Case No: 2200035/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH (HYBRID HEARING)**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Mr S Sheath**
Ms K Omer

BETWEEN:

Dr C Zouzias

Claimant

And

Health Education England (R1)

St George's University Hospital NHS Foundation Trust (R2)

Respondents

ON: **21-30 July 2021**

Appearances:

For the Claimant: In Person
For the First Respondent: Robin Moira White, Counsel
For the Second Respondent: Tara O'Halloran, Counsel

JUDGMENT

1. The claim of victimisation is dismissed upon withdrawal.
2. All other claims against R1 and R2 fail and are dismissed.

REASONS

(requested by the claimant on 30.7.21)

1. By a claim form presented on 18 December 2016, the claimant brought claims of disability discrimination pursuant to sections 19 and 15 of the Equality Act 2010. All claims are denied by the respondents.

2. We heard evidence from the claimant. On behalf of the first respondent (R1) we heard from Dr Andrew Frankel (DAF); Professor John Harrison (PJH); and Catherine Wheatley (CW). We also admitted into evidence the witness statement of Dr Sarah Hill (DSH) who was unable to attend due to ill health, though the weight we attached to it was limited to those matters which were not in dispute or which were evidenced elsewhere by contemporaneous documents or other witness testimony. On behalf the second respondent (R2), we heard from Claire Low (CL) and Dr Samuel Thayalan (DST)

3. The parties presented a joint bundle of document, in pdf and paper form, running to 1403 pages. References in square brackets in the judgment are to the pdf page numbers.

Application to Amend

4. At the start of the hearing, the Tribunal heard an application from the claimant to amend his claim to change the PCPs; unfavourable treatment and; detriments in relation to his section 19, 15 and 27 Equality Act 2010 (EqA) claims respectively. The application was opposed by the respondents.

5. In considering the application, we took into account the leading authority; Selkent Bus Co Ltd v Moore [1996] ICR 836 At paragraphs 843F – 844C, the Employment Appeal Tribunal said as follows:

"(4). Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5). What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

(a). The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b). The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.

(c). The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

6. Having heard submissions from the parties and taken into account relevant Selkent factors, we refused the application. In reaching that decision, we took into account the following:

   6.1 The PCPs, unfavourable treatment and detriments were identified at a case management hearing conducted by EJ Baron on 10.10.17. In the order that followed, the parties were instructed to notify the Tribunal within 14 days of receipt if they wanted the order varied. There was no such notification from the claimant. [108] In a subsequent case management hearing on 22 June 2020, the parties confirmed that the list of issues had been agreed.

   6.2 The claimant made his application to amend on 4 May 2021, nearly 4½ years after presenting his claim. He relied on ill health and being a litigant in person as the reason for the delay. We did not consider this a satisfactory explanation. There was insufficient evidence before us that ill health prevented the claimant from making his application over such a long period. We also noted that illness had not prevented him from participating in the interlocutory hearings or engaging in correspondence with the Tribunal and the respondents.

   6.3 We considered the balance of prejudice between the parties. The respondents had prepared their cases based on the issues originally identified in October 2017 and were not in a position to deal with the entirely new basis upon which the claimant wished to present his claim, without a postponement. The final hearing had previously been postponed and it was not in the interests of justice to delay the matter further, given that we were more than 5 years on from the presentation of the claim. Had the amendment been allowed, the respondents would have been prejudiced by not being able to properly respond to the new allegations. On the other hand, if the amendment were refused, the claimant would not be totally deprived of a potential remedy against the respondents as he still had his section 15 and section 19 claims to pursue. We therefore considered that the respondents would be more prejudiced by the granting of the application than the claimant would by its refusal.

   6.4 Taking all the above matters into account, the application was refused.

   The Issues

7. The claimant confirmed that regardless of the outcome of his application to replace the existing victimisation detriments with others (which was refused) he was withdrawing the existing detriments. The victimisation claim is accordingly dismissed upon

withdrawal. The claimant had previously confirmed that he was only pursuing the indirect discrimination claim against R1. The list of issues were updated accordingly and are referred to more specifically in our conclusions.

