Case No: 2304434/2018 & 2303674/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS: Mrs J Jerram
Mr P Adkins

BETWEEN:

Mrs N Moustache

Claimant

And

Chelsea and Westminster NHS Foundation Trust

Respondent

Under the provisions of Rule 69, the Reserved Judgment sent to the parties on 14 January 2021 is corrected as underlined under the heading "Appearances" and at paragraphs 64 and 76 below.

ON: 6 - 9 October 2020

Appearances:

For the Claimant: In person
For the Respondent: Ms S Ramadan, Solicitor

CORRECTED RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By claim forms presented on 10 December 2018 and 1 September 2019, the claimant complained of disability discrimination, age discrimination and unfair dismissal. All claims were resisted by the respondent.

2. We heard evidence from the claimant. On behalf of the respondent, we heard from Tina Benson (TB) Chief Operating Officer; Nicole Porter Garthford (NPG), former Associate Director of Human Resources; Julie Pie (JP) Executive Assistant and; Anna Letchworth (AL) General Manager, Patient Access. There was a joint bundle of documents and references in square brackets are to pages in the hard copy bundle as, unhelpfully, the pdf page numbering on my electronic bundle is different.

   The Issues

3. The issues to be determined are contained in an updated List of Issues document prepared by the respondent, dated 24 June 2019. The issues are referred to more specifically in our conclusions.

   The Law

4. Section 13 of the Equality Act 2010 (EqA) provides that 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.

5. Section 23 provides that on a comparison of cases for the purposes section 13, there must be no material difference between the circumstances relating to each case.

6. "The relevant circumstances" for the purposes of the statutory comparisons are those which the respondent took into account when deciding to treat the claimant as it did. If the relevant circumstances are to be "the same or not materially different" all the characteristics of the Claimant which are relevant to the way her case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. MacDonald v Advocate General for Scotland and TSB Governing Body of Mayfield Secondary School [2003] IRLR 512 House of Lords.

7. Section 26 provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic, or engages in conduct of a sexual nature, and the conduct has the purpose or effect of –

   (i) violating B's dignity, or
   (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

8. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

9. Section 15 EqA provides that 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.

10. In considering the issue of proportionality, we must ask ourselves whether the treatment of the claimant was reasonably necessary to achieve the stated aims. Allonby v Accrington & Rossendale College and others [2001] EWCA 529. Put another way, could the aims reasonably have been achieved by a less discriminatory route and do the Respondent's aims outweigh the discriminatory impact of the treatment/measures.

Burden of Proof

11. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

12. The leading authority on the burden of proof in discrimination cases is Igen v Wong [2005] IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved the burden passes to the respondent to prove that it did not discriminate.

13. In the case of Madarassy v Nomura International PLC [2007] IRLR 246 it was held that the burden does not shift to the respondent simply on the claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable Tribunal could properly conclude from all the evidence before it that there may have been discrimination."

Findings of Fact

14. On 15 January 2001, the claimant commenced employment with the respondent as a Band 4 Personal Assistant (PA) to Associate Directors at West Middlesex Hospital.

15. Around August 2011, the claimant was diagnosed with osteoarthritis in her hip and knees. She had a first hip replacement operation in September 2012 and a second one in March 2015. The claimant relies on osteoarthritis as her qualifying disability and in light of her Disability Impact Statement dated 26 July 2019, the respondent concedes that at the relevant time, the claimant was disabled for the purposes of section 6 EqA.

16. Until September 2016, the claimant worked as PA to the General Manager for Medicine and the General Manager for Surgery. She also supported the Medicine and Surgery Division Teams. Her duties were set out in a non-exhaustive job description dated January 2006 [144-146]. Following a restructuring, the claimant was redeployed to a PA

role in the Corporate Department, supporting 3 Directors. In addition, she temporarily assisted Tina Benson (TB) Chief Operating Officer, whose PA had resigned. It was later agreed that the claimant would continue to assist TB on a permanent basis. At some point, the claimant's role was divided into 2 separate administrative jobs, which she shared with Julie Pie (JP) They were both based in the Executive Offices of the Hospital. JP had worked in the Executive office for 18 years and was much more experienced in working in that environment than the claimant. The claimant continued to report to Ally Maffey (AM), Business Manager for the Chief Executive.

