EMPLOYMENT TRIBUNALS

Claimant: Mr L Mbuisa

Respondents:
1. Isand Ltd
2. Cygnet Health Care Ltd
3. Caireach Ltd

Heard at: Leeds **On:** 14, 15, 17 November 2022

Before: Employment Judge Jones
Mr M Lewis
Mr M Elwen

REPRESENTATION:

Claimant: In person
Respondents: Mr B Williams, counsel

JUDGMENT having been sent to the parties on 29 November 2022 and a request from the claimant having been made in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides following

REASONS

Introduction

1. These are claims for disability discrimination by way of harassment, breach of the duty to make adjustments and claims for monies owing.

The Claims

2. The claims and issues (with some minor adjustments) are taken from the Order of the preliminary hearing of Employment Judge Davies on 25 April 2022. We refer to the respondents in the singular for this purpose.

<u>Disability related harassment</u>

3. The claimant says that the respondent subjected him to unwanted conduct related to disability, which had the purpose or effect of violating his dignity or

creating an intimidating, hostile, degrading, humiliating or offensive environment for him, by continuing to ask him to walk up and down stairs and work with violent patients, even though they knew that he should not do so. Paula and Michelle did this after the one to one meeting with Paula in June 2020 when the claimant told her about his disabilities. The other team leaders did it after OH had advised about adjustments for the claimant's disabilities.

Breach of the duty to make adjustments

4. The claimant says that the respondent failed to make reasonable adjustments for disability as follows:
   4.1 Requiring the claimant to work with JD and RA put him at a substantial disadvantage because of each of his three disabilities. JD and RA could be violent and would have to be restrained. This would cause him back pain and pains in his chest and difficulty breathing. It was reasonable for the Respondent not to allocate him to work with JD and RA, and it failed to do so.
   4.2 Requiring the claimant to attend work from June 2020 onwards put him at a substantial disadvantage because of his asthma and heart condition, because he would be exposed to COVID and was at greater risk if he caught it. It was reasonable for the respondent to put him on furlough and it failed to do so.
   4.3 Not providing a chair in the "person in need" room put the claimant at a substantial disadvantage because of his back condition, because it was painful for him to stand for long periods and he had difficulty getting up if he sat on the floor. It was reasonable for the respondent to provide a chair in the room and it failed to do so.
   4.4 Requiring the claimant to work without PPE or masks from June to September 2020 put him at a substantial disadvantage because of his asthma and heart condition because he was exposed to COVID and was at greater risk if he caught it. It was reasonable for the respondent to provide PPE and masks and it failed to do so prior to September 2020.

Unpaid wages – unauthorised deductions

5 The claimant says that the respondent failed to pay him the following sums that were properly due to him:
   5.1 Pay for his accrued holiday when his engagement started.
   5.2 Wages from 15 September 2020 to 8 October 2020.

Issues

The correct respondent

6 Which of the above respondents is the employer?

Disability

7 Did the respondent know, or ought it not reasonably to have known that the claimant had the admitted disabilities of back injury, heart arrythmia and asthma?

Disability related harassment

8 Did the respondent continue to ask the claimant to walk up and down stairs and work with violent patients, even though they knew that he should not do so, as set out in the list of claims above?

9 If so, was that unwanted conduct?

10 Did it relate to disability?

11 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

12 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Breach of the Duty to make adjustments

13 Did the respondent have the following provisions, criteria or practices ("PCPs"):
- 13.1 Requiring the claimant to work with JD and RA;
- 11.2 Requiring the claimant attend work from June 2020 onwards;
- 11.3 Requiring the claimant to work without PPE or masks?

14 If so, did the PCPs put the claimant at the following substantial disadvantages:
- 14.1 JD and RA could be violent and would have to be restrained. This would cause him back pain and pains in his chest and difficulty breathing.
- 14.2 He was exposed to COVID if he attended work or if he worked without PPE or masks and was at greater risk if he caught it, because of his asthma and heart condition?

15 Did the lack of a chair in the "person in need" room put the claimant at a substantial disadvantage because of his back condition, in that standing for long periods caused him pain and if he sat on the floor he had difficulty getting up?

16 Did the respondent know or could it reasonably be expected to know that the claimant had the disabilities and that he was put at the substantial disadvantages?

17 If so, what steps was it reasonable for the respondent to have to take to avoid those disadvantages? The claimant suggests:
- 17.1 Not requiring him to work with JD and RA;
- 17.2 Putting him on furlough from June 2020 onwards;
- 17.3 Providing him with PPE and masks;
- 17.4 Providing a chair in the "person in need" room.