The Law

Indirect discrimination

8. Under section 19 EqA, where A applies a provision, criterion or practice (PCP) to B , it is discriminatory in relation to the protected characteristic (in our case disability) if:

    - A applies or would apply the PCP to persons who do not share B's disability;
    - it puts or would put persons with anxiety and depression at a particular; disadvantage compared with persons not have anxiety and depression;
    - it put the claimant at a particular disadvantage and;
    - A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

Discrimination arising in consequence of disability

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.

Findings of Fact

10. Health Education England (R1) is a public body tasked with planning and delivering education and training to those who wish to provide NHS Services in England. R1 provides doctors and other healthcare professionals with training across all specialisms. It is divided into regions, and Health Education South London is the Local Education Training Board (LETB) that covers the South London area and is responsible for training and education of all NHS staff in this area.

11. In January 2002, the claimant obtained his provisional practicing licence as a doctor, having studied and obtained a Batchelor of Medicine at St Mary's Hospital Medical School.

12. The claimant applied and was accepted by The London Deanery (predecessor organisation to R1) onto its formal training programme for qualification as a Specialty Registrar in Occupational Health. The claimant accepted a placement at Guy's and St Thomas' NHS Trust (GSTT) and his training commenced on 6 August 2008.

13. The training comprised clinical work and educational work. The educational requirements were that the claimant would sit Membership of Faculty of Occupational Medicine (MFOM) Part 1 exam within the first 2 years, the MFOM Part 2 exam towards

the end of the final year. He was also required to do a 10,000 word dissertation, which could be completed at any stage within the training period.

14. The claimant training was assessed on a day to day basis by senior clinical professionals at the Trust. His supervisor at GSTT was initially Professor David Snashall but in Spring 2009, Dr Ali Hashstroudi replaced him as supervisor.

15. The training programme was governed by the Gold Guide (the "Guide"), which is a reference guide for postgraduate specialty training in the UK. At appendix 1 of the sixth edition, dated February 2016, is a document headed: "*Conditions of Joining a Specialty Training Programme*". This is an agreement between the trainee and R1 [1310-1313]. Although this post-dates the claimant's entry onto the training scheme, he confirms at paragraph 4 of his witness statement that he signed a training agreement with the London Deanery. We have not seen a copy of that agreement but have no reason to think that the terms were materially different.

16. On appointment as a trainee, the claimant was issued with a National Training Number (NTN). The purpose of the NTN is to support educational planning and management by enabling Postgraduate Deans to keep track of the location and progress of trainees [1251]. Paragraph 6.39 of the Guide provides that the NTN will be withdrawn if a trainee is assessed by the Postgraduate Dean as being unsuitable to continue the Specialty training [1255]

17. Progression through the specialty training was based on the achievement of competencies. Those competencies are assessed annually at an Annual Review of Competence and Progression (ARCP) panel meeting. The ARCP panel comprises of Specialty Consultants and will usually be chaired by the Head of School, Associate Dean or Training Programme Director [1282] The function of an ARCP panel is to make a summative assessment of competencies based on regular workplace assessments and evidence of progress recorded in the trainee's portfolio. At the end of the ARCP meeting, the panel should arrive at a numbered outcome, indicating the level of progress and the next steps.

18. The normal period for completion of the Specialty training is 4 years and on that basis, the claimant's training period was originally due to be completed by 5 August 2012.

19. Paragraph 7.82 of the Guide allows trainees to have additional aggregated training time. The maximum extension that the ARCP panel can independently recommend is one year. However, in exceptional circumstances and at the discretion of the Postgraduate Dean, training may be extended up to a maximum of 2 years. If the trainee fails to comply in a timely manner with the educational plan for the additional training, they may be required to leave the training programme before the additional training has been completed [1292]

20. As well as the ARCP annual reviews, the claimant had interim discussions intended to support him, though he told the Tribunal that he found them distressing.