17. On 6 October 2016, the claimant and other colleagues received an email from AM, confirming that minute taking had been removed from the job description of band 4 senior administrators [171].

18. On 11 October 2016, the claimant signed a variation to her terms and conditions, which had attached to it a new job description. There was no substantive change to the terms and conditions and job description, save that her title was now Corporate Office Senior Administrator [166-170]

19. In January 2017, Emily Clayton (EC) became the claimant's line manager.

20. On 3 May 2017, EC decided that the claimant should take the minutes for an A&E board meeting. When the claimant objected to taking minutes, EC responded "*I am not asking you, I am telling you*". The claimant found this disrespectful.

21. On 1 June 2017, EC emailed the claimant to arrange a 1:1 meeting on 6 June to discuss concerns that had been raised about her performance [229]. The meeting did not go ahead as it was overtaken by the events below.

22. On 5 June 2017, the claimant raised a formal complaint about EC's conduct on 3 May 2017 [230-235]. In the opening paragraph of the complaint, the claimant says that her concerns relate to harassment, bullying and victimisation at work. She makes no reference to any particular protected characteristic. The complaint was acknowledged on the same day by Keith Loveridge (KL) HR Director, who said that he would ask someone from his team to review it and advise the claimant of the next steps [251C].

23. On 9 June 2017, the claimant informed the respondent that she had further concerns that she wished to raise as part of her complaint and would set these out on a separate sheet [251A]. These were contained in a subsequent email dated 23 June. One of them was that "*There has been private discussions with my other colleagues about the new Band 5 and Band 4 portions at West Middlesex. I was excluded from those discussions, which was concerning future plans for the corporate team at West Middlesex. The action is classified as discrimination and victimisation in the work place.*" [252]. The claimant contends that this aspect of her complaint was not dealt with. Nicole Porter-Garthford (NPG) at the time Associate Director of Human Resources, who dealt with the grievance at stage 3, was not made aware of the claimant's email of the 23 June and TB could not recall it.

24. In or around May 2017, a permanent Band 5 Team Leader role was advertised. It was a dual-site role, based across Chelsea & Westminster Hospital and West Middlesex Hospital. The claimant was not interested in the role because of the travel so did not apply. JP did apply but was unsuccessful.

25. On 19 June 2017, JP was offered an Acting Up Band 5 Team Leader role based exclusively at West Middlesex Hospital. JP did not apply for this but was offered it based on the strength of her application and performance at interview for the cross-site permanent role. The claimant was not considered for that role and she contends that it was because of her age and disability. At this time, the claimant was just about to turn 64 years of age.

26. Although not specifically part of the job description, there was an expectation that a PA would occasionally make beverages, when requested, and the claimant had done so in the past. However, after her hip operation, the claimant struggled to perform these duties as she was unsteady on her feet. When the claimant and JP were working together, JP would be asked to make the tea and coffee. When JP was not available, people would approach the claimant for beverages and she would assist. However, after nearly having an accident with cups of tea, she decided she would no longer do so. She did not announce her decision to anybody and was not challenged about it.

27. On 13 July 2017, a meeting took place between the claimant, Fiona Akhurst-Reid (FAR) Employee Relations Manager, and Harbens Kaur(HK) Head of Legal Services, to discuss her grievances. The outcome of that meeting is recorded in a letter to the claimant from HK dated 26 July 2017, setting out the matters discussed. The letter refers to a number of complaints of unfair treatment by EC. The letter makes no mention of age or disability discrimination. The letter confirms that the parties agreed that the way forward was for a facilitation meeting. [264-266]. The claimant says that at the meeting, she asked not to be managed by EC. However, we prefer the respondent's evidence that her request was to be managed by TB temporarily as this is what is recorded in the outcome letter.