Time limits

18 For any complaint of discrimination or harassment that was not presented within three months (plus early conciliation extension) of the act complained of, was it part of conduct over a period that ended within that time limit?

19 If not, is it just and equitable to extend time for bringing the complaint?

Unauthorised deductions from wages

20 Did the respondent fail to pay the claimant sums that were properly payable to him, in respect of accrued holiday when his engagement ended and outstanding from 15 September 2020 to 8 October 2020?

The Evidence

21 The claimant gave evidence. The respondent called Miss Michelle O'Neill Hospital Manager at Cygnet Woodside, Miss Harriet Harland, Team Leader and Mrs Sarah Stevenson, Social Worker and Bank Nurse.

22 The parties submitted a file of documents of 691 pages. Several further documents were introduced during the hearing.

Background

23 The second respondent operated an independent mental health hospital in Bradford known as Cygnet Woodside. It is a secure mental health hospital in which the patients are detained under the provisions of the Mental Health Act, a Deprivation of Liberty Order or by informed consent. It provided for the assessment, treatment and rehabilitation for up to nine male adults with a primary diagnosis of learning disability, with challenging or complex needs.

24 The claimant worked at the Cygnet Woodside Hospital as a Support Worker. Between 1 May 2018 and 8 June 2020 he had worked there as an agency worker and between 8 June 2020 and 3 December 2020 as a bank worker. The engagement terminated by the claimant's resignation. He had been assaulted by one of the patients, RA, on 8 October 2020 resulting in the loss of a tooth. RA had also broken the claimant's glasses. The claimant was absent as a consequence of the assault until his resignation.

25 The claimant was a disabled person. His medical conditions in that respect are summarised in a medical report of Dr Islam Rustom, Consultant Occupational Physician, dated 18 August 2020.

26 The claimant suffered a back injury in 2013 when a panel of glass fell upon him. This led to him being off work through ill health for 18 months. The injury affected his back, knees, hips and ankle. He was treated by a musculoskeletal specialist who he last saw in 2016. The pain score was 5/10 (10 out of 10 being severe). He had occasional sciatica pain. He had pain in the left knee from 2013 but had had no recent treatment for that.

27 The claimant was diagnosed with a heart condition in 2017, arrhythmia, which is treated with medication. The claimant had asthma from childhood for which he took two inhalers. Dr Rustom also reported that the claimant had been

treated for an assault in 2017 with antidepressant medication, therapy and counselling, but was no longer taking antidepressant medication and this aspect of his health is not a disability relied upon in this case.

28 That assault had been at another hospital operated by the Cygnet Group, the Cygnet Bierley Hospital, where the claimant had worked as a bank worker. He had resigned from that post on 30 August 2017.

29 The claimant supported all of the patients at the Cygnet Woodside Hospital, but principally RA and JD. Both could be challenging because of outbursts of aggression which would require physical restraint and medication. They required 2 to 1 support in the hospital and in the community.

The Law

Discrimination

30 By section 39 (5) of the Equality Act 2010 (EqA) a duty to make adjustments applies to an employer and by section 21 of the EQA failure to comply with the duty in section 20 (below) is a failure to comply with a duty to make reasonable adjustments which is discrimination against a disabled person.

31 By section 40 of the EQA an employer must not harass an employee.

32 By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

The duty to make adjustments

33 Section 20 of the EqA provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

34 By paragraph 2 of Schedule 8 of the EqA, "*A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know…that an interested disabled person has a disability and is*

likely to be placed at the disadvantage referred to in the first, second or third requirement".

35 Section 136(1) of the EqA concerns the burden of proof: *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.* Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

Harassment

36 By section 26 of the EqA,

(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.

Unauthorised deductions from wages

37 By section 13 of the Employment Rights Act 1996:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Analysis

The Employer: which respondent?

38 The respondents are all part of the Cygnet Group of companies. Mr Williams said that the third respondent was not responsible for employing the claimant and that it had been mistakenly named as the employing party to the casual worker agreement which the claimant signed on 1 May 2020. He said that the first and second respondents were named on the wage slips and that one or other would be responsible for discharging any liability, albeit it was not clear which was the employer. The claimant was unclear as to which had engaged him.