21. On 18 May 2012, there was an ARCP panel meeting chaired by Professor John Harrison, (PJH) Head of School of Occupational Medicine (London) at R1. The panel recommended Outcome 3, denoting inadequate progress and need for additional training time. As a result, the claimant's training was extended by 6 months, to 5 February 2013.[203-209]

22. In July 2012, the claimant was diagnosed with anxiety and depression and was signed off by his doctor with work related stress and remained off until April 2013. The respondents concede that the claimant was at the time of the alleged discriminatory acts disabled for the purposes of the EqA though they dispute knowledge.

23. On 31 August 2012, the claimant wrote to PJH requesting a transfer from GSTT. He claimed that he had been subjected to systematic victimisation and bullying and intense and persistent scrutiny and that his training had been inadequate [223]. His request was initially refused [226]

24. In January 2013, the claimant was informed that serious concerns had been raised regarding his performance as a Trainee in Occupational Medicine which required a formal investigation [232]. In the Investigation Report that followed, it was concluded that there were grounds for concern regarding the likelihood of the claimant completing his training in a timely manner based on his progress and performance [347]

25. On 6 September 2013, an ARCP panel meeting took place, again chaired by PJH. The claimant repeated his request to be transferred, claiming that his relationship with GSTT had irretrievably broken down. As a result, PJH sought an alternative placement for the claimant and on 13 September 2013, informed him that one had been found at R2. No reference is made in the meeting notes to the claimant's anxiety and depression [435-436].

26. The claimant's placement transferred to R2 on 24 November 2013 and at that point DST became his educational supervisor. As R2 had already filled its training positions and had no budget or need for an additional trainee, the claimant was employed on a supernumerary basis whereby his post was completed funded by R1 [697- 698]

27. There is a dispute about the type of contract the claimant was employed under by R2. R2 contends that he was employed under a succession of fixed term contracts and it has disclosed 5 such contracts, properly addressed to the claimant, covering the whole period of his employment. The claimant claims he was employed under a permanent contract which is evidenced by a contract document dated 18 November 2014. He said that this was the only contract he received and the only one bearing his signature [590-595]. He went further, alleging that the other contracts were created for the purposes of these proceedings. That is a serious allegation and one which should not be made lightly. The claimant has not produced any evidence to substantiate those allegations, all he points to are discrepancies in the dates that appear in the contracts. However, based on evidence we heard from R2, we consider it more probable that these were as a result of clerical errors associated with the way in which the documents were populated rather than anything more sinister.

28. The claimant also points to the fact that the other contracts were not signed by him. A lack of signature does not signify that the contracts were not sent. We know from the claimant's disability impact statement that one of the effects of his disability was that he was unable to manage administrative matters efficiently, including opening and reading letters [116] We are satisfied on balance of probabilities that the contracts were issued.

29. In any event, the claimant was aware that his employment with R2 was for a specific purpose i.e. completion of his training. He also knew that his continued employment with R2 was contingent on his training continuing and on R1 funding it. The claimant's

assertion that he was a permanent member of R2 staff was not the reality of the situation and we prefer the evidence of R2 on this.

30. By the time of his transfer to R2, the claimant had not completed two main components of his training; MFOM exams and his dissertation. As a result, DT supported him in a number of ways. Between November and December 2013, DT met with the claimant frequently for personal pastoral care meetings and ensured the claimant was not given a workload during this period. Also, between January and May 2014, the claimant was given a reduced workload and his clinical work was reduced further during times when he had to prepare for exams. He was also given study leave beyond that to which he was entitled as a trainee.

