



EMPLOYMENT TRIBUNALS

Claimant

Mr A Aruho

AND

Respondent

University College London Hospitals
NHS Foundation Trust

Heard at: London Central

On: 28 March – 4 April 2023

Before: Employment Judge Nicolle

Non-legal members: Mr I McLaughlin and Ms Z Darmas

For the Claimant: in person

For the Respondent: Ms J Danvers of counsel.

JUDGMENT

The claims for direct disability discrimination under s.13 of the Equality Act 2010 (the EQA), reasonable adjustments under s.20 and s.21 of the EQA, direct race discrimination under s.13 of the EQA, indirect race discrimination under s.19 of the EQA, harassment related to disability under s.26 of the EQA and victimisation under s.27 of the EQA fail and are dismissed.

The Hearing

1. The hearing took place in person between Wednesday 29 March and Tuesday 4 April 2023 and the Tribunal deliberated as to its decisions on 5 April 2023. The hearing was adjourned at lunchtime on Friday 31 March 2023 at the Claimant's request as result of his ill health and resumed at 10 AM on Monday, 3 April 2023.
2. There was an agreed bundle comprising of approximately 790 pages.
3. The Claimant gave evidence and Sharon Singh, Deputy Head of Supply Chain (Ms Singh), Alex Cunha, Supply Chain Team Leader (Mr Cunha), Ali Supply Chain Officer, (Mr Belhocine), James Reeve, Supply Chain Officer (seconded as Inventory Management Implementation Assistant) (Mr Reeve), Seema Chinniah, Supply Chain Manager, (Ms Chinniah), Sharon Stark, Supply

Chain Manager, (Ms Stark), Antonia Tineo, Supply Chain Officer, (Mr Tineo) and Launa Pettigrew, Senior Employee Relations Manager, (Ms Pettigrew) gave evidence on behalf of the Respondent.

The Issues

4. The issues are set out in the Case Management Order of EJ Joffe dated 11 December 2021 but as they run for 7 pages we do not repeat here but will address in our conclusions. In summary the claim involves allegations of direct disability discrimination, direct race discrimination, indirect race discrimination, an alleged failure by the respondent to make reasonable adjustments on account of the claimant's disability, harassment related to disability and victimisation.

Findings of Fact

The Claimant's position

5. On 15 July 2019 the Claimant started employment with the Respondent as a Supply Chain Officer within its Procurement Supply Chain Division.

6. The Claimant identifies as "black African". He was initially based at the Respondent's Westmoreland Street Hospital, before moving with effect from 1 February 2021 to work within the Supply Chain Team at University College Hospital ("UCH"). For a limited period prior to moving to UCH (also referred to as the Tower) he worked at Grafton Way which was not yet open for patients.

7. The Claimant applied unsuccessfully for a Band 4 role as a Team Leader, in July 2020 and then again in February 2021. The Respondent considered that his attitude and behaviour changed after the second unsuccessful application with it being alleged that he became disruptive and challenging.

8. The Claimant tested positive for Covid-19 on 17 January 2021. At this time he was based at Westmoreland Street Hospital.

The Supply Chain Officers

9. The Supply Chain Officers' role involves inventory management, chasing outstanding orders, receiving deliveries, putting delivered stock away in stock rooms and escalating any stock issues or discrepancies to other teams.

10. The Supply Chain Team is made up of 41 people, 6 Supervisors, 8 Team Leaders and 27 Supply Chain Officers. There are 2 Supply Chain Managers, Ms Chinniah and Ms Stark, who report to Ms Singh.

11. The employees in the Supply Chain Team are predominantly of BAME origin. There are currently 32 of BAME origin (7 Supervisors, 17 Team Leaders and 22 Supply Chain Officers) and 9 are white British (3 Supervisors, 1 Team Leader and 5 Supply Chain Officers). In the context of the Claimant's specific claim we were not provided with an ethnicity breakdown of BAME Supply Chain Officers, specifically with regards to those of African ethnic origins.

Job Description

12. The job description for a Supply Chain Officer refers to the Respondent providing services across 8 sites including UCH. It says that the post holder will normally be based within one of the Trust hospital sites but could be required to work at any site when circumstances demand.

Covid-19 Guidance & Risk Assessment

13. Ms Stark says that this document was circulated to all employees in May 2020. It includes the following:

“In a letter sent to NHS Trusts dated 29 April, NHSE/I have noted that there is emerging data to suggest that black, Asian and minority ethnic (BAME) communities are disproportionately affected by Covid-19”.