39 This is an unsatisfactory state of affairs. A party to a contract is entitled to know with whom he is entering into the agreement. The quality of the record keeping and aspects of the administration of the respondents was poor. Not only did the casual worker agreement mis-state the name of the employer as the first respondent, but the wage slips were ambiguous, naming both the second and third respondents. The claimant was provided with a job description by Ms O'Neill, signed and dated 1 May 2020 for the post of Staff Nurse, not Bank Support Worker.

40 Against this confusing background, we find that the second respondent was the other party to the contract and the claimant's employer for the purpose of these claims. It is one of those named on the wage slips and its name, in the abbreviated form of Cygnet Health Care, is in the heading for the Grievance and Covid 19 policies and in the "In Case of Emergency" form. The evidence points to it as having the necessary element of control and direction to the working relationship to be the employer.

Unauthorised deductions from wages

41 Mr Williams faced a difficulty in explaining the respondent's defence to the claims for underpayments of wages and holiday pay because of the lack of clarity in the wage slips and absence of records in respect of shifts the claimant had worked in October 2020. The claimant was paid a month in arrears, payment being made in the middle of the following month to which the work was undertaken. There is no payslip for November 2020 which would reflect the work undertaken by the claimant in October 2020. The claimant says he undertook five shifts in that month, including on the date he was assaulted, 8 October 2020.

42 The respondents have no record of the claimant having worked any shifts in October 2020, but acknowledge he was at work when he was assaulted. This is a reflection of the poor record-keeping to which we have referred.

43 We accept the claimant's evidence that he worked five shifts of 12.25 hours in October 2020. For that he is owed £551.25, being 61.25 hours at £9 per hour. In addition he is entitled to holiday pay which would accrue in respect of those hours. The second respondent paid at the rate of £1.09 per hour to reflect holiday entitlement. That is slightly greater than the entitlement under the

Working Time Regulations. For the purpose of the October work the claimant is entitled to the additional sum to reflect such holidays of £66.76.

44 Mr Williams invites us to deduct the sum of £370.81 which is included as a pay correction on a payslip dated 13 December 2020. His instructions are that it is believed this may reflect the actual hours worked by the claimant in October 2020 which monies could have been paid into his account, rather than the five shifts to which he refers. Even were that correct, it is negated by the recovery of that sum on the same payslip. As is common, the payslip also includes aggregate sums for the year-to-date. If this were a payment for the October work, it would have to be recorded somewhere on a payslip and in the aggregate totals of pay for the financial year, for the purpose of assessment to any liability such as income tax and national insurance or pension entitlement. There is no payslip to reflect the October work.

45 We do not accept the claimant's suggestion that he should be entitled to the further sum of £389.35 (that being pay correction of £370.81 and a pension payment of £18.54 on the December 2020 wage slip). The pay correction in that payslip accounts for the sum which is then deducted, but there is no evidence this sum was properly payable in the first place. We have no evidence as to how the pension payments were calculated.

46 We accepted the submission of Mr Williams that the omissions of holiday pay in the July and August pay slips were corrected in the September payment when £152.87 for that was made.

47 We do not award the claimant a sum for sick pay. Although he included this in a schedule of loss it was not a claim which was identified by Employment Judge Davies. Nor was this addressed in the evidence.

Disability discrimination
Disability and knowledge

48 It is accepted that the claimant has the disabilities of a back injury, heart arrhythmia and asthma.

49 There can be no doubt that the second respondent had knowledge of this condition from at least 18 August 2020 when Ms Riley, Administrator for Cygnet Healthcare, received the occupational health report of Dr Rustom. Miss O'Neill cannot recall when she saw that document first, but that is not material to knowledge in the possession of the employer, which has a responsibility to communicate to those in management, to enable them to discharge the duties arising from the EqA and safeguard the patients and other staff.

50 Upon application to be a bank worker, the claimant completed a pre-employment medical questionnaire, signed and dated 17 April 2020. He recorded that he had mental health problems in the form of anxiety, work-related stress injury, back pain, musculoskeletal problems and asthma. He stated that he had been restricted or advised of medical reasons not to carry out heavy lifting work and that this might affect his ability to carry out daily

activities at home or work. He stated that stress and back pain had originated from work or been made worse by activities at work. He stated he took medication at night and had allergies which might affect his respiratory system, in respect of dust, cold or carpets. This information collectively led to the referral to the occupational health advisor who reported on 18 August 2020.

