EMPLOYMENT TRIBUNALS

Claimant: **Dr Hasiba Hamoud**

Respondent: **Spencer Private Hospitals Ltd**

By CVP
On: **10-13 May 2022**

Before: **Employment Judge Martin**

Representation
Claimant: **Mr Maitland-Jones - Counsel**
Respondent: **Mr Isaacs - Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claims are unfounded and are dismissed

RESERVED REASONS

1. By a claim form presented to the Tribunal on 27 November 2019 the Claimant brings claims of direct discrimination and harassment on the protected characteristics of race, religion, and age. The Respondent defended the claims in its response presented on 10 January 2020.

2. The Tribunal heard evidence over three days. There were some technical issues on day one so evidence was not heard then and arrangements were made for the Claimant to give evidence from the Ashford Tribunal using equipment provided by the Tribunal.

3. On the first day and again on the second day there were some communication difficulties. The Tribunal wanted to ensure that the Claimant was able to understand and give evidence as English was not her first

language, noting however that she was a consultant gynaecologist who had been working in the NHS and private practice for many years. The Claimant said she had been living in the UK for 42 years and did not need an interpreter. The issues may have been to do with sound quality over the internet as the Claimant was able to give evidence fully without any problems.

4. For the Claimant we heard evidence from herself, her son Mr Ali Wylie and from Dr Mai Mamoud. For the Respondent I heard from Mrs Cheryl Lloyds, Mr George Tsavellas, Mrs Lynn Orrin and Mrs Diana Daw. There was a bundle of document numbered to 400, although there were about 40 more pages than this in the bundle. Some additional emails were added to the bundle on the final day from both parties.

5. The law:

Direct discrimination

Section 13 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.”

Section 23 provides that:

On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.”

6. In considering the claim of direct discrimination, the first task of the Tribunal is to decide whether on the primary facts as proved by the Claimant, and any appropriate inferences which can be drawn, there is sufficient evidence from which the Tribunal could (but not necessarily would) reasonably conclude that there had been unlawful discrimination.

7. If the Claimant can prove such facts, then the burden of proof passes to the Respondent to show that what occurred to the Claimant was not to any extent because of the relevant protected characteristic as set out in the Equality Act 2010.

8. In each case, the matter is to be determined on a balance of probabilities. The fact that a claimant has a protected characteristic and that there has been a difference in treatment by comparison with another person who does not have that characteristic will not necessarily be sufficient to establish unlawful discrimination. In all cases the task of the Tribunal is to ascertain the reasons for the treatment in question and whether it was because of the protected characteristic. The provisions of section 136 of course apply to any proceedings under the Act, and not only to claims of direct discrimination.

Harassment

9. Section 26 of the EqA provides:

(*1)* *A person (A) harasses another (B) if—*

(a) *A engages in unwanted conduct related to a relevant protected characteristic, and*

(b) *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. . .*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are - . . . race, religion and age

10. A Tribunal should consider all the acts together in determining whether they might properly be regarded as harassment (**Driskel –v- Peninsular Business Services Ltd** [2000] IRLR 151, EAT and **Reed and Bull Information Systems Ltd –v- Stedman** [1999] IRLR 299, EAT).

11. The motive or intention on behalf of the alleged harasser is irrelevant (see **Driskel** above).

12. The Court of Appeal confirmed in **Land Registry –v- Grant (Equality and Human Rights Commission intervening)** [2011] ICR 1390 "*when assessing the effect of a remark, the context in which it is given is always highly material*".

13. In **Richmond Pharmacology –v- Dhaliwal** [2009] ICR 724 the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

The Tribunal's findings of fact and conclusions

14. The Tribunal has come to the following findings of fact and conclusions on the balance of probability having heard the evidence, read the documents and considered the submissions. Not all evidence heard will be recorded below. These reasons are confined to those matters that are relevant to the issues and necessary to explain the decision reached.

15. The Respondent is a private hospital in East Kent. Between 2004 and 10 September the Claimant was engaged as a self-employed consultant gynaecologist. To practice at the Respondent, the Respondent must grant practicing privileges.

16. The Claimant's case arises because of her practicing privileges being revoked following an investigation into the circumstances of an operation carried out by the Claimant on 10 April 2019. There are two factual allegations that the Claimant raises.

    (a) The conduct of the meeting of 5th August 2019 and
    (b) The withdrawal of privileges on 10th September 2019.

17. In general, the facts surrounding the operation were not in dispute. The Claimant had a list of two patients both requiring laparoscopic surgery. The standard which is carried out across the country and in most of the developed world is to have at least one assistant present to hold and manipulate the camera, and if organs need to be moved out of the way, then

a second assistant would be required. It was common ground that before any operation there is a 'huddle' when all those involved confirm their roles and that they are appropriate people to carry out those roles. The normal procedure is for the patient to be brought to the operating room after the huddle. The evidence we heard was that this type of operation is never done by the surgeon alone. The Clamant accepted that this was her normal practice.