28. Between 26 July and 6 August 2017, the claimant was signed off sick with stress at work [268]

29. On 23 August 2017, the facilitated discussion between the claimant and EC took place, led by TB. Details of the discussions are recorded in a letter sent to the claimant afterwards by TB. It was agreed that the grievance was resolved and would not be pursued provided certain actions were carried out. Those actions are listed at sub-paragraphs a-f of the letter and included one to ones at least once a month and performance management discussions and actions [274-275].

30. During the meeting, TB asked the claimant whether she had considered the possibility of retirement. The claimant contends that this was because of her age and disability. TB told us that in the meeting, the claimant had said that her mobility issues were making it painful to travel to work and sit in the office and that all the processes were making her anxious and stressed. TB said that she was trying to be supportive and suggested retirement alongside other options. The claimant denied having any conversation with TB about difficulty getting into work. In fact, she told us that she had no difficulty getting into work as she had been issued with an essential parking permit and was able to park next to the building. Unfortunately, there are no minutes of the meeting and the subsequent letter outlining the discussion does not refer to these matters. However, in relation to this dispute, we prefer the evidence of TB. The claimant's challenge of TB evidence was only in relation to difficulty getting into work, she did not challenge the rest of the conversation. TB appeared clear in her recollection of events and the claimant does not provide an alternative account of the conversation. It is not in dispute that the claimant's mobility issues were causing her difficulty at work; she refers to this herself in

relation to the making of tea and coffee. TB's account of the conversation is broadly consistent with this.

31. In response to TB's enquiry, the claimant said that she wanted to carry on working for at least another two years but if she could get a good pension, she would consider retirement. After the meeting TB made some enquiries on the claimant's behalf and emailed her with the details of who she needed to contact for details about her pension. The claimant responded by thanking her and stating that she would get in touch with the said contact. [273A]. In the event, the claimant chose not to pursue the retirement route.

32. The claimant complains that the August 2017 meeting turned into a performance management process without warning. This is because there was a discussion about the concerns referred to in EC's email of 1 June 2017 [229] However, the claimant conceded in cross examination that it was she who introduced the topic into the meeting by asking what the performance concerns were, which then led to a discussion about those issues.

33. In accordance with the actions agreed on 23 August 2017, fortnightly one to one meetings took place between the claimant and EC to discuss her performance and set targets. To that end, an informal performance management action plan was drawn up [282-283]

34. On 19 February 2018, EC invited the claimant to a stage 2 formal review meeting to discuss continuing concerns about her performance [292-293]

35. On 5 March 2018, the claimant requested to escalate her original grievance on grounds that EC had not adhered to the actions agreed on 23 August 2017 [297-300]. However, the claimant was told that her original grievance had closed and that she would need to raise a fresh grievance if she had new concerns [301-302]

36. On 14 March 2018, a stage 2 formal performance management meeting took place between the claimant and EC. An 8 week action plan was agreed which set out the areas of concern, the actions required to address them and the timescales [311-314]

37. On 13 April 2018, the claimant submitted a further grievance. The claimant raised 3 matters: the unsatisfactory handling of her June 2017 grievance; not receiving an appraisal for over 3 years and; being performance managed [345-348]

38. On 26 June 2018, EC went on maternity leave until 30 May 2019.

39. On 6 July 2018, the claimant attended a grievance meeting conducted by Victoria Burley (VB) Head of Employee Relations. At that meeting, there was a reference to matters having spiralled due to the claimant's disability and age. However, the notes indicate that there was no direct response to that comment. [370-374]

40. On 31 July 2018, VB wrote to the claimant advising her that her grievance had not been upheld. The letter makes no specific reference to the "disability and age" comment but says that it is based on the contents of the grievance letter. [389-393]

41. On 9 August 2018, the claimant appealed against the grievance outcome. The appeal raises a number of issues but does not refer to age or disability discrimination in either specific or general terms [394-396].