51 Guidance notes to the pre-employment medical questionnaire advised that the medical data would be confidential to the Human Resources Department and, where necessary, their occupational health advisors. It explained that the purpose of the questionnaire was to ensure that the applicant was medically suitable for the job, to advise on reasonable adjustments to the workplace to ensure that the underlying health problem was not made worse, to ensure that the applicant did not have a medical condition which could pose a risk to his safety or that of his colleagues or others including those in the respondent's care and to identify if there was a risk of developing a work related illness for any hazards in the workplace.

52 Miss O'Neill had never seen this form. That is not particularly surprising given the terms of confidentiality expressed within it. Nevertheless, the Human Resources Department was on notice of the claimant's conditions from that point in time. It would have been expected to communicate any material information to managers to enable them to discharge relevant duties pending further confirmation from the occupational health advisors. Although the information in the medical questionnaire had been provided confidentially, it would be appropriate for the Human Resources Department to obtain the consent of the employee to pass on that information to the relevant senior manager for reasons of safety to the employee and others.

53 We had no evidence from the Human Resources Department as to why medical information had not been conveyed to Miss O'Neill, but it is reasonable to infer that might have been because on the same questionnaire the claimant had stated that he did not require any specific aids or adaptations to assist him in the workplace to allow him to carry out the proposed work activities or role and that his general health was good. The only qualifications were heavy lifting, that he took medication at night and that he had allergies to dust, cold and carpets. The claimant had worked in similar environments for the Cygnet Group as a support worker. As such, he was aware of the type of challenges which he would be required to undertake including restraint and containment when patients became aggressive and the consequence to his breathing of working in this type of environment. Mrs Stephenson clarified that the role did not involve heavy lifting.

54 At the same time the claimant also completed a form "In Case of Emergency", in which he declared he took medication and stated he had a back injury, asthma, arrhythmia heart problems and had allergies to citrus fruit, cherry, cold, dust and carpets. Miss O'Neill had not seen this document. We would have expected it to have been something she would have seen.

55 In summary, we find that the respondent had knowledge of the disabilities from 17 April 2020, even if that information had not been passed on to the claimant's managers from the Human Resources Department.

Reasonable adjustments

56 The claimant has identified three provisions, criteria or practices (PCPs).

57 In respect of the first, that the claimant was required to work with JD and RA, it is accepted that was applied to the claimant, at least when he offered himself for and was accepted on any particular shift.

58 In respect of the second, that he was required to attend work from June 2020 onwards, with the same qualification, that PCP is accepted by the respondent as one which applied to the claimant.

59 Initially, the respondent had challenged these two PCPs because the casual worker agreement did not obligate the claimant to accept any work. The later concession by Mr Williams was appropriate. It is an unattractive argument for an employer to say that the PCP was voluntarily accepted because the casual worker could have refused the work. That would facilitate the operation of discriminatory practices which deterred those with disabilities from working and thereby defeat the purpose of the non-discriminatory provisions in the EqA.

60 In respect of the third, the requirement for the claimant to work without PPE or masks, we accept the submission of Mr Williams that this PCP did not apply. At the commencement of the pandemic a difficulty was encountered with the wearing of masks because this unsettled a number of the patients. They were adversely affected by change. Familiarity with those who supported them, by visual recognition, was beneficial to their well-being. In the Cygnet Woodside Hospital a decision was taken that masks should not be worn, but if any member of staff chose to wear a mask he would be allowed to do so. The situation changed by September 2020. Masks were then worn by many members of staff. A number of staff were absent by that stage and with new faces unfamiliarity of workers could not be avoided.

61 We reach this finding on the basis of the evidence of Miss Harland and Miss O'Neill. It was consistent with the policy documentation, which specifically allowed for exceptions to mask wearing in the interests of the service user. There is little evidence of the claimant to contradict what they said. He addressed this in paragraph 2.32 of his written statement and stated that staff did not always wear face masks and that those who did, did not always wear them properly. At paragraph 4.2.1, he posed the question as to whether the respondent had required him to work without PPE or masks and then answered it by stating no masks were provided until late 2020.

62 We found Miss Harland to be a reliable witness. She was able to provide detailed answers about the requirements of individual residents. She had worked at the Cygnet Woodside hospital for 10 years and as Team Leader since 2014. Her evidence was that staff who wished to wear masks could do

so from March 2020. We do not find the claimant ever raised a request to wear a mask or that the respondent imposed a condition that he could not do so.

63 In respect of the other two PCPs, we find the claimant faces an insurmountable difficulty of attributing to his employer knowledge, or constructive knowledge, of a disadvantage which arose from the PCP. That is, we are not satisfied that the second respondent's managers knew or ought reasonably to have known that the PCPs would have placed the claimant at the substantial disadvantages he points to.