It identifies various risk categories to include BAME over 55 years and/or having an underlying health condition.

Email from Ms Singh to Supply Chain Officers dated 20 January 2021

14. Ms Singh advised that the Respondent had been asked to help with providing additional Materials Management resource in the form of Supply Chain Officers or Team Leaders to UCH. She concluded by saying:

“If you are interested please come back to me before Friday”.

15. The Respondent had not previously been responsible for the management of Critical Care Unit (CCU) consumables in the Tower at UCH as this had been outsourced to Mitie.

16. The Respondent says that no Supply Chain Officers were compelled to work in the Tower. It says that individuals would be selected, if there were not enough volunteers, based on their relevant experience and knowledge. The Claimant was chosen, partly based on his having previously volunteered to work at the Tower. We find no evidence that the Claimant objected to his assignment to work at the Tower. He therefore commenced on 1 February 2021.

17. The Respondent says that no employees objected to working in the Tower because of health concerns. However, there was an employee who asked not to work in the Tower, because of their possible emotional reaction, given that a family member had experienced an adverse health situation whilst in one of its Covid wards. The Respondent acceded to this request.

Claimant's return to work interview dated 27 January 2021

18. This was conducted by Joshua Terry, Supply Chain Supervisor, UCLH (Mr Terry). In an email to Ms Singh of 18 February 2021 he said that he had carried out a return to work interview with the Claimant but completed the document

shortly after the Claimant. The Claimant contends that the document is a “forgery”. The Respondent accepts that it was completed in a single person’s handwriting (Mr Terry’s) and did not include any comments written by the Claimant and nor was it signed by the Claimant or a representative of the Respondent. Ms Pettigrew says that this is not unusual. We reject the claimant’s contention that the document is a forgery.

19. The employee comment section refers to the Claimant having taken time off for Covid but saying that whilst the illness had made him weak he now feels better.

Email from Ms Singh to various dated 3 February 2021

20. Ms Singh advised that face masks must be worn at all times and that staff should use alcohol gels.

Email of 5 February 2021 regarding the Claimant

21. In an email from Conor Aldis (Mr Aldis) to Nasar Sadiq, Interim Senior Supply Chain Lead Project Manager, (Mr Sadiq) on 5 February 2021 he advised that the Claimant had refused to undertake a stock take in T2 stating that he was assigned to T3.

22. In a subsequent email from Mr Sadiq to Ms Singh of 5 February 2021 he stated that the Claimant was refusing to listen to a reasonable management instruction to carry out a stock take in the Vascular Ultrasound storeroom on T02.

Claimant’s email to Ms Singh of 8 February 2021

23. The Claimant contends that this constitutes a Protected Act. This email comprises 6 pages with 19 numbered paragraphs.

24. Whilst the email initially responded to the complaints raised by Mr Aldis and Mr Sadiq regarding the stock take in T02 on 5 February 2021 he went on to raise a series of other concerns. These included:

- That Marple House is in a “deplorable state”
- “I have expressed a reservation of working at the Tower for fear of my life giving how vulnerable I am at the moment”.
- “I expressed this fear with Aaron being placed in “high concentration” of Covid in the whole of UCLH. I find this negation of duty of care”.
- “My experience at the Tower is an endless encounter of Covid-19, patients in lifts, corridors, nurses come out of Covid-19 wards into the corridors all suited up without any warning, the sluice rooms have never been any riskier, given my current health condition I request and in absence of a health risk assessment (not done for

me) for employees recovering from Covid-19 like myself not to work in this place. I suggested that a constant review is required to ensure our safety. I also requested to have a speedy look into my situation in relation to the workplace before one of us becomes another statistic”.

10 February 2021

25. The Claimant was off work due to his wife testing positive for Covid-19. In evidence he said that he also tested positive for Covid. We accept the Claimant’s evidence that he tested positive for Covid at that time, albeit we consider it surprising that he did not make this clear to the Respondent.

Email from Ms Singh to the Claimant of 18 February 2021

26. In a 2 page email she referred to points arising from his interaction with Mr Aldis. She said that lessons could be learnt in regard to the Trust values by both parties. She said that she had definitely seen a less favourable side as to how the Claimant had conducted himself.