42. An appeal hearing was held on 12 October 2018, chaired by Gillian Holmes (GH) Director of Communications. The claimant attended with her daughter. The claimant did not refer to age or disability. though the appeal manager had the notes of the stage 2 grievance meeting containing that reference. Nicole Porter Garthford (NPG) one of the panel members on the appeal, told us that the reference to disability and age in the notes did not register with her and the claimant did not specifically raise this at the hearing. The claimant was asked what resolution she wanted to her grievance and she replied that she would need to see the outcome letter before answering that. [453-459]

43. On 6 November 2018, GH wrote to the claimant with the appeal outcome. The appeal was unsuccessful but it was agreed that the performance review process would be stopped as it was seen as a potential barrier to the claimant's return to work. There was no reference to age or disability discrimination in the letter though that is unsurprising given that it was not a matter raised at the hearing [460-465]

44. On 10 May 2018, the claimant commenced another period of long-term sickness absence. She attended absence review meetings on 30 August 2018, 12 December 2018 and 1 March 2019, but continued to be unfit to return to work in any capacity.

45. On 8 January 2019, the respondent referred the claimant to occupational health. In the referral document, it sought advice on when the claimant was likely to return, whether her condition amounted to a disability; whether there were any adjustments that could assist and whether redeployment or ill health retirement was an option [466F-G].

46. The claimant was seen by occupational health on 6 February 2019 and on 13 February, Dr Maqsood sent his report to the respondent. In the report (which was partly redacted) he said that the claimant may be fit to return to work with some support but she had come to the conclusion that she will no longer return to work irrespective of what adjustments can be put in place. The claimant told us that this was because she was being expected to return to the line management of EC and that was a problem for her. [466J-466K].

47. On her return from maternity leave, EC transferred to another department. The claimant told the tribunal that had she been told that EC was no longer there, she may have considered returning. However, she never at any point raised EC's continued line management as a barrier to her return. Indeed, at the sickness absence review meeting on 1 March, she was asked by her temporary line manager, Emma Perlman, if there was anything she could do to support her return to work and the claimant said there was nothing [466L-M]

48. The respondent did not see the OH report straight away as the claimant initially withheld her consent for its disclosure as she disagreed with some of its contents. The respondent did not have sight of it until shortly before the dismissal.

49. On 6 March 2019, the claimant's GP signed her off work with depression and work related stress for a further 3 months, until 6 June 2019 [469]

50. On 31 May 2019, the claimant attended a final sickness absence review meeting. By this stage, she had been off work continuously for 13 months. The claimant was again asked what could be done to support a return to work and she replied that nothing could be done to support a return to her role or any other role in the Trust. She agreed that she made the comments attributed to her in the OH report and agreed that she remained

unfit to return to work in any capacity in the foreseeable future.

51. On 6 June the claimant was signed off work with depression and work related stress for a further 3 month period until 5 September 2019 [473]

52. On 13 June 2019, the respondent informed the claimant that she was dismissed on grounds of capability with immediate effect, with 12 weeks' notice pay in lieu [474-479].

53. On 16 June 2019, the claimant sent an email to the respondent confirming that she would not be appealing the decision to dismiss her [480]

<u>Submissions</u>

54. The respondent presented written closing submissions which were spoken to. The claimant provided oral submissions. These have all been taken into account.

Conclusions

55. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the agreed issues:

<u>Jurisdiction</u>

56. The claimant presented her claims of age and disability discrimination on 10 December 2018 and commenced ACAS conciliation on 9 November 2018. Therefore any alleged discriminatory acts occurring before 10 August 2018 are out of time unless they form part of discriminatory conduct extending over a period, ending on or after the cut-off point i.e. 10 August 2018.

57. The respondent accepts that allegation 3(c) - *age and disability grievance not addressed* and 3(g) - *request not to be managed by EC* - were conduct extending over a period as they concerned the actions of individuals involved in the grievance process, which concluded on 6 November 2018, with the appeal outcome letter. We too find that these matters were in time.