31. The first ARCP panel after the transfer took place on 27 January 2014. The claimant was again awarded Outcome 3 and his training time was extended for a further 12 months. It was also agreed that his 9 months sickness absence between July 2012 and April 2013, along with the 2 months of phased return that followed would not count towards his training time. The new date for completion of his training was 5 January 2015. That date was extended by a further month to 5.2.15 following a further review, to take into account a further month of phased return to work [526-527, 568]

32. On 31 March 2014, after representations from Vicky Laws, the claimant' BMA (British Medical Association) representative, PJH and Dr Andrew Frankel (DAF) Consultant Nephrologist, decided to grant the claimant a further extension of his training to 5 August 2015. This was said to be a final extension but in fact, it turned out not to be [564]

33. Due to concerns about the claimant's lack of progress in his training, he had a number of interim ARCP reviews. At each of these he was given targets and deadlines in order that he could complete his training by the revised end date. The claimant said in evidence that these interim reviews were not supportive but this is not what he was saying at the time, as illustrated at paragraph 36 below.

34. At an informal ARCP meeting on 30 May 2014, objectives were set. These included attempting his MFOM part 2 exam in October 2014 and submitting his dissertation proposal for approval [580]. The expectation was that the claimant would submit his ARCP proposal by July 2014. The claimant did take the part 2 exams in October 2014 but unfortunately did not pass them. He re-took them in June and July 2015, but failed them again.

35. At an informal ARCP meeting on 31 July 2014, it was recorded that the claimant had made inadequate progress and that additional training time was required [584]
,
36. A further interim review took place meeting with Dr Thayalan on 11.2.15 the claimant made the following comments:

"*I have been making steady and satisfactory recovery with my health and also good progress in my specialty training under the educational supervision of Dr S. Thayalan, I am also grateful to the Health Education South London for their ongoing support with my training in Occupational Medicine and for offering me several valuable support meetings and useful interim ARCPs during the past year. The Occupational Health Department at St George's has been a very supportive environment for my successful reintegration into the workplace and resuming full-time work and specialty training again. I have received encouragement, guidance, positive feedback and support*

from my supervisor Dr Thayalan as well as the rest of OH team, and have found the experiences in this working environment the most educational and productive of my occupational health career to date".

37. At an ARCP meeting on 11 November 2015, the claimant was again awarded an Outcome 3 based on not having achieved the competencies, assessments and objectives previously set. It was recommended that his training be extended for a further 8 month extension taking the training completion date to the 5 April 2016 [690]

38. One option repeatedly recommended to the claimant by PJH and also advised by his BMA representative was that he consider Less Than Full Time Training (LTFT) This would have reduced the his clinical hours and afforded him more time to prepare for the MOFM exams and his dissertation. However the claimant was not prepared to consider this adjustment, insisting that he wanted to undertake the training full time.

39. The claimant had planned to re-take his part 2 exams in January 2016. However, on 8 January 2016, he emailed PJH informing him that due to his financial situation he was unable to sit the part 2 exams as he was unable to pay the entry fee [701]. That apart, the claimant was not in fact ready to take the exams.

40. On 8 April 2016, the claimant attended his final ARCP, chaired by Sarah Hill (SH) Head of School of Pathology. The claimant received Outcome 4 – *release from training programme*. The reasons given were that he had not met his objectives from his previous ARCP and had not obtained his part 2 exams or completed his dissertation. Reference was also made to the fact that the claimant had had 26 months of formal extension time, which was in excess of that outlined in the Guide [720]

41. On 11 April 2016, SH wrote to DAF detailing the claimant's ARCP history and the evidence presented to the ARCP panel on the 8 April 2016. She also explained the reasons for recommending Outcome 4 [736-745]

42. On 15 April 2016, DAF wrote to the claimant informing him that he had accepted the panel's advice and that he would be withdrawn from the training programme with three months' notice. The claimant was advised of his right to appeal the decision [748] The claimant exercised his right of appeal on 29 April 2016 [755] This was put on hold, at the claimant's request, pending the resolution of a separate complaint he had made against SH in relation to the final ARCP on 28 April 2016 [749]

43. On 29 June 2016, Vicki Laws wrote to DAF requesting that the claimant's contract be extended beyond his 3 month notice period to allow his grievance and appeal processes to be completed [809-810]. That request was refused [815]

44. The grievance against SH and the appeal remain outstanding.

<u>Submissions</u>

45. All parties provided written closing submissions, which they spoke to. We have taken these into account.

Conclusions

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

Did the respondents know that the claimant was disabled?