27. She referred to various steps taken to address issues raised by the Claimant at Marple House.

28. She said that all staff had been asked to complete a Risk Assessment via an email sent on 22 May 2020 if they believed they fell into a Covid risk category. She said that on confirmation with Occupational Health (OH) there is no other Risk Assessment available to those returning to work after having Covid.

29. On 19 February 2021 the Claimant was signed off work for a month with post viral symptoms.

The Claimant’s work at Podium Theatres Three (P3)

30. On 1 April 2021 the Claimant returned to work at UCH Podium Theatres Three (P3 or the Podium). The Podium comprises 4 floors with a separate goods lifts for staff accessible from the UCH loading bay. P3 Theatres is the only department on the 3rd floor of the Podium. There is a walkway from the Podium to the Tower.

31. The Respondent says that the Claimant was moved from the Tower to P3 because of the concerns he had raised about the working conditions in the Tower and more specifically the Covid departments. In particular the Respondent says, and we accept, that P3 was a non-Covid area and therefore low risk.

Claimant’s referral to occupational health on 6 April 2021

32. This document was emailed to the Claimant prior to being submitted to OH. It referred to his having tested positive for Covid on 17 January 2021 and having then self-isolated from 10 to 19 February 2021.

Claimant meeting with Emily Mapfuwa, Senior OH Advisor (Ms Mapfuwa) on 13 April 2021

33. In her report to Ms Chinniah dated 13 April 2021 she gave as background that the Claimant had been off sick long term as result of twice being infected by Covid. She said that his current situation involved symptoms consistent with potential Long Covid. These symptoms included fatigue, sore throat, constant dryness of mouth and throat. She said that the fatigue impacts his day-to-day functions. She said that he was anxious due to the ecosystem of the environment he works in. He is anxious about the working space that does not seem to allow for sufficient social distancing to ensure wellbeing. She said that these were all sources of anxiety for him.

34. She said that Long Covid symptoms are likely to be limiting his ability. She advised that redeployment needs to be considered and that a Risk Assessment should be completed.

35. On 20 April 2021 the Claimant was signed off until 4 May 2021 because of Post-Covid Syndrome.

Email from Ms Chinniah to Ms Mapfuwa of 16 April 2021

36. Ms Chinniah advised that there were no other Band 3 roles within Procurement and Supply Chain that could accommodate the Claimant's redeployment.

The Claimant's return to work on 5 May 2021

37. The Claimant completed a return to work assessment on 5 May 2021. This refers to his illness as being "Covid-19". In response to a question from Employment Judge Nicolle he said that he had contracted Covid on or about 26 April 2021. We considered that the Claimant was extremely evasive regarding whether he contracted Covid, or whether as the contemporaneous evidence suggests that he was off work as a result of Post-Covid symptoms. We find on the balance of probabilities that the Claimant is unlikely to have contracted Covid again at this point. Whilst he claims that he told Ms Chinniah in the corridor that he had again contracted Covid she disputes this. Further, we do not consider that the reference to "Covid-19" on the return to work form is necessarily consistent with him contracting Covid for the third time in 2021 but rather it is much more likely that it represents a generic reference to Covid and Post-Covid symptoms in circumstances where the Claimant had been signed off on several occasions with post Covid symptoms. The Claimant was unable to produce any evidence, whether as a text from NHS test and trace, or otherwise to support his assertion of a 3rd Covid infection.

Claimant Risk Assessment of 5 May 2021

38. The Claimant undertook a Risk Assessment with Ms Chinniah on 5 May 2021. This referred to "Post-Covid Syndrome".

Alleged incident with Mr Belhocine on 5 May 2021.

39. Mr Belhocine says that the Claimant had not been seen for a number of hours and he was concerned that he was not contributing to the team. He says that he found him in the nurses' rest room sitting on a sofa. He says that there were 4 other staff members in the room.

40. The Claimant variously alleges that Mr Belhocine "manhandled or assaulted him". Mr Belhocine denies making any physical contact with the Claimant.

41. In an email from Mr Belhocine to Ms Chinniah of 5 May 2021 he refers to the Claimant's "aggressive attitude" and that he had been very rude and talking over him and raising his voice. He went on to say that the Claimant had called him a "snitch". He expressed feeling very frustrated and angry with the situation.