64 Their knowledge depended upon what they had been advised by the occupational health specialist, human resources adviser and any information given to them by the claimant.

65 Under a section headed, "Advice on fitness to work", Dr Rustom wrote, on 18 August 2020,

> "*He can stand for two hours when he worked during the shift. He can lift shopping bags. He can climb a flight of stairs. He has difficulty with getting up from a kneeling position. He can manage house chores. He drives for 40 minutes without difficulties. He sleeps eight hours a night.*
>
> *On assessment, he had good engagement during the call. He had reasonable memory and concentration. He did not feel anxious but he had mild low mood symptoms. He has not had any sickness absence since he started his role. He did not have any adjustments in place.*
>
> *Based on the given history of my assessment today, I suggest that he is fit to continue his role but with the following adjustments:*
>
> - *Up-to-date manual handling training, control and restraint training, and CPR training.*
> - *Wearing face mask all the time to prevent any contamination or chemical exposure that could affect his asthma.*
> - *He would need to be cautious about heavy lifting, assess the risks, and manage the load according to his capability."*

66 In the list of issues at the preliminary hearing, it is stated that the claimant was placed at substantial disadvantages firstly, because JD and RA could be violent and would have to be restrained which caused the claimant back pain and pains in his chest and difficulty breathing. Secondly it was said he was exposed to Covid if he attended work or if he worked without PPE or masks and was at greater risk because of his asthma and heart condition.

67 In respect of the first disadvantage, we are not satisfied that the respondent knew or ought reasonably to have known that requiring the claimant to work with JD and RA would cause him back pain, pains in his chest and difficulty breathing. There is nothing in the report of Dr Rustom to justify that conclusion.

68 When the claimant spoke to Dr Rustom he had been working with JD and RA for over two years, either as an agency or bank worker. The claimant accepted the content and opinion in Dr Rustom's report before it was disclosed to his employer. On an earlier occasion when he had seen an occupational health physician in May 2017, he had made representations after seeing the first report to suggest that the doctor had overlooked certain issues which were then addressed in a further report. No such request was made of Dr Rustom. Given the history, the claimant must have known he could have raised further concerns but chose not to do so. We are satisfied he did not do so because he was satisfied with the recommendations and that they were appropriate.

69 The claimant says to the Tribunal that the advice about caution over heavy lifting was sufficient to warn his employers that he should avoid working with patients, specifically RA and JD, who might become aggressive. That is because he says self defence and restraint involved strenuous movement and holds which could last for several minutes on the floor. He says that would have been a foreseeable risk of aggravation to his back injury.

70 The employer could not have reasonably associated the advice about heavy lifting with the management of aggression which could lead to injury in his case. The first recommendation was for up-to-date training on manual handling, control and restraint. It is implicit that in making the recommendation Dr Rustom envisaged that those duties could be discharged safely by the claimant. The claimant never mentioned the substantial disadvantage of aggravated back pain following restraint of RA and JD to Dr Rustom either during the telephone assessment or after receipt of the report. It is unreasonable of him to attribute foresight of such a disadvantage to his employers when he had never raised it himself.

71 Mrs Stephenson's evidence was material to the issue of restraint techniques and their association with back pain. She too had a back injury. She had been assaulted on several occasions by different patients, but not RA or JD. She said that the training on safe methods of restraint and control of aggression would not preclude her from those duties because of her back injury. In making the environment safe for people with disabilities, it is necessary to base arrangements on medical advice and not make assumptions as a layperson. The claimant invited such assumptions to our reading of the recommendations of Dr Rustom.

72 It is true that the report had alluded to the claimant having difficulty when getting up from kneeling; but that is not the substantial disadvantage which was identified at the preliminary hearing. That was back pain. Nor is it included the claimant's witness statement, the particulars of complaint, amended particulars of complaint or further information. In contrast pains in the chest and difficulty breathing were raised as consequences of managing the aggression of RA and JD at the preliminary hearing. These were never raised with Dr Rustom. In respect of the arrhythmia, Dr Rustom said it should not have been a barrier to work, it being managed with medication. In respect of asthma, the advice concerned the effect of hot weather and coming into

contact with certain cleaning products or pungent smells. There is no reference to either condition being a cause for concern when it came to working with RA or JD or any other patient who demonstrated challenging and aggressive behaviour. It is again unreasonable of the claimant to attribute to his employer knowledge of substantial disadvantages when he never mentioned them himself. The claimant has repeatedly identified problems with hindsight which he now says should have been addressed, but no such problems were apparent to him or his employer at the time.