58. All the other matters are on their face out of time (occurring between 3.5.17 and 23.8.17) and we consider them to be single one off acts that are not continuous with any in time acts. We have therefore considered whether there are reasons to exercise our discretion to extend time on just and equitable grounds.

59. The claimant's explanation for not lodging her claim sooner was that she had to first make sure that she had a claim. The trouble with that argument is that the claimant's case before us was that she first raised a complaint of age and disability discrimination on 23 June 2017, a year and a half before she presented her claim. The claimant submitted that she was unfamiliar with tribunal proceedings and was none the wiser as to when to lodge her claim. The claimant was a member of a trade union and she kept them updated on what was happening in the workplace. She therefore had every opportunity to seek their advice on whether to lodge a claim and on the time limits involved.

60. We find that there are no basis for a just and equitable extension of time. In those circumstances, allegations 3 a), b), d), e) and f) are out of time. However, in case we

are wrong about that, we have considered these allegations in the alternative, and have found as follows:

Issue 3a) EC decided that the claimant should take the minutes for an A&E board meeting and said "I am not asking you, I am telling you".

61. This is referred to at paragraph 20 above. We have accepted the claimant's account of the conversation as we did not hear from EC. The claimant in cross examination conceded that EC may have said this to her because she thought minute taking was part of her job. It must therefore follow that the claimant had not apprised her of its removal from her job description. That is clear from the claimant's account of this incident in her grievance document of 22 May 2017, where she states that she told EC that she could not do the minutes because JP was away and that she was required to look after the office [230]. It seems to us that the real complaint is not the request to take minutes but EC's response when the claimant objected. Whilst it does appear a bit terse and dictatorial, there is no evidence from which we could conclude that the comment was because of the claimant's age or disability. Neither do we find that it was harassment related to age or disability.

Issue 3b) – offering JP Acting Up Band 5 role

62. This is a reference to the matters at paragraphs 24 and 25. There is an actual comparator here, JP, who we heard from. JP is younger than the claimant and is not disabled. However, it is established law that a difference in treatment and a difference in protected characteristics is not sufficient to establish a prima facie case of discrimination; there has to be more, and there was not. Indeed, from the evidence of JP, we are satisfied that the reason she was offered the role was because the respondent considered her the most qualified person. It had nothing to do with the claimant's age or disability.

Issue 3d) Instead of resolving the grievance, the claimant was subjected to a performance management plan on 23 August 2017

63. In her further and better particulars of complaint, the claimant alleges that the facilitation meeting on 23 August turned into a discussion about her performance. However, as is clear from paragraphs 32 and 33, the claimant introduced the topic into the meeting and it became part and parcel of the resolution of the grievance. In any event, there is no evidence before us that discussing the claimant's performance issues in this way amounted to direct discrimination because of age and disability or indeed harassment.

Issue 3e) Expecting the claimant to continue with her duties of making coffee and bringing lunch to meetings when she struggled to perform these duties as she was not steady on her feet.

64. This is addressed at paragraph 26 above. There was no less favourable treatment of the claimant as, by her own admission, JP was also asked to make tea and coffee. Indeed, of the two of them, JP was asked the most and the claimant would normally only be asked if JP was absent or otherwise disposed. The request for tea and coffee generally came from visitors rather than those managing the claimant. The fact that she decided of her own volition to cease this task suggests that there was no expectation on the part of the respondent that she continue with this activity. There is no evidence of direct discrimination or harassment.

Issue 3f) TB asking the claimant about the possibility of retirement

65. This is dealt with at paragraphs 30. In cross examination, the claimant said that she was not upset at being asked about retirement. The only sentiment she expressed was puzzlement at the question given that they were there to discuss her grievance. At paragraph 15 of her further and better particulars, the claimant said that she wanted to carry on working for at least another 2 years but if she could have got a good pension, she would have considered it [41]. It seems to us therefore that being asked about retirement was not considered a detriment, in the sense of less favourable treatment, neither was it unwanted conduct.