Team meeting on 6 May 2021

42. The meeting took place at the Claimant's request. The Claimant says that the team complained about him not working as hard as them and that other team members "stormed out". We find it likely given the concerns raised by Mr Belhocine and others regarding the Claimant's apparent lack of work subsequent to his return on 5 May 2021 that concerns were raised with him regarding his lack of apparent effort. Further, we find that Mr Reeves did leave the meeting abruptly but not in a way that could be characterised as "storming out". We also find that Mr Cunha telling the Claimant words to the effect of he might as well go home was characteristic with his and others' frustration regarding what they perceived as the Claimant's negative attitude and lack of effort.

Claimant's email to Ms Chinniah of 6 May 2021

43. The Claimant stated that his physical and mental health has continued to get worse. He said that his mental health working in P3 and the entire ecosystem around it has been adversely affected.

44. In an email from Ms Chinniah to the Claimant on 6 May 2021 she stated that the Respondent had not been instructed by his GP or Occupational Health (OH) for his duties to be amended and therefore he should continue with the tasks assigned by his team leader. She asked him to address his concerns in writing in regard to his duties and health.

Email from the Claimant to Ms Stark of 6 May 2012

45. The Claimant referred to what he contended was a "hostile environment". He says that he had been asked to go home.

Email from Mr Cunha to Ms Chinniah of 9:44 on 6 May 2021

46. He referred to a meeting which had taken place that morning and that he had advised the Claimant to go home.

Meeting between the Claimant, OH, HR and Ms Chinniah on 7 May 2021

47. The Claimant alleges that he was asked what he contends were invasive questions regarding his health. The Claimant did not give specific examples as to what he objected to but this it would appear that this was particularly in respect of questions regarding his mental wellbeing. We find that the questions asked by Ms Chinniah were entirely appropriate in the context of the concerns identified by the Claimant and his engagement with OH. We consider it wholly unrealistic for the Claimant to expect that the meeting would solely focus on redeployment and other adjustments without any consideration being given to his current health situation.

Email from Ms Chinniah to Fabian Weier of OH (Mr Weier) of 7 May 2021

48. The email was copied to Adrian Buckingham, Deputy Director. Mr Chinniah said that she had serious concerns regarding the Claimant's mental health state. She referred to him in a meeting with her shaking, and having high levels of anxiety and fearing for his life working in P3.

49. On 7 May 2021 the Claimant was signed off work for a month with post Covid.

Email from Mr Weier to the Claimant of 13 May 2021

50. Mr Weier advised the Claimant that his manager had outlined that his move to P3 was based on the recommendation from OH, to ensure the need for physical movement, and therefore exposure in his role, was reduced.

Occupational Health Report of 2 June 2021

51. T R Ashika Sequeira, OH Physician had a telephone conversation with the Claimant on 2 June 2021. She said that he had reported symptoms following Covid infection and psychological symptoms. She recorded the Claimant as having said that an adequate Risk Assessment had not been undertaken, that he was continuing to perform heavy manual duties, and returned to work full time without a phased return and his perceived lack of support from Management regarding OH/GP recommendations. She said he was fit to work with adjustments and that it seemed likely he had symptoms consistent with Long Covid. She said that from available evidence, Long Covid symptoms can persist for months (possibly longer) after initial infection.

52. She went on to say that the Claimant is likely to cope better in a sedentary (desk based) role that requires lighter duties. She said that in respect of Covid he fell into the low risk category of vulnerability taking into account his personal health risk factors. She recommended a manual Risk Assessment, opportunity to take short breaks, a gradual increase in hours rather than an immediate return to full-time working and that a work stress Risk Assessment be undertaken.

Email from Ms Chinniah to the Claimant on 14 June 2021

53. In relation to the manual handling and stress Risk Assessment she recorded that during a conversation on 9 June 2021 the Claimant had stated that he did not want to complete these with her as he had lost trust in her and that the process was taking too long to resolve. She said that she had asked if he would like Edward Kontoh, Supervisor at P3 (Mr Kontoh) to complete the assessment but he had refused. She went on to set out the Respondent's position in relation to the physical demands of duties, social distancing, regular breaks, phased return, and staff psychological and welfare services. In summary her response was that P3 represented the best option for the Claimant and that all possible reasonable adjustments had already been undertaken given the limitations regarding, for example, social distancing in a hospital environment.

Letter from MIND to the Claimant of 16 June 2021

54. This refers to the Claimant having attended an assessment on 20 May 2021. It says that his levels of anxiety and depression are 9 and 14 respectively. It referred to a referral to the Life After Loss Bereavement Service. The Claimant says that this did not refer to a bereavement but was more a generic reference to counselling services in the context of Covid and general resulting anxiety. We consider that the Claimant's evidence in this respect is not credible and that the clear and obvious reading of the letter is a referral to post bereavement counselling following the death of a family member or close friend.