73 That has led us to conclude that not only did the second respondent not have knowledge of the substantial disadvantages but there were, in fact, no such disadvantages. He gives no details or particulars of instances in which these problems occurred in his statement. He never spoke of taking time off or seeing his GP. On 22 June 2020 the claimant wrote to Miss O'Neill to complain of unfair treatment, bullying and abuse of position. His complaint was that many shifts had been cancelled without notification. He said this was a breach of his human rights and employment rights. He said he felt he had been discriminated against. He said he would terminate the bank agreement and revert to agency if it continued. As to working with RA and JD and consequential risks to his health, he said nothing. The claimant would have raised the concerns in this case at that time if they arose. He would have pointed out that he was suffering back and chest pain because he had been allocated the same two patients to work with. The same can be said of his complaint on 25 October 2022, following his assault. We consider it is unacceptable of Miss O'Neill not to have provided a written response to either letter of 22 June 2020 or 25 October 2020; but even had she responded, it would not have been to the concerns the claimant now raises, because his letter made no mention of them.

74 The same applies to his complaint that he should have been furloughed. He made no suggestion of his concern about an enhanced risk to Covid because of his asthma or arrythmia to Dr Rustom or anyone else. The respondent had a policy to allow payment of furlough or sick pay in certain circumstances, on the provision of advice from a GP. There is no medical evidence the claimant was in the extremely clinically vulnerable category. Furlough could only take place if both parties consented. That would require a discussion in which the claimant asked or agreed to being furloughed. No such discussion ever took place.

75 Far from requesting paid leave from work, the claimant complained of too little work. He complained of cancellation of shifts without notice. Miss Harland said that the claimant was keen to work as many shifts as possible, such that she had to tell him she had to be fair to others when allocating work. The proposition that he should have been furloughed against that background is misconceived. It is a further example of an attempt retrospectively to fit his case to his disabilities regardless of the circumstances which prevailed at the time.

76 The claimant says that he had raised his concerns verbally with Miss O'Neill and others on multiple occasions. He cannot say specifically when. Mr Williams says this is sketchy and typical of the claimant's approach, with his

initial evidence being that he had raised issues with Paula, the Head of Care, then to embellish it to extend to others. The claimant says that there is inconsistency in the evidence of the respondent's witnesses. He says Miss Harland said in her statement he had never raised concerns about working with RA and JD but agreed in cross examination that on two occasions she had allowed the claimant to work with a different patient when he had raised a concern on the day. In respect of one, RA had fallen when out in the community and sustained a cut. The claimant said he felt uncomfortable accompanying RA to hospital. Miss Harland agreed to substitute for the claimant that day. She also said there were regular debriefings at which RA and JD were discussed. There was no request she was aware of from the claimant not to work with these patients other than on those two isolated occasions.

77 We agree with the submission of Mr Williams. The claimant's evidence about who he told, what exactly he said and when he did so was lacking in detail. It was undermined and inconsistent with his written complaints and interview with Dr Rustom. In contrast, when her memory was prompted, Miss Harland could give detail and context to the two occasions when she had placed the claimant with other patients. Rather than undermine her reliability as a witness, it enhanced it.

78 The complaint about the failure to provide a chair, as an auxiliary aid, also faces the difficulty that the claimant has not established that his employer knew or ought to have known of the particular disadvantage. The claimant relies upon the occupational health report of Dr Rustom, in respect of which it stated he could stand for two hours when he worked during a shift. It is not unreasonable to infer that standing for longer than two hours might have been a difficulty. No recommendation was made that the claimant should be provided with the chair. It would not appear that the claimant had drawn Dr Rustom's attention to his working circumstances which generated back pain by having to stand for long periods.

79 At the preliminary hearing the adjustment proposed was that a chair should have been provided in the "personal need" room. There was no evidence about what such a room was. Rather, the complaint at this hearing was that a chair should have been provided on the upstairs corridor.

80 There were periods when RA and JD would choose to stay in their bedrooms and the two support workers would wait outside on the upstairs landing. Complaints had been made by the claimant and others of the absence of the chair to Mrs Stephenson. At some stage, albeit it is not clear when, a small portable stool was provided. At a later stage in 2020, probably in October, seats were attached to the wall. These measures were clearly a response to concerns raised by staff who had had to stand for lengthy periods.