47. The relevant time for these purposes is the date of the alleged discriminatory acts. In relation to R1, the relevant date of knowledge is 15 April 2016 at the earliest, this being the date that DAF decided to accept the ARCP panel recommendation and give the claimant 3 months' notice of withdrawal of his training. In respect of R2, the relevant date is the 15 July 2016, the effective date of termination of the training and of the claimant's employment.

48. Knowledge of disability does not have to be actual knowledge, it can be constructive knowledge. In other words, the respondents should reasonably have been expected to know that the claimant was disabled.

49. In looking for evidence of knowledge in relation to R1, we need go no further than the statement provided by SH, in particular, paragraph 14, where she states: *"The panel were aware that the claimant had been diagnosed with mental health issues*….."

50. Also, in the report of the final ARCP meeting, the claimant is recorded as saying: that…..*"I had an exacerbation of depression and anxiety early this year. I attended my GP, and I have self-referred to PHP for additional support*". [727]

51. Long before that there had been a number of OH referrals when the claimant was at GSTT. Reference is made in those reports to the claimant suffering from an anxiety disorder. On 29 April 2013, Dr Hashstroudi wrote to OH asking whether the claimant had an underlying health condition likely to be covered by EqA [288]. Dr Swann responded that he considered that the claimant did have an underlying health condition that could be considered a disability under the EqA [301]

52. Although these referrals were done by the claimant's supervisor at GSTT, Dr Houstroudi, it is inconceivable that the information would not have been shared with those at R1 carrying out the ARCP. PJH was asked in cross examination whether he had seen the OH report of Dr Swann referencing disability. He did not deny seeing it, he simply replied that he could not recall whether he was made aware of it at the time. We see at page 387 of the bundle an example of Dr Hastroudi sharing with PJH information from an OH report prepared by Dr Swann, just days before the report referred to at paragraph 51 above. We therefore consider it likely that Dr Swann would also have shared the earlier report. Further, the claimant's email to PJH of 8 January 2016, refers to his diagnoses of depression and anxiety [701].

53. We also bear in mind that the individuals referred to above are occupational health specialists who will have a greater insight and awareness of the symptoms and effects of mental illness than the average employer.

54. In all the circumstances, we are satisfied that R1 had knowledge of the claimant's disability.

55. We also find that the second respondent had knowledge of the claimant's disability based on the evidence of DST who accepted in cross examination that he was aware that the claimant had mental health issues and that the claimant had given him a copy of the report from his consultant psychiatrist.

INDIRECT DISCRIMINATION

Did R1 apply a PCP

56. The claimant says that R1 applied a PCP that: "*The training for the speciality registrar had to be completed within a certain time limit*"

57. The rules of R1 relating to completion of specialty registrar training are referred to at paragraphs 18 and 19 above. We find that this was a PCP a.

***Did that requirement put or would it put people with the claimant's protected characteristic at a particular disadvantage*.**

58. Section 6(3) EqA makes clear that a reference to the protected characteristic of disability in this context is a reference to a particular disability. So the group with the particular disadvantage must be people with anxiety and depression.

59. It is for the claimant to show group disadvantage. It is not enough for him simply to assert it. It must be demonstrated by evidence. There was no such evidence before the Tribunal. The claimant sought to blame the respondent's alleged failure to disclose diversity data of the proportion of trainees receiving outcome 4 who were disabled by reason of mental impairment. However, R1 did not have such information. The claimant further submitted that the provisions of the Guide did not take into account disability. However, we are satisfied that the terms of clause 7.82 of the Guide are wide enough to take into account disabilities by the exercise of the exceptional discretion. [1292] We accept the evidence of DAF that very few extensions go beyond a year and when the discretion is exercised, matters are looked at in the round and this would include disabilities. Other parts of the Guide make specific reference to disability and the need to make reasonable adjustments. The claimant has therefore not been able to satisfy us that there was group disadvantage and the claim fails at this point.