18. There are standards set by various bodies including the Royal College for obstetricians and Gynaecologists. One standard relates to the necessity to have assistants helping in laparoscopic procedures.

19. On 10 April 2019 the Claimant had two patients in her evening list. The surgery was scheduled to start at 6 pm. She had arranged for Dr Mamoud to assist her. Dr Mamoud this is on a voluntary basis without pay. The afternoon surgical list overran and there was a delay in the first surgery starting. The Claimant told Dr Mamoud of this and told her to come at 7 pm and that she should carry on completing an audit that was due the next day. As it transpired the delay was shorter than expected. Dr Mamoud could not be contacted by telephone due to mobile phone coverage issues. Dr Mamoud lives on the hospital premises so could get to the operating theatre quickly. The Claimant asked for Dr Mamoud to be called to attend the operation during the operation when she was asked by staff present what her position was on having an assistant.

20. During the pre operation huddle, the Claimant was asked if an assistant was required, and she said that one was not required for the first surgery and only for the second surgery on her list. Rather than wait for Dr Mamoud to arrive, the Claimant decided to start the operation on her own. The Claimant was manipulating two tools, one in each hand. She did not have hands free to manipulate or hold the camera. The Claimant asked the scrub nurse to hold the camera. This nurse refused as she had not been trained to hold the camera. Rather than stopping or pausing the operation, the Claimant put the camera on her shoulder, balancing it there, while she carried out the operation. The staff statements afterwards say the camera was dropped onto the patient's abdomen at some point. This was denied by the Claimant. By the time Dr Mamoud arrived the operation was concluded. There was no harm done to the patient.

21. Following the operation, a 'Datix' investigation form was completed by the Theatre Manager Ms Karen Spencer who referred to the Claimant's "complete lack of patient safety". At this point the Claimants practising privileges were suspended and she was invited to an investigatory meeting. There is no complaint made about the fact of the suspension. For whatever reason (this was not explained) it took until 5 August 2019 for an investigation meeting to be arranged. The Claimant was informed of the composition of the investigatory panel in advance of the meeting. For confidentiality purposes she was not provided with copies of the statements staff made following the operation. The Claimant made no objections to the composition of the panel before the meeting, and it was only at the end after Mr Farrugia had left that she complained about his presence and further involvement in the process.

22. The Claimant's witness statement says:

    "One member of the panel was Dr Martin Farrugia (MF) with whom I had a conflict of interest. Dr Farrugia worked in the NHS before he resigned from the NHS due to serious allegations against him before a Disciplinary hearing. He had a significant influence from the start of the incident and as revenge he manipulated the rest of the panel and made this case look like a serious one whereas it was done successfully without harm to the patient. Further he was one of the Consultants, including myself, who were doing private gynaecological work at SPH and he obviously would benefit by removing me from my private work to take over my patients".

23. The Claimant was not able to substantiate these allegations against Dr Farrugia. The documentation shown to the Tribunal was that he had resigned from the NHS as it would not approve a request he had made for flexible working. Mr Farrugia is the Claimant's named comparator for her direct discrimination claims. There was no evidence that he had any issues with the NHS in relation to his clinical work. In submissions the Claimant's representative acknowledged that Mr Farrugia did not appear to be an appropriate comparator and that the Claimant should rely on a hypothetical comparator. He did not however withdraw this part of the claim. The Tribunal find that Mr Farrugia is not an appropriate comparator. He is obviously not a person in the same circumstances as the Claimant who does not share her protected characteristics.

24. In any event, Mr Farrugia left the meeting early, and when he had gone the Clamant said she was not happy with him being involved. Had she mentioned this earlier Ms Orrin who chaired this meeting would not have invited him. It appears that Mr Farrugia was sent the copies of the minutes after the meeting. The Tribunal is satisfied that he was not involved any further.

25. Much was made by the Claimant's counsel about the reliability of the evidence heard from Ms Lloyds and Ms Orrin. Ms Lloyds had originally said that she had not sent the minutes to Mr Farrugia because the Claimant had raised an objection about him. The Claimant then produced an email which showed that Mr Farrugia had in fact been copied in. This led to further disclosure by the Respondent of emails showing that he was not involved in the decision-making process. Ms Lloyds was recalled and conceded that the minutes had been sent based on the email produced. She said, and the Tribunal accepts, that her recollection after a couple of years was that she had not sent the minutes.

