



EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: University Hospitals Bristol and Weston NHS Foundation Trust

Heard at: Bristol

On: Monday 6th March 2023,
Tuesday 7th March 2023,
Wednesday 8th March 2023

Before: Employment Judge Frazer
Mrs L B Simmonds
Mrs L Simpson

Representation

Claimant: Mr Mozam (Solicitor)

Respondent: Mr Adjei (Counsel)

JUDGMENT

The Claimant's claims for a failure to make reasonable adjustments, discrimination arising from disability, direct disability discrimination and disability related harassment are not well founded and do stand dismissed.

REASONS

1. We sympathised with both parties' positions in this case given that all concerned were working in the realm of frontline care provision and were faced with the very difficult challenges presented by the unfolding pandemic in March and April 2020.
2. The Claimant presented two claims to the Tribunal: 1404827/ 2020 which was for unfair dismissal and 1404937/ 2020 which was unfair dismissal, age and disability discrimination. The first was closed as it was a duplicate. Both claims were considered by Employment Judge Cadney at a preliminary hearing on 11th August 2021. At that hearing the Claimant's claims for unfair dismissal was dismissed as having been presented outside the relevant time limit and it was found not reasonably practicable to extend time. The age discrimination claim was dismissed as having no reasonable prospects of success. As for the disability discrimination claims

he found that it was just and equitable to extend time for presentation and they have been the claims that have been the subject of our determination.

The Hearing

3. We had before us a list of issues which contained claims for a failure to make reasonable adjustments discrimination arising from disability, disability related harassment and direct disability discrimination. The Respondent had conceded that the Claimant was a disabled person by reference to HIV so there was no requirement for us to determine whether the Claimant was a disabled person under s.6 Equality Act 2010. By way of a case management decision at the start of the hearing we dismissed the application for an amendment of the claim form arising out of the application to amend the list of issues. There was an agreement between the parties in relation to an amendment of paragraphs 8.1 and 11.1 insofar as the unfavourable treatment was the 'cancellation of already rostered shifts going up or two around the end of May 2020'. We had evidence from the Claimant for herself and from Lynne Pickford, Nichola Blainey and Catherine Williams for the Respondent. We heard submissions from both parties in closing and delivered an oral decision at the end of the third day.

The Issues

4. We had regard to the following issues.

A Failure to Make Reasonable Adjustments (s20 Equality Act 2010)

1. Did the Respondent apply a PCP to the Claimant and non-disabled employees? The Claimant relies on the following alleged PCP:
 - 1.1 Requiring qualified staff to work in ICU.
2. If the above is found to be a PCP which the Respondent applied to the Claimant and non-disabled employees, did the PCP place the Claimant at a substantial disadvantage compared with non-disabled employees? The Claimant relies on the following alleged substantial disadvantage:
 - 2.1 That the Claimant was in the 'at high risk' category in relation to COVID19 due to her disability and was therefore more vulnerable to catching the virus while working on the ICU ward during this time.
3. If the Claimant was placed at a substantial disadvantage, did the Respondent know or ought it to have known that the Claimant would be put at a substantial disadvantage by the PCP?
4. If there was a PCP which placed the Claimant at a substantial disadvantage compared with non-disabled employees, how would the proposed adjustment of allowing the Claimant to be allocated to duties in a different department or ward have alleviated the substantial disadvantage?
5. Was the proposed adjustment a reasonable adjustment for the Respondent to have made.

Discrimination Arising From Disability (s.15 Equality Act 2010)

6. Did the Respondent know, and could it reasonably have been expected to know, that the Claimant had the disability? From what date?
7. Did the Claimant's:
 - 7.1 vulnerability to COVID19 resulting from her underlying conditions and/or
 - 7.2 inability to work in ICU arise as a consequence to the Claimant's disability?
8. Did the Respondent treat the Claimant unfavourably by:
 - 8.1 The cancellation of already rostered shifts going up to around May 2020.
 - 8.2 On 28th April 2020 the Claimant was dismissed/ not offered any further shifts.
9. Was the unfavourable treatment because of the 'something' set out in 7.1 and 7.2?
10. Was the treatment a proportionate means of achieving a legitimate aim? In the response the Respondent says at paragraph 27 amended response that the legitimate aim was a safe workplace and that dismissal was a proportionate means of achieving that aim as there was COVID-19 across all wards, not just ICU: the Claimant refused to move to any ward that had definite or suspected COVID patients and the Respondent could not guarantee that the Claimant would be working somewhere with no or low risk of COVID 19. The Respondent felt that the only option was not to roster the Claimant for any shifts until the COVID situation had improved.