55. On 18 June 2021 the Claimant was signed off work for one month with Post- Covid Syndrome.

56. On 6 July 2021 the Claimant was signed off work until 20 July 2021 with Post-Covid Syndrome.

57. The Claimant returned to work on 21 July 2021.

Email from Opope Ogunleye, Senior Employee Relations Advisor, UCLH (Ms Ogunleye) to the claimant of 28 July 2021

58. Ms Ogunleye referred to the Claimant's employee led complaint to the ER Team. She rejected his various complaints regarding his deployment to P3, his allegation that OH reports and recommendations made by his doctor had been rejected, that he had been treated unfairly because he had raised concerns about health and safety, that he had been discriminated against and bullied and harassed by Ms Chinniah.

59. On 8 August 2021 the Claimant was signed off work until 13 September 2021 with Post-Covid Syndrome.

60. In an email from the Claimant to Ms Chinniah of 10 August 2021 he stated that PPE is a slide show that requires reading. This email was sent in relation to an automated reminder he had received regarding mandatory annual update training. The Claimant says that he had never had any training regarding PPE. The Respondent's position is that he had received such training in or about April

2020 but it is acknowledged that he had not received any specific training in relation to PPE in a Covid environment.

Report on Claimant from Kuntal Shar, SPR2 Consultant ENT/Head and Neck Surgeon dated 20 October 2021

61. This followed a referral of the Claimant from the respiratory team with post Covid syndrome and anxiety. The report referred to him having what seemed like a quite severe Covid infection in January 2021 and subsequently experiencing Post-Covid Syndrome.

Letter from Dr S M Choudhry regarding the Claimant dated 12 January 2022

62. This referred to the Claimant having a Covid infection in January 2021 and then developing Post-Covid Syndrome suffering from chest pains, shortness of breath, dry sore throat, continuous cough, tiredness, anxiety and depression. He said that he had started on anti-depressants and also advised a self-referral for counselling.

Report from Dr Akshita Devaraj, Clinical Fellow-Post Covid dated 16 February 2022

63. This referred to the Claimant experiencing symptoms consistent with Long Covid and that he had not noticed any improvements in symptoms since his last consultation in September 2021. It referred to him experiencing frequent panic attacks associated with palpitations and breathlessness. He had been referred to the Covid Psychology Team.

Claimant's disability impact statement

64. This referred to the Claimant experiencing post viral syndromes and anxiety and depression as result of what he contends are the Respondent's direct actions and inaction. He said that the problems had lasted for more than a year since January 2021.

The Claimant's evidence

65. We considered that there were several occasions where the Claimant's evidence was inconsistent, selective or evasive. We formed the impression that he would sometimes seek to create uncertainty by refusing to acknowledge what should have been evident to him but rather rely on highlighting potential inconsistencies in the documentary record and/or the respondent's witness evidence. In particular we refer to the following:

- His statement in response to a question from the Judge that he had Covid for a 3rd time in April 2021 when this is not recorded in the contemporaneous documents, but repeatedly failed to answer the question as to whether he had Covid, but instead relied on pointing to the 5 May 2021 return to work interview which referred to "Covid-19".

- His refusal to accept that at the time he was deployed to P3 in April 2021 that it contained no Covid patients.
- His apparently deliberate, or at best disingenuous, refusal to draw a distinction between P3 and the Tower and frequently referring to elements within the Tower when referring to his work in P3.

The Claimant's comment regarding questions asked of the Respondents' witnesses by Employment Judge Nicolle

66. On the 4th day of the hearing after the Judge asked 3 questions of Ms Stark the Claimant stated that he considered that his questions had the effect of filling in gaps in the Respondent's evidence. The Judge explained to the Claimant that this was not the case and that the questions asked were to seek clarity arising from matters in the witness evidence. The particular questions concerned whether there had been any refusals to work in the Tower because of Covid concerns, whether there were any Covid patients in P3 in the Material Period, were there any staff who refused to work in P3 and what was the process if an employee turned up to work and had not objected.

