief, advanced no argument whatsoever to explain why there had been a delay and why it would be just and equitable to extend time in her favour. There is no presumption in favour of a Claimant in these circumstances and the Claimant has to explain why there had been a delay and why it would be just and equitable to extend time in her favour.

124. Under cross examination, and for the first time, the Claimant said that she had been told by the Citizens Advice Bureau to delay whilst an internal grievance process took place and that her Trade Union Officer did not give her any conflicting evidence regarding time limits. The Claimant did act promptly following the conclusion of the grievance appeal. We are conscious of the line of Authorities which establishes that a delay to await the outcome of an internal process is a factor to take into account and nothing more. It does not automatically excuse delay, nor extend time.

125. In this case, a number of complaints were already out of time before the Claimant raised them in her grievances. By way of example, the complaint relating to Easter Holiday leave arose at the end of January 2018 when the Claimant's leave dates were changed. The complaint should therefore have been made by 30 April 2018. No complaint whatsoever was raised about this matter until the Claimant's second grievance on 12 September 2018 when the claim was already four and a half months out of time. No explanation for the delay was given by the Claimant at all. A submission was made on her behalf at the end of the case that she was *"keeping her head down"*. But that was not her evidence and indeed she had advanced no evidence at all about this matter.

126. Against that background, therefore, the Claimant did not satisfy us that it would have been just and equitable to extend time for any of the complaints. She advanced no evidence in chief, but only advanced an explanation based on advice apparently given by the Citizens Advice Bureau and not challenged by her Trade Union Officer. Further, when asked about this during cross examination, there was no explanation for the earlier delays. Whilst we take into account her evidence regarding the advice apparently given by the CAB, that is only one factor. It does not deal with the earlier delay in any way, shape or form.

127. Our conclusion, therefore, is that we would not extend time because it is not just and equitable to do so. Had we done so, in any event, the Claimant's complaints and all of them, would fail on their merits as we have set out above.

128. Accordingly, the unanimous decision of the Tribunal, is the Claimant's complaints fail, both on their merits and on the issue of jurisdiction and they are accordingly dismissed.

11 January 2021

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Employment Judge Ord

Judgment sent to the parties on
13th January 2021

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T Henry-Yeo

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For the Tribunal office