Harassment related to disability (s.26 Equality Act 2010)

11. Did the Respondent do the following things:
 - 11.1 The cancellation of already rostered shifts going up to the end of May 2020.
 - 11.2 On 28th April 2020 the Claimant was dismissed/ not offered any further shifts.
12. If so, was this unwanted conduct?
13. Did it relate to the Claimant's protected characteristic, namely disability?
14. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
15. If not, did it have that effect on the Claimant? If so was it reasonable for the Claimant to consider it had this effect?

Direct disability Discrimination (s.13 Equality Act 2010)

16. Did the Respondent do the following:
 - 16.1 On 28th April 2020 the Claimant was dismissed/ not offered any further shifts because of her disabilities (and not for the reason given by the Respondent).
17. If so, was that treatment less favourable than the Respondent treated or would have treated comparators who are not in materially different

circumstances to the Claimant? The Claimant relies on a hypothetical comparator.

18. For direct disability discrimination claims, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same skills or abilities as the disabled person (regardless of whether those skills or abilities arise from the disability itself).
19. If so was it because of the Claimant's disability?

Submissions

Respondent

5. For the purposes of the claims for a failure to make reasonable adjustments and discrimination arising from disability on behalf of the Respondent it was submitted that it had no actual or constructive knowledge of the Claimant's disability. It denied that the PCP as claimed existed. It was submitted that the Claimant was required to work in ICU as a runner and had indeed done so. No medical evidence had been provided that the Claimant was more vulnerable to catching the virus while in ICU. Occupational health evidence related to a greater risk of severe infection not in vulnerability to catching the virus. The Claimant's conduct was inconsistent with her position that ICU was a high risk area as she accepted the runner role. Any adjustment was not reasonable because of there was a spread of COVID throughout and the Respondent had placed its permanent staff into perceived lower risk positions. For the purposes of the s.15 claim there was no something arising. No medical evidence had been provided regarding vulnerability. The something arising was not caused by disability. The decision was not because of the something arising but because the Claimant had refused to work as directed and it was safety critical. If there had been unfavourable treatment then the proportionate response was to stop the Claimant's shifts. What else could the Respondent have done in circumstances where COVID was everywhere? The harassment was not related to disability. The removal did not have the prohibited effect because the reason was to maintain a safe workplace. The direct discrimination claim was bound to fail since Pickford and Williams did not know about the Claimant's disability.

Claimant

6. Catherine Williams ought to have been aware of the Claimant's disability as there was reference to underlying condition. The Claimant's behaviour was something arising because it was because of the risk posed by COVID to her given her condition. The respondent gave no consideration to her health problems. The behaviour was an effective cause of her dismissal. She refused to take on shifts because of the risk. **Hall v Constable of West Yorkshire** paragraph 42 applied. It had been disproportionate to dismiss the Claimant because of an inadequate and biased investigation. The Claimant was not qualified to work in ICU. There had been no risk assessment of that area and no job description had been provided or a proper explanation given about what a runner would do. It

would have been reasonable to transfer the Claimant to a lower risk area. The Respondent had said that it had transferred permanent staff but Equality Law must apply to all staff and to the Claimant too. Restricting the Claimant's shifts and banning her from a hospital was both harassment and direct discrimination. It affected the Claimant's dignity and had a significant impact on her ability to work. There was direct discrimination because the decision makers knew that she had health problems.

Authorities

7. The parties referred us to authorities in the course of their submissions. On behalf of the Claimant we were referred to: **Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15/LA**; **City of York Council v Grosset [2018] EWCA Civ 1105** and **Baldeo v Churches Housing Association of Dudley and District limited UKEAT/0290/18/JOJ**. The Respondent referred us to **Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ**.

The Law

8. It was accepted by the Respondent and we find that the Respondent was a principal for the purposes of s.41 Equality Act 2010. Those provisions and the provisions of the relevant sections are set out below.