81 Although not specific or by reference to dates, in paragraphs 4.5.1 to 4.5.3 of his witness statement the claimant stated it took him longer to get up than others and that the plastic stools did not last and were not helpful as they were the same as sitting on a hard surface. He never explained this to his managers or to Dr Rustom. Nor did his evidence demonstrate when he had

stood for particular periods, the extent to which they were greater or less than the two hours referred to by Dr Rustom, whether he had breaks, was relieved by others and what he did.

82 The evidence to the Tribunal was in the most general of terms. It was insufficient to establish that his employers could reasonably have been alive to this alleged disadvantage because of his disability. The allegation is further undermined by reference to the allegation at the preliminary hearing of the absence of a chair in the personal need room, which was clearly not the upstairs corridor. In evidence it emerged that there was appropriate seating downstairs. The problems with providing suitable seating upstairs arose from the risk of it being used as a weapon, at times of aggressive outbursts and given the limited width of the corridor. If a particular difficulty arose for the claimant because of his disability, a resolution would require an evaluation of these difficulties. Mrs Stephenson said she would relieve the claimant and other staff from time to time when they had been standing outside patients' rooms for a while. How, or whether, the claimant managed, the extent to which this was the same or different to others remained quite unclear.

Harassment

83 There were two floors to the hospital, the ground floor and the first floor. The claimant used the stairs regularly to discharge his duties. There was a goods lift, but he did not use it. Often it would not be convenient to do so if he was supporting a patient.

84 The claimant never raised any concern about using the stairs. The report of Dr Rustom referred to the claimant as being able to climb one flight of stairs. He made no suggestion this should be subject to restriction or adjustment. The only reasonable inference is that is because the claimant never raised it as a problem. We are not satisfied it was a problem. The claimant's use of the stairs was not unwanted conduct. The complaint is misconceived.

85 We have found the claimant did not ask to be removed from working with RA and JD in the way in which this case was presented to Employment Judge Davies and before us. He did not inform his employers of difficulties discharging those duties because of any aspect of his health. The requirement to work with these patients could not, in the circumstances, be unwanted conduct related to the claimant's disability.

Summary

86 The claims for the October 2020 pay and associated holiday entitlement are well founded but the claims for disability discrimination and harassment are not. At the time the claimant worked for the second respondent as a bank worker the effect of the Covid pandemic brought unprecedented challenges to the care sector, which faced shortages of staff and new ways of working at very short notice. The CQC inspected Cygnet Woodside Hospital in September 2020 and graded it as inadequate, placing it in special measures which could have led to further regulatory restrictions on the establishment or Cygnet. A decision was taken by Cygnet to close the hospital the following

year and change the way the service was provided. The claimant drew support from the conclusions of the CQC. We were mindful of this background and the context within these events arose but in respect of the relatively narrow issues we had to determine, save as included in our analysis, it took matters no further.

87 In the light of our findings that the discrimination and harassment claims do not succeed, it is not necessary to address time limit issues.

Costs

88 After we delivered our decision and reasons, Mr Williams made an application for costs.

89 Under Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 the Tribunal may make a costs order and shall consider whether to do so where it considers that a party has acted unreasonably in the bringing of the proceedings or part, or the way the proceedings or part have been conducted, or any claim or response has no reasonable prospect of success.

90 The Tribunal may have regard to a party's ability to pay by Rule 84, both in respect to whether an order should be made and, if so, in what sum.

91 The Rules must be applied by consideration of the principles in Rule 2 which is that the Tribunal shall deal with cases fairly and justly including, so far as is practicable, ensuring the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay so far as compatible with a proper consideration of the issues and saving expense.

92 In this claim the respondents seek an order for costs against the claimant on the grounds that he has brought claims or part of the claim with no reasonable prospect of success and that he has conducted proceedings unreasonably by pursuing claims which are hopeless.

93 We have considered the totality of these proceedings. In the initial claim form the claimant brought very many legal claims spanning many areas of law including automatically unfair dismissal, protected disclosures detriments, breaches of the Agency Worker Regulations, race and sex discrimination as well as disability discrimination, breaches of the Health and Safety at Work Act. The forms of discrimination span many of its various definitions.