26. Allegations were made in the Claimant's evidence against Mrs Orrin. These allegations had not appeared in any documentation or any pleading or in the Claimant's witness statement. The allegation was that Mrs Orrin had discriminated against the Claimant on the grounds of race, religion and age for three years previously. Mrs Orrin denied these allegations. Given this was not a pleaded allegation the Tribunal has not considered this any detail. The Tribunal accepts Mrs Orrin's evidence that what the Claimant said was incorrect.

27. Also present at the investigatory meeting was Mr George Tsavellas (Medic al Advisory Committee Chainman), Mr D Malamis (Clinical Governance Committee Chairman), Miss Hamoud (Consultant Gynaecologist) and Ms Orrin (Hospital Director) The Claimant was accompanied by her son Mr Ali Wylie and by her MDU representative, Dr Hogwood.

28. Minutes of the meeting were produced, and the Claimant was given the opportunity to comment on them which she did by amending certain parts. Not all her amendments were accepted although they were noted.

29. The allegations relating to this meeting are that Mr Tsavellas was *"very aggressive, shouting, interrupting, and slapping on his chest"*; that she was constantly interrupted and could not give her answer to questions and that she received a barrage of questions akin to an interrogation. In her witness statement the Claimant says

    "During the meeting some of the questions were repeated over 10 times to intimidate, harass and bully me.

    For example, Lynn asked me Why? 13 times (please see lines 21, 56, 85, 98(Twice), 139, 143, 147, 154, 159, 162, 208 and 211).

    Lynn mentioned the incident 10 times. (Please see lines 3, 5, 6, 24, 25, 128,198, 221, 275 and 309)

    The panel used the word assistant 52 times and Lynn used this word 15 times (please refer to lines 78, 81, 93, 115, 130, 138, 139, 143, 147, 151, 154, 159, 201, 203 and 209)."

30. The Claimant says that Dr Mamoud was not questioned about the incident despite her giving a statement. She says the decision was pre-determined.
31. Mr Tsavellas denied being aggressive or interrupting as the Claimant alleges. He said in the meeting and again in his evident that he was shocked and flabbergasted that this incident had happened: "*I find this account shocking as I have completed major surgery using the laparoscopic technique for over 15 years and I have always required an assistant to complete this safely."* He said his concern was for patient safety and just because the Claimant had got away with it this time with the patient not being harmed did not mean it was a safe procedure. His main concern was that the Claimant did not appear to understand the seriousness of her actions and the potential for harming a patient.

32. The Tribunal has considered the conduct of the meeting very carefully. It has read the minutes in some detail and listened to the evidence of those who were there.

33. The Tribunal is satisfied that there was no objection to Mr Farrugia' participation in the process prior to the investigatory meeting. This is surprising if the Claimant truly believed he had a grudge against her. However as found above he was not part of the decision-making process. The Tribunal has rejected the allegations against Mrs Orrin. There was nothing to suggest she was biased against the Claimant.

34. Regarding the tenor of the meeting, it is always difficult to detect this from the written word alone. Therefore, reading the minutes only gives limited help. However, having read the minutes, the Tribunal does not see excessive repetition of questions, can not detect where the Claimant was prevented from answering, indeed she is shown to give full answers to most questions. Her criticisms of the repeated use of certain words are set out above is baseless. Given the nature of the allegations it is hardly surprising that the words assistant, incident and why were used several times. There was an incident, it involved her not having an assistant present and the purpose of the meeting was to establish what happened and why it happened.

35. Had the meeting gone as the Claimant alleges, then Dr Hogwood the MDU representative would have intervened, and her son could also have intervened. However, we accept his evidence that he did not feel it was his place to intervene directly, but he could have asked Dr Hogwood to have intervened. The Tribunal has noted the note Dr Hogwood made after the meeting and her comments there. She did not come to give evidence to the Tribunal so this could not be examined further.

36. The Tribunal has no doubt that the meeting was tense and difficult for the Claimant, and for others attending. The allegations related to patient safety and were shocking to those investigating. There is no doubt that the incident occurred. The only question was why this had happened.

37. Even had the meeting gone as the Claimant has alleged, the Claimant would have to show the reason for this was because of her race, religion or her age. For the first time during the hearing the Claimant alleged a conspiracy by all those present to discriminate. This had not been identified in any pleading or additional information. The Tribunal does not find a conspiracy. The reason for the meeting was the incident on 10 April 2019. Had there been no incident then the meeting would not have happened. It was inevitably tense because of the nature of the allegation and the perception that the Claimant did not fully appreciate the seriousness of the incident and did not have insight into why it was wrong.