41 Contract workers

- (1) A principal must not discriminate against a contract worker—
- (a) as to the terms on which the principal allows the worker to do the work;
 - (b) by not allowing the worker to do, or to continue to do, the work;
 - (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
 - (d) by subjecting the worker to any other detriment.
- (2) A principal must not, in relation to contract work, harass a contract worker.
- (3) A principal must not victimise a contract worker—
- (a) as to the terms on which the principal allows the worker to do the work;
 - (b) by not allowing the worker to do, or to continue to do, the work;
 - (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
 - (d) by subjecting the worker to any other detriment.
- (4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).
- (5) A "principal" is a person who makes work available for an individual who is—
- (a) employed by another person, and
 - (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).
- (6) "Contract work" is work such as is mentioned in subsection (5).
- (7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

13 Direct discrimination

(1) 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

15 Discrimination arising from disability

(1) 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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

(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.

(4) The second requirement is a requirement, where a physical feature 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.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

26 Harassment

(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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

Knowledge of Disability

9. The respondent need not have constructive knowledge of a diagnosis. It needs to show that it was unreasonable for it to be expected to know, first that a person suffered a) an impairment which was physical or mental, b) that that impairment had a substantial and c) long term effect, and next that a provision, criterion or practice which it applied placed that person at a substantial disadvantage in comparison with persons who did not share that disability, such that steps might be taken in order to prevent it having that effect: **Donelien v Liberata UK Ltd UKEAT/0297/14/JOJ** at paragraph 5 Langstaff J.

10. For the purposes of s.15 the EHRC Code of Practice on Employment 2011 sets out guidance on knowledge:

5.14 It is not enough for the employer to show that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it.

5.15. An employer must do all they reasonably can to find out if an employee has a disability What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and make sure that personal information is dealt with confidentially.

11. For the purposes of a s.15 claim the employer need only have actual or constructive knowledge of the disability itself not the causal link between the disability and its consequent effects which lead to the unfavourable treatment – **City of York Council v Grossett [2018] EWCA Civ 1105**.

Findings of Fact

Events leading to 21st April 2020

12. The Claimant is a registered nurse Band 5. She was engaged by RMR Recruitment agency who supplied her services to the Respondent between May 2017 until April 2020. This case concerns the period from March 2020 onwards when the COVID19 pandemic started to unfold. The Claimant says that she did not get a letter to shield from the government. As at April 2020 the pandemic was new so there were no lateral flow tests

or PCRs available. There was no way of ascertaining which patients were free of COVID19. This meant that some of the patients were what was known as query COVID19 and some were diagnosed with COVID19. There were also people who may have had asymptomatic COVID19. We accept that at Weston there was a lack of isolation cubicles so COVID19 was able to spread quickly.

13. The Claimant opted to continue working despite her concerns about her health condition and her age (she was over 60 at the time). However, she contacted her GP and obtained a fit note which is dated 7th April 2020 (p.198). This was silent about her condition. It simply stated that she was identified as falling within a high risk group for Coronavirus and that she would benefit with her employer's agreement from 'workplace adaptations' namely that she needed to work in a low risk area for 6 months. This fit note was sent to Catherine Williams from the agency on 8th April (p.231). Catherine Williams wrote to the neutral vendor on 8th April 2020 to say that while she fully understood the Claimant's concerns '*we have no low risk areas in the acute hospital service*' and '*we do have COVID patients on all wards and therefore is at risk in any area. If she is 'high risk group' I would advise her not to work in the acute hospitals at this time*'.
14. There was a communication between Sarah Tester, Allocation Officer, and Catherine Williams of the Respondent dated 3rd April about the Claimant refusing to work with COVID patients due to existing health problems or to go into any cubicles (p.191). The Claimant accepts that she did not tell the Respondent about her condition specifically. All of the Respondent's witnesses from whom we heard evidence state that they did not know about the Claimant's disability until the tribunal proceedings. The Claimant did not have an obligation to declare her condition because the nature of her role was unlike that of midwives or surgeons who would need to make such a declaration because of the health risk to patients.
15. Further to this there is an email at p.202 from James Merrell, Clinical Site Management, of the Respondent dated 8th April to a number of people to say that on that day the Claimant turned up for work on the Hutton ward but that she refused to work on any ward that had Query COVID patients. She was sent home as her shift had already been cancelled. There were, according to this email, some other agency nurses who were not working for some wards because of anxiety about caring for COVID or potential COVID patients. Mr Merrell raised that the Respondent was running into difficulties because of this. Catherine Williams expressed an opinion in response that if the agency nurses were not prepared to work where the clinical need dictated then she questioned whether '*we should be booking them*'. It was not clear to us at that stage on the email evidence whether it would have been clear to the Respondent that the Claimant had refused because of an underlying health condition or whether she was refusing because of a general anxiety about COVID that the other nurses had.