94 These claims were subject to four preliminary hearings. These claims were broad and diffuse with little focus. The claimant included in the claim form lists of legal rights with little factual assertions as to why there was any breach of them. That led to Employment Judge O'Neill requiring the claimant to provide further information in a tabular format. The information provided still failed to explain how many of those legal claims could proceed at all. At a lengthy hearing in front of Employment Judge Davies all of the claims were carefully identified and she set the case down for a further hearing for

consideration as to whether or not any should be struck out on the grounds they had no reasonable prospect of success or subject to a deposit. Employment Judge Maidment considered all but those we considered had little reasonable prospect of success and required the claimant to pay deposits. As the claimant did not pay those deposits, most of the claims he had initially brought were struck out.

95 We have considered the fact that the claimant was not legally represented, is not a lawyer and has had to manage a difficult case with complex law. He is not unfamiliar with tribunal proceedings because he informed us he has pursued other employment tribunal cases but he is, nevertheless, a litigant in person who does not have legal experience and qualifications.

96 Giving all latitude to that lack of knowledge, the broad and diffuse way in which he sought to bring claims against the respondent was unreasonable. The Tribunal is experienced with dealing with litigants in person and the difficulties they encounter. This case falls into a different category. Little, if any, thought had been given to what legal claims might actually arise by reference to what had happened. Rather, the claimant applied a scattergun attack seeking to allege any potential or possible legal claim he could think of. Many were simply misconceived. That is to act unreasonably in the bringing of proceedings and unreasonably in their conduct.

97 In a number of the disability discrimination claims the claimant had constructed, retrospectively, cases which simply could not have arisen on the facts as they were at the time the events complained of happened. He has focused upon what might relate and apply to his disability when he issued the case and then suggested that that was something the respondent should have been aware of and addressed. In the circumstances which prevailed it was simply was not the case. At the very latest, by the time the claimant had seen the disclosed documents in the bundle, particularly the medical report of Dr Rustom and the letters he had written by way of complaint, he should have realised the disability discrimination claims were without merit. That would have been apparent when he was putting together his witness statement. One example is reliance on a medical exemption he had in respect of taking the Covid vaccine because of his asthma. The Tribunal asked for the document he referred to in his statement to be produced because it was not in the bundle. When it was produced, it post-dated these events by many months and was irrelevant to these claims.

98 We are satisfied in pursuing these claims in this way there was further unreasonable conduct of the proceedings with respect to the discrimination aspects of the case.

99 The second test, having found that there has been the bringing of unreasonable claims and unreasonable conduct, is whether we should make an order for costs or not. We may have regard to the claimant's ability to pay. Given that the application has been limited to £618.01, the claimant has not suggested that is a relevant consideration. If we were to make an order in the terms requested it would be a set-off of the compensation.

100 In regard to the other considerations including those we have set out in the overriding objective, we re-state that we recognise that any unrepresented party faces obstacles in pursuing a claim to the Tribunal and we give considerable latitude in those circumstances. However, this is an unusual case in that the number of claims brought are so many and so diffuse and the way in which the claimant had sought to pursue the remaining ones so deficient in terms of the evidence which was available.

101 Against that the respondent has not conceded that the claimant was owed monies and was in some difficulty with its own record-keeping and paperwork to explain what the claimant had and had not been paid and who the appropriate employer was. We regard that as a material consideration, but not to the extent of refusing to make an order for costs at all. The claimant's conduct led to several days of hearings including the final 3 days of hearing time, when his wages claim would have been resolved in a two hour hearing before an employment judge.

102 We acknowledge the argument of the claimant that he did not pursue those claims which Employment Judge Maidment thought had little reasonable prospect of success and subjected to deposit orders. It does not follow that because Judge Maidment did not say that the remaining claims had little reasonable prospect of success that it was reasonable of the claimant to pursue them. That is because Judge Maidment did not know what the evidence would be. The claimant did. Unlike Judge Maidment, the claimant knew what had happened at work at the relevant the time and that the facts as they then were did not support the cases he pursued to the end.

103 The third question is the sum which should be paid in respect of costs. It is unnecessary to repeat the factors which we have set out above, with respect to considering whether a costs order should be made including the issue of ability to pay. The claimant has had to bring proceedings for sums he should have been lawfully paid. For that reason there would have been a considerable discount on the costs we would have awarded had they not been limited to £618.01. We would certainly not have ordered the claimant to pay the full costs of the respondent of £22,000 plus VAT, the minimum estimate we were given. Having regard to all of the above, we find it is appropriate for the claimant to pay a proportion of the costs of the respondents and an appropriate and reasonable sum is that requested of £618.01.

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Employment Judge D N Jones

Date: 17 January 2023

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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