The Law

Time limit for discrimination claims

67. S123 provides:

- (1) Proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section
 - (a) conduct extending over a period is to be treated as done at the end of the period.
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

68. For acts extending over a period, it is relevant to consider whether a discriminatory regime, rule, practice, or principle, which had a clear and adverse effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

69. Guidance was provided in analysing what constitutes conduct extending over a period in Hendricks v. Metropolitan Police Commissioner [2003] IRLR 96 to include per Mummery LJ in the Court of Appeal at paragraph 48:

“the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs, by the concept of an act extending over a period”.

70. Extension of time under s123(3) is the exception rather than the rule Robertson v. Bexley Community Centre [2003] IRLR 434.

71. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: Neary v Governing Body of St Albans Girls' School [2010] ICR 473. Section 33 requires the court to take into account all the circumstances of the case, and in particular the factors set out at s.33(3). Those factors which are relevant to the claim are:

- (a) the length of, and reasons for, the delay by the claimant;
- (b) The extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the promptness with which the claimant acted once she/he knew of the facts giving rise to the cause of action; and
- (d) the steps taken by the claimant to obtain appropriate professional advice once she/he knew of the possibility of taking action.

72. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, while the checklist in s.33 provides a useful guide for tribunals, it need not be adhered to slavishly.

Race and disability discrimination and the burden of proof

73. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

74. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA). The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination

Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

“Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

75. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870:

“They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”

Conscious or unconscious thoughts of the alleged discriminator

76. An act may be rendered discriminatory by the mental processes, conscious or nonconscious, of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877, HL. In such cases, the tribunal must ask itself what the reason was for the alleged discriminator’s actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that answers the question of whether the claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin. per Lord Nicholls:

“In every case...it is necessary to enquire why the claimant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance because the claimant was not so well qualified for the job. Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision.”

77. A benign motive is irrelevant when considering direct discrimination: Nagarajan at 884G-885D, per Lord Nicholls. It is irrelevant whether the alleged discriminator thought the reason for the treatment was the protected characteristic, as there may be subconscious motivation: Nagarajan at 885E H:

“I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes, and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough

investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds.”

Drawing of inferences

78. It is not sufficient for to draw an inference of discrimination based on an “intuitive hunch” without findings of primary fact to back it: Chapman and Anor v Simon [1994] IRLR 124.

79. The process of drawing inferences is a demanding task. If a tribunal is to make a finding of discrimination on the basis of inference, per Mummery J in Qureshi v Victoria University of Manchester [2001] ICR 863:

“It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. An intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion.”

80. In determining whether a claimant has established a prima facie case, the tribunal must reach findings as to the primary facts and any circumstantial matters that it considers relevant: Anya v University of Oxford and Anor [2001] IRLR 377 (CA). Having established those facts, the tribunal must decide whether those facts are sufficient to justify an inference that discrimination has taken place.

81. Where there are multiple allegations, the tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an “across the board approach” when deciding if the burden of proof shifted in respect of all allegations: Essex County Council v Jarrett UKEAT/19/JOJ.

82. The less favourable treatment must be because of a protected characteristic and that requires the tribunal to consider the reason why the claimant was treated less favourably in accordance with the guidance in Nagarajan. The tribunal needs to consider the conscious or subconscious mental processes which led the respondent to take a particular course of action in respect of the claimant and to consider whether her gender played a significant part in the treatment: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Direct discrimination

83. Under s13 (1) of the EQA read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

84. Discrimination includes subjecting a worker to a detriment (S.39 EQA).

85. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristic. However, in some cases, for example, where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

86. In a direct disability discrimination case, where a tribunal is concerned with the state of mind of an alleged discriminator which caused him or her to act in the way alleged, the alleged discriminator must have actual knowledge rather than constructive knowledge of the disability; or at least the actual facts from which it can be concluded that the employee was potentially disabled.

Indirect discrimination

87. The EQA provides:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

88. In Ishola v Transport for London [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.

89. In considering whether there is group disadvantage, a Tribunal needs to identify the correct pool for comparison. There must be no material difference between the circumstances relating to each case (s.23 EQA). It is for the Claimant to prove group disadvantage. In certain cases it is possible for a Tribunal to reach conclusions based on its own knowledge and experience.

90. Courts and Tribunals are entitled to take judicial notice of facts which are so notorious or so well established that the knowledge can be accepted without further enquiry. A party seeking judicial notice of a fact has the burden of convincing a Tribunal that the matter is one capable of being accepted without further enquiry.