[On 8th April there was an email chain around 1107 between the neutral vendor, Catherine Williams and Emma Beaumont about working in ITU. The Claimant had not undertaken a shift at ITU. The Claimant had contacted the agency and had queried her working in ITU on the basis of her not having the skills and

experience. She also mentioned that she had failed a fit test but would work in ITU if she was provided with suitable PPE as she was only able to wear surgical masks. The Respondent did not have the Claimant's fit note at that point in time and nothing was .The Claimant did not say that it was because of her health condition. There was then a line of enquiry in the subsequent emails about her getting fit tested and Catherine Williams raised with the neutral vendor that if she was happy to move to keep the shifts booked. The response from the neutral vendor was that once the Claimant had PPE she will be happy to move. Cath Williams was ok with that.]

16. We referred to Catherine Williams' email dated 8th April. During the hearing we heard evidence from Catherine Williams that there were in fact what were considered to be lower risk areas in the hospital at that time but that the permanent staff who had health conditions were put on the lower risk wards so there were no available shifts for agency staff. However she went on to say that the wards were lower risk but were not COVID19 free.
17. In response to the email of 8th April, Charlotte Ditchfield the neutral vendor emailed Catherine Williams on 17th April 2020 and pasted a message from the Claimant who had thanked her for the advice and acknowledged that there were no infection free areas including in the community as well (p.229). The Claimant went on to say that she had been working hence stopping now would not be the solution as her job was one of those affected by the pandemic and there was not an area free from the infection risk at the present time. She went on to say that she was over 60 with an underlying condition. She requested that the Trust excluded her from working in high-risk areas such as ITU and COVID 19 HDU units.
18. On 20th April the neutral vendor enquired as to whether the Claimant would be happy to work on ITU as a runner. The Claimant came into work that evening but refused to work with COVID patients as she said she was not able to nurse them (p.238). She was moved to Cheddar but refused to work with any COVID patients and went home.
19. We find the chain of emails supported the events at the time. It was contemporaneous record of what happened. The neutral tester queried whether the Claimant and another nurse needed to be restricted and mentioned the Claimant's doctor's note.
20. Catherine Williams directed that the Claimant should be restricted *'if they are not able to be flexible and go where the clinical need requires them.'*
21. At 1750 on 21st April 2020 Catherine Williams emailed the neutral vendor to state *'Things haven't changed, we have COVID in all wards and am slightly losing the will to live with these nurses as we have communicated with the agencies on numerous occasions about this. Maybe they don't read their emails!'*
22. On 20th April Julian Wheeler reported that there were two agency staff including the Claimant who had been unwilling or unable to nurse COVID19 patients either suspected or confirmed cases.

23. We find that the Claimant refused to nurse suspected or diagnosed COVID19 patients.

Waterside Complaints

24. The Claimant did a number of shifts for the Respondent's Waterside Unit which was originally a 12 bed (now 13 bed) unit which was used for escalation patients. Waterside has two registered nurses and one nursing assistant. Nichola Blainey was the ward manager. She had had an informal complaint from a member of staff before about the Claimant not being dynamic and working as part of a team and had spoken to the Claimant about it before. On 23rd March 2020 a member of staff (nursing assistant) came to her to raise some concerns about the Claimant and her behaviour on a shift on 21st March 2020. As a consequence she requested written statements from the two staff who had worked with the Claimant on those shifts. Those are at pages 179 to 186. The nursing assistant's statement raised concerns including the Claimant not prioritising work and sitting in a room for a long time, shouting at her and calling her a liar. The statement at p.182 includes a reference to the Claimant almost shouting and being very angry. In that statement reference was made to her not helping others and sitting down and not doing anything. It was mentioned that she was rude. From the statement at page 183 it was apparent that the Claimant had complained that the nursing assistant was rude to her. There were complaints about the Claimant not doing certain tasks. She had requested her to take a blood sample and the Claimant was alleged to have started shouting at her. There was a complaint about an unnecessary request made by the Claimant at one point. At page 185 there was a complaint that the Claimant had refused to help with the management of morphine IV. There was a complaint that the Claimant did not help others and was arguing instead of doing her job.
25. Having considered the statements Nichola Blainey then submitted a bank office staff report on 13th April which was normal protocol for allegations of misconduct on the part of agency workers. They were not subject to the Respondent's performance management procedures as were the permanent staff.
26. The Claimant was then asked to provide a reflective statement on 21st April 2020 p.262. The Claimant responded to the complaints with her version of events. She alleged that the nursing assistant raised her voice at her. The Claimant referred to an incident with nurse 1 concerning the morphine. Her case was that she was not trained and was not comfortable with administration and follow up. The Claimant asked for further information. She complained about the nursing assistant not helping her in the same way as other nursing assistants did.
27. On 28th April 2020 at 1330 Nichola Blainey emailed Lynne Pickford with her views on the situation. She stated that she had trust in her nurse in charge and her judgments. Her evidence before us was that she put a lot of weight on the statements of the permanent staff as she worked with them and trusted their opinions. In the second paragraph she stated that the nurse in charge did not feel that the Claimant helped anyone and