38. It is correct that the Claimant said during this meeting that she would not again do a laparoscopic operation without an assistant being present. Taken in isolation this would be appropriate. However, during the meeting the Claimant said on more than one occasion that she felt the technique she used was safe because she was a skilled surgeon. In answer to questions asked by the Judge the Claimant said that she had not balanced the camera on her shoulder in an actual operation before, but that she had practiced this in the past. She then said that this practice amounted to one time thing it out at a training session some years previously. The Tribunal is not medically trained however this does appear to be very limited practice.

39. Despite saying she would not do this again, she said in answer to a question about whether she agreed what she did was wrong and would she do this again, the minutes record her saying *"If there was a risk to the patient I would not do this again. The assistant was late. I did not know the scrub nurse could not*

hold the camera". She went on to say, *"If I considered there to be a risk, I would have stopped". "It is not safe if you do not know what you are doing".*

40. Having read the minutes in detail, the Tribunal accepts the view taken that the Claimant had been equivocal in her answers. On the one hand she was saying she would not do it again but on the other hand said would not do it if she thought there was a risk. There was discussion in the meeting which is minuted about not knowing if there was a risk until the operation had begun.

41. Counsel has suggested that the Claimant's command of English may have been a problem. This was something discussed at the start of the hearing. However, once the technical issues had been resolved, the Claimant was able to communicate clearly and articulately. She did not have difficulty understanding the questions being put to her.

42. In relation to Mr Tsavellas's involvement. The Tribunal can see that there was a part of the meeting when he was actively involved. The minutes show that after this he took much less of an active part with Mr Malamis asking most of the questions. There was no pleaded allegation against Mr Malamis.

43. It was suggested that it was insulting and impolite for Mr Tsavellas to suggest (either by question or statement) that the Claimant had not used an assistant to save money (the Consultant pays for the assistant). The Claimant says that it was a statement and the minutes show this. The minutes are not a transcript, and as previously said, it is difficult to establish the tenor of the meeting from them. The Tribunal is not therefore able to say if this was said as a statement or a question. It was something that Mr Tsavellas was thinking about, so it was legitimate to put this to the Claimant.

44. Even if the Tribunal had found the meeting to be as the Claimant described it, the Tribunal can not find any link to her protected characteristics of race, religion, or age. Even if Mr Farrugia had a grudge against the Claimant, it appears this was not related to her race, religion or age. In any event there is no complaint about his behaviour or line of questions during the meeting. We do not find that Mr Tsavellas or Mrs Orrin acted in a discriminatory manner. We appreciate that discrimination is unlikely to be obvious. However, here the Claimant had undertaken an operation in clear breach of recognised standards in not having an assistant present to operate the camera. The Tribunal is satisfied that this is the reason why the meeting happened as it did. The Tribunal rejects the suggestion of any conspiracy.

45. The second issue is the sanction applied, namely removing the Claimant's privilege to operate. This is a sanction which is provided for in the Consultants Handbook:

"Privileges will automatically cease if a clinician's registration with the GMC lapses or is removed. The Hospital Director / Registered Manager shall, in any event, be entitled to terminate, suspend or otherwise vary admitting privileges upon three months written notice at any time. The Hospital expects all clinicians to fully comply with the duties of a doctor registered with the General Medical Council: "Patients

must be able to trust doctors with their lives and wellbeing. To justify that trust we, as a profession, have a duty to maintain a good standard of practice and care and to show respect for human life." "

46. The Tribunal is satisfied that the Respondent had genuine concerns about the Claimant's actions and insight. The Tribunal does not find the decision to remove privileges to be tainted by discrimination. The letter removing privileges was clear as to the reasons: "*This decision has been taken after consideration of the evidence presented, and due to our remaining concerns relating to patient safety it is a decision that is supported by our Clinical Governance Lead, Mr D Malamis and the Chairman of our Medical Advisory Committee, Mr G Tsavellas in line with SPH Policy on Practicing Privileges*."

47. There is no pleaded complaint about the appeal. However, for chronological completeness this is dealt with briefly. The Claimant appealed. The appeal was originally dealt with on the papers and refused. The Claimant asked for an in-person appeal meeting. This was granted. At the meeting, the Claimant withdrew her grounds of appeal instead substituting them with and appeal against the severity of the sanction only. There was no mention of discrimination in her grounds of appeal or at the appeal hearing. Her appeal was dismissed.

48. This case is not about the fairness of the decision reached or the processes leading to that decision. It is about whether the Respondent discriminated on the grounds of race, religion or age. Mr Maitland-Jones conceded in submissions that the Claimant's claim for age discrimination was weak. He said it was obvious what the Claimant's race was and her religion as she wore a hajib. However, this is not sufficient to found a claim for discrimination. There must be something more than a difference in treatment and having a protected characteristic to prove a claim of discrimination.

Employment Judge Martin
Date 13 May 2022