66. In the circumstances, had the above matters been presented in time, we would have dismissed them on their merits.

Issue 3c) – grievance of age and disability discrimination on 23.6.17 not dealt with

67. This is referred to at paragraph 22. The claimant uses the term discrimination and victimisation and although capable of indicating unlawful discrimination, they also have a generic meaning. The claimant make no reference to age or disability either in her original grievance document of 5 June 2017 or the additional information on 23 June 2017. We are surprised that the general reference to harassment, bullying and victimisation in the 5 June document did not ring alarm bells with the respondent, especially given that one of the recipients, FAR, was the Employee Relations Manager. That said, at the meeting on 13.7.17 (para 27) the claimant did not specifically refer to age or disability discrimination. Had she done so, we consider it likely that those matters would have been addressed as it inconceivable that both an Employee Relations Manager and a Head of Legal Services would simply ignore it. As is clear from our findings, the resolution of the grievance at the initial stage was by agreement by way of a facilitated discussion on 23.8.17. Therefore if there was a complaint of age and disability discrimination and victimisation, the reason it was not dealt with at this point because the claimant withdrew it as part of that agreement.

68. The chronology of the grievance process thereafter is at paragraphs 34-42 above. Although the claimant made vague references to her age and disability being an issue, she made no clear complaint of discrimination. Her case is not assisted by the fact that she did not expand on these vague references at any of the grievance meetings. If the claimant was raising complaints of discrimination, the respondent did not realise this and that is why they were not dealt with. It had nothing to do with her age or disability. Whilst we are critical of the respondent's failure to pick up the, albeit, vague references to discrimination, that is a comment on the depth of their enquiry and does not alter our finding.

Issue 3g) The claimant requested not to be managed by EC but was told on 12.10.18 that EC would continue to manage her on her return from sickness absence

69. As stated at paragraph 27 above, the claimant's request was to be managed by TB temporarily. That is not the same as a request not to be managed by EC going forward. The actual request predated the facilitated discussion and so ceased to be a live issue once there was an agreed resolution to the grievance. When the claimant subsequently revived her grievance, she did not make a fresh request. This allegation is not made

out on the facts. In any event, it is difficult to see how this amounts to direct discrimination and harassment.

Conclusion on claims of direct discrimination and harassment

70. All claims of direct discrimination and harassment fail and are dismissed.

Section 15 claim

71. The claimant says that she was subjected to unfavourable treatment by the respondent raising performance issues at the meeting on 23 August 2017. This is not made out on the facts as we have already found that it was the claimant who introduced this topic into the meeting, not the respondent. This complaint fails.

Unfair Dismissal

72. We are satisfied from the dismissal letter that the reason for the claimant's dismissal was capability, based on her long term sickness absence.

73. In considering whether or not the respondent acted reasonably in dismissing the claimant, we have taken into account the following matters:

74. The respondent consulted with the claimant in relation to her absence. Over the period there were 4 absence review meetings with the claimant on 30.8.18; 12.2.18; 3.319 and 31.5.19. At these meetings, the respondent enquired after the claimant's health; clarified the reasons for her continued absence; discussed any medical information available; sought her view on the likelihood of a return in the foreseeable future and on any measures/adjustments that might assist this. The claimant was apprised of the next steps. On each occasion, the claimant indicated that she was unfit to resume work in any capacity and that there were no adjustments the respondent could make that would alter that fact.

75. The respondent took steps to establish the true medical position of the claimant by referring her to occupational health. The questions that it posed in the referral document were appropriate and relevant to the question of whether or not the point of dismissal had been reached.

76. By the time of the final absence review meeting, the claimant had been off work continuously for 13 months and remained unfit for work, with no foreseeable return date. Her continued absence had caused pressure on the running of the service as her work had either been covered by colleagues or by bank staff, which created an additional cost burden. We are satisfied that the respondent had reached the point where it was entitled to dismiss.

77. In light of the above, we find that dismissal was in all the circumstances fair.

Judgment

78. The unanimous decision of the tribunal is that all claims fail and are dismissed.

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Employment Judge Balogun
Date: 6 January 2021

Corrected on 15 January 2021