instead challenged requests made. She said that her attitude made it difficult for staff to work with her and she did not consider that she was working in a way that ensured the whole ward was managed effectively and safely. She said that the Claimant's statement did not show any insight into how her actions had affected staff and acuity of the ward on more than one occasion. She requested that she did not work on Waterside. We found her evidence about why she restricted the Claimant to be consistent with her email correspondence.

28. We found some inadequacies with the way that the investigation was conducted but remind ourselves that this was not an unfair dismissal case and we accepted the Respondent's reasons given for the decision were genuine.

Decision on 28th April

29. On 28th April 2020 Lynne Pickford and Nichola Blainey considered the Claimant's statement. They found that it was not reflective and that there were issues with her working as a team which would impact on patient care. It was considered that the Claimant had refused to be flexible and work in different areas where she had been required to work. Lynne Pickford notified the neutral vendor on 28th April and asked them to notify the agency that the Claimant should no longer be able to work for the Trust. She had spoken with Catherine Williams about the Claimant's refusal. We find that it was more likely than not that she did not know about the Claimant's fit note during her discussions with Cath Williams or Nichola Blainey as we accept that this did not feature in the decision. She was not copied in to the email dated 3rd April between Sarah Tester and Catherine Williams on 3rd April.

30. The decision was taken jointly between Lynne Pickford and Catherine Williams on 28th April and we find that Catherine Williams did know that the Claimant had an underlying health condition as she saw the fit note and we note the email dated 3rd April where it was stated she was refusing to work with COVID patients due to existing health problems but the health problems were not the reason for the decision.

Knowledge

31. We accept that none of the Respondent's witnesses had actual knowledge of the Claimant's disability HIV while she was employed.
32. The question is whether the Respondent had constructive knowledge. We find that Catherine Williams knew that the Claimant had an underlying health condition as did the agency. The Claimant had submitted a fit note with limited detail that gave no information that the Claimant had a disability. That did not put the Respondent on notice in our finding as it did not make specific reference to any health condition short or long term. The claimant completed a COVID19 risk assessment from the agency which is at page 336. When asked '*do you have any underlying health conditions that might affect the work you are undertaking. She said 'No and Note I am over 60 with other underlying condition not listed.'*' She seems to be

saying that she has an underlying condition but that it would not affect her work.

33. We do not find that the respondent was put on sufficient notice. The Claimant agreed that she never told anyone in the hospital that she had a HIV diagnosis. The Claimant's evidence was that she had not disclosed her condition as it was stigmatised and we understand this. Catherine Williams was candid about whether she ought to have made further enquiries. She said perhaps she ought to have done but what we had to look at that whether the health condition was flagged up as a long-term condition and it was not. We take the context as important in this case in deciding as to what was reasonable. The situation was pressing, immediate and responsive. There was a background of the Respondent having to ensure patient safety and that there were a sufficient number of staff: it was an emergency situation. Before the Claimant was restricted the Respondent had made a operational decision that if agency staff weren't going to work on certain wards and not be flexible they should be restricted so that the Respondent could have staff that were available to service the unfolding care needs. There were also 150 bank staff per shift. We do not consider it would have been reasonable for the Respondent in those exceptional circumstances to proactively follow up the general reference to the Claimant's health condition.