Did the PCP put the claimant at a particular disadvantage

60. If our findings at paragraph 59 are wrong, we find that the PCP was applied to the claimant by the issuing of Outcome 4 at the final ARCP but that he was not at a particular disadvantage. The claimant started his training on 6 August 2008 and should have completed it by 5 August 2012. Instead, he was granted 5 extensions. The clock was stopped for 18 months to take account of his sickness absence and phased return to work. By 5 April 2016 when training was finally withdrawn, 7 years and 8 months had passed since its commencement, which was well beyond the timeframe in the Guide. In addition to that, a number of adjustments were made to assist him in getting through his training. For these reasons, we find that the claimant was not at a particular disadvantage.

Was the PCP a proportionate means of achieving a legitimate aim

61. If our findings at paragraph 60 are wrong, we find in any event that the PCP was a proportionate means of achieving a legitimate aim. The legitimate aims of R1 are those set out at paragraph 30 of their submissions. The cost of training, including salary, was around £750,000 for a normal 4 year course. The claimant's training had still not completed after nearly 8 years; the training period for 2 trainees, and there was still no prospect of him completing the training any time soon. The claimant did not at any point articulate to R1, or indeed to the Tribunal, how long he thought he should have been given to complete his training and from his evidence before us, it appeared that he did not want to be constrained by a deadline at all. The effect of continuing his training would have been to reduce the through-put of trainees and would not have been equitable to those coming behind, particularly given the adjustments that had already been made to assist the claimant.

62. In all the circumstances, we are satisfied that R1 actions in withdrawing the training were proportionate.

63. The indirect discrimination claim fails.

DISCRIMINATION ARISING IN CONSEQUENCE OF DISABILITY

Was the claimant subjected to unfavourable treatment

64. We are satisfied that the matters at 5.1 of the list of issues amount to unfavourable treatment

What was the something arising in consequence of disability

65. The Code of Practice on Employment defines Something arising in consequence of disability as including anything which is the result, effect or outcome of a disabled person's disability.

66. The claimant says that the "*something*" was his inability to complete his final membership examination and dissertation at the same time within a prescribed time. However, having reviewed the objectives and tasks set in the various ARCPs, we are satisfied there was no such requirement. Factually, the "*something*" relied on is not made out so cannot have been in consequence of disability. The claim therefore fails at this point.

Was the unfavourable treatment a proportionate means of achieving a legitimate aim

67. However, if our findings at paragraph 66 are wrong, we have gone on to deal with the issue of proportionality.

68. We accept that the matters set out at paragraph 39 of R2's written skeleton are legitimate aims of both respondents.

69. In considering whether the respondents' actions were proportionate, we have carried out a balancing exercise by weighing the business needs of the respondents against the

severity of the impact of the unfavourable treatment on the claimant. In respect of the latter, we have explored whether there was a less discriminatory way of achieving the respondents legitimate aim. Taking each respondent in turn:

R1 refusing to allow the claimant to continue to train as an Occupational Health Specialty Registrar

70. In relation to this, the justification arguments relating to the indirect discrimination claim can be read across to this one. We weigh those against the effect that withdrawing the training had on the claimant's ability to progress his career to his desired specialism. As already mentioned, the claimant had been offered the option of undertaking LTFT (part time training) freeing up more time for his exams and dissertation but he refused to entertain this. We also heard from DST of an alternative route to qualification as a Specialty Registrar via CESR, which did not require training to progress within certain time limits. The claimant has also not taken this route.