34. Those findings mean that the s.15 and s.20 claims are to be dismissed and they have an impact on the other claims too but in fairness to the parties we have found facts and conclusions on the main elements in dispute as set out below.

Failure to make reasonable adjustments

PCP requiring qualified staff to work in ICU

35. Non ICU staff could be required to work in ICU as runners from April. The Respondent was looking for general qualified people to be runners. The Respondent did operate that PCP at the relevant time.

Did that place the Claimant at a substantial disadvantage?

36. The Claimant has HIV and therefore she says that she was more vulnerable to catching the virus because of her condition. We cannot be clear about this as we have no evidence of comparative vulnerability to catching a virus between the Claimant and persons who were not disabled.

37. The Respondent said the role of runner was lower risk. The Claimant said it was not. We have no objective evidence apart from the Respondent saying that there was a verbal risk assessment from senior nursing staff that the role was lower risk. There was no job description of the role and the parameters were not clear. It was not patient facing and was in a clean space. The Claimant says that her exposure to aerosols posed a risk to her of contracting the virus.

38. Notwithstanding that, the evidence that the PCP would have put the Claimant at a substantial disadvantage owing to vulnerability to catch the virus in comparison to non-disabled persons was not made out.
39. In any event placing the Claimant in a lower risk ward would not have alleviated any disadvantage. COVID19 was everywhere and she agreed with that.

Section 15

40. We had no medical evidence that the Claimant was at an increased vulnerability to catching COVID19. We ask ourselves whether the Claimant's refusal to work in ICU was because of her condition? She stated that she was at increased risk of exposure to the virus through aerosols and ventilation. We accept that she genuinely refused because she believed that it would affect her, given her condition. We accept the Claimant felt genuinely fearful about the aerosols in the environment and risks posed by ventilation and therefore we would find that there was a 'something arising'. We accept that there was unfavourable treatment through the cancellation of the already rostered shifts on 21st April and indefinite dismissal on 28th April. Was the Claimant's disability an effective cause of the unfavourable treatment. We took into account **Hall v Chief Constable of West Yorkshire** and found that it was on the looser causal test as set out in paragraph 42.
41. Was the decision proportionate? The legitimate aim was a safe workplace. The Respondent could not guarantee that she would not be working somewhere with low or no risk of COVID 19. The Respondent felt that it could only roster her after COVID19 situation had improved (paragraph 90 of the amended response). Given the unfolding situation we query what else could have been done by the Respondent and we find that the decision was proportionate. That was reflected in Catherine Williams' email dated 8th April.

s.26 Harassment

42. The cancellation of the Claimant's shifts going up to end of May 2020 and the dismissal on 28th April is the conduct relied upon. Did it relate to the Claimant's protected characteristic? It related to her refusal to work flexibly. The Respondent was not aware that the Claimant was disabled and we find it was not on those grounds but on the basis that the Claimant was not servicing the requirement to work flexibly as directed as set out in Catherine Williams' email. While we accept that the decision was very difficult for the Claimant but in the circumstances given the unfolding situation we do not find that it had the proscribed effect or that it was reasonable for the Claimant to find that it had this effect. The Respondent was reacting to an unfolding emergency situation.

Direct Discrimination

43. The Respondent did not treat the Claimant less favourably than it treated or would have treated a comparator without the Claimant's disability. The reason for treatment was not the disability because a) respondent did not have knowledge that the Claimant was disabled or of her condition and b) the Respondent would have restricted anyone who refused to work flexibly across the hospital as directed as seen by the email correspondence.

Reconsideration

44. After we had announced our decision Counsel for the Respondent indicated that an email dated 8th April that we had referred to in our findings of fact, which was redacted, was not about the Claimant but about another employee. We therefore retired to consider whether this would affect our decision in any material way. We considered that since we had found that the Claimant had genuinely refused to work because of her fear of catching COVID19 and not because of reasons related to her skills and experience the paragraph did not affect our findings of facts and conclusions. The paragraph has been left in the decision italicised and in parenthesis for completeness.

Employment Judge A Frazer

Date: 10 March 2023 (amended 12 April 2023)

Judgment & Reasons sent to the Parties: 28 March 2023
Amended Judgment sent to the Parties: 17 May 2023

For the Tribunals Office