71. In his closing submissions, the claimant asserted that R1's actions were not proportionate because paragraph 7.94 of the guide provides that R1 should not implement Outcome 4 – withdrawal of training – until the outcome of the appeal. [1295]. When looked at in isolation, one can see how that paragraph might be interpreted in that way. However, in our view, it should be read in conjunction with paragraphs 7.130 - 7.132 [1300]. Those contemplate that any appeal will be made within 10 days of notification of the ARCP recommendation and that the decision will be reviewed 15 days thereafter. This would be well within the 3 month notice of withdrawal and therefore not inconsistent with 7.94.

72. As the claimant was at pains to point out, the Guide is guidance and not cast in stone. That is evident from the fact that R1 departed from the Guide by giving the claimant an extension to his training of 26 months. R1 also departed from the provisions of the Guide by delaying the claimant appeal (at his request) for what is now more than 5 years. Having agreed to depart from the guide, the claimant cannot cherry pick those bits which should be applied strictly and those which should not. The claimant's interpretation of the Guide would mean that he could remain a trainee and be paid indefinitely, so long as his appeal remained outstanding. That would be detrimental to legitimate aims and could not have been the intentions of the Guide.

73. In all the circumstances, we consider that the actions of R1 in withdrawing the training were proportionate.

Dismissal of the claimant by R2

74. In relation to the claimant's dismissal by R2, the decision was a direct and inevitable consequence of the withdrawal of training. The claimant's employment with R2 was supernumerary and always contingent on R1 funding it. That funding ceased when the training contract was terminated. We have accepted the evidence of DST, who told the Tribunal that R2 ran on a negative budget so did not have the finances to employ the claimant in a non-funded role; Any request for additional funding would take a lot of time and would have had to have been justified based on need. Retaining the claimant in a surplus role without a budget would have been detrimental to R2's resources and finances. Whilst the claimant had lost his employment with R2, he had not lost his career. He remained a qualified doctor able to work in the NHS or privately. He was also

still able to progress to specialty registrar through an alternative route, as mentioned at paragraph 70.

75. Hence on balance, we are satisfied that the needs of R2 in terminating the claimant's contract outweighed any discriminatory impact that may have been caused to the claimant. We find R2's actions proportionate.

76. The section 15 claim against both respondents fails.

WERE THE CLAIMS PRESENTED IN TIME

77. Section 123 of the Equality Act 2010 provides that a discrimination complaint must be presented after the end of 3 months starting with the act complained of or such other period as the tribunal considers just and equitable.

78. Dealing first with the withdrawal of the training. The "act" was the decision of DAF to accept the advice of the final ARCP panel and withdraw the training. That was confirmed to the claimant on 15 April 2016 and it is from this point that time started to run. ACAS early conciliation commenced on 5 October 2016, outside the 3 months therefore the claimant did not receive the benefit of an ACAS extension. He was therefore required to present his claim against R1 by 15 July 2016. The claim was not presented until 18 December 2016, over 5 months out of time.

79. We have considered whether there were grounds to extend time. In doing so, we have reminded ourselves of the case: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, in which the Court of Appeal made clear that the discretion of the Tribunal to extend time on just and equitable grounds should be exercised exceptionally and that the burden was on the claimant to satisfy the Tribunal that there were reasons why it should do so.

80. In a document at pages 101-103 of the bundle, the claimant asserts that the delay in filing his claim was due to confusion about who his actual employer was; his medical condition; (no medical evidence has been produced indicating that this affected his ability to present his claim on time) and being given inaccurate advice by his BMA employment adviser about who he should sue. However, he gave no evidence on this, either in his witness statement or orally. In fact, he gave no evidence on the time point at all. the circumstances, the claimant has not satisfied us that there are just and equitable reasons to extend time and we decline to do so.

81. It follows that the Tribunal had no jurisdiction to deal with the claim against R1.

82. In relation to the termination of employment, this act occurred on the effective date of termination, which was the 15 July 2016. The claimant had the benefit of an acas extension which meant the new deadline for filing his claim was 19 December 2016. The claim against R2 was therefore in time.

Judgment

83. The unanimous decision of the Tribunal is that all claims against R1 and R2 fail and are dismissed.

Employment Judge Balogun
Dated: 8 October 2021