Justification

91. It is for the employer to prove that a PCP is justified. Further, can the aim be achieved by less discriminatory means.

Disability

92. A person has a disability if he has a mental or physical impairment which is long term (i.e. has lasted 12 months or is likely to do so); and has a substantial adverse effect on his ability to carry out normal day-to-day activities (s.6 EQA).

93. The burden is on the Claimant to show that he has one or more disabilities.

94. "Substantial" means more than minor or trivial (s.2 112 EQA). In assessing the effects of a disability it is permissible to consider the cumulative effects of impairments.

95. When considering the potential effects of an impairment in the absence of treatment and whether the effects were likely to last for more than 12 months, "likely" should be interpreted as "could well happen" in accordance with Boyle v SCA Packaging Limited [2009] ICR1056. In assessing whether the Claimant had one or more disabilities we took account of the guidance in Goodwin v Patent Office [1999] IRLR 4 and the sequential steps recommended to be followed namely:

- Did the Claimant have a mental and/or physical impairment?
- Did the impairment affect the Claimants ability to carry out normal day-to-day activities?

- Was the adverse conditions substantial; and
- Was the adverse condition long term?

96. The time at which to assess the disability is the date of the alleged discriminatory act as per Crookshank v VAW Motorcast Limited [2-002] ICR 729. This is also the Material Period when determining whether the impairment has a long term effect. This is to be assessed by reference to the facts and circumstances existing at the date of the alleged discrimination so a tribunal is not entitled to have regard to events occurring subsequently.

Reasonable Adjustments

97. S.39(5) of the EQA imposes a duty to make reasonable adjustments on an employer. S.20 provides that where a provision, criterion, or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to take in order to avoid the disadvantage.

98. A Tribunal must first identify:

- The PCP applied by or on behalf of the employer;
- The identity of non-disabled comparators; and
- The nature and extent of the substantial disadvantage suffered by the Claimant in comparison with those comparators.

99. The test of reasonableness imports an objective standard.

100. A Tribunal must examine the issue not just from the perspective of the Claimant but also consider wider implications including the operation objectives of the employer.

101. For the s.20 EQA to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it.

Medical evidence

102. In Morgan v Staffordshire University [2002] ICR475 it was held that reference to the applicants GP notes was insufficient to establish that she was suffering from a disabling depression.

103. A Claimant must establish that there is the necessary link between the disability and treatment complained of.

Harassment

104. Under s26, EQA, a person harasses the claimant if he or she engages in unwanted conduct related to a protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

105. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, where Mr Justice Underhill (as he then was) gave this guidance:

“An employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.’

106. General Municipal and Boilermakers Union v Henderson [2015] IRLR 451 is authority for a single incident being unlikely to be sufficient to create an environment sufficient to give rise to an offence of harassment.

Victimisation

107. Under s27 EQA, it is victimisation for a respondent to subject a claimant to a detriment because he had done a protected act. A ‘protected act’ includes making an allegation (whether or not express) that someone has contravened the EQA.

108. For the test that needs to be applied useful guidance is provided in Shamoon and that an unjustified sense of grievance cannot amount to a detriment. The test to be applied in determining whether a detriment exists is if a reasonable worker would, or might, take the view that the treatment was in the circumstances to his or her detriment. This must be applied by considering the issue from the point of view of the victim. While an unjustified sense of grievance about an alleged discriminatory decision cannot constitute detriment a justified and reasonable sense of grievance about the decision may do so.

Discussion and conclusions

109. We set out below our findings in relation to the issues as set out in pages 69-74 of the case management order of EJ Joffe dated 10 December 2021. Given the number of individual issues identified and the significant overlap between the respective claims for disability discrimination, race discrimination and victimisation we will not repeat our findings in respect of many of the individual issues to avoid the judgment becoming unnecessarily repetitious.

110. We will address the issues in the order set out save that we will deal with jurisdiction on account of time separately in respect of disability and race discrimination.

Disability

Did the Claimant have a disability as defined in s.6 of the EQA at the time of the events the claim is about?

Did he have a physical or mental impairment: Long Covid/Covid syndrome, anxiety, and depression?

Did they have a substantial adverse effect on his ability to carry out day-to-day activities?

If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatments or other measures?

Were the effects of the impairment long term?

Did they last at least 12 months, or were they likely to last at least 12 months?

If not, were they likely to recur?

111. We consider it preferable to address the above issues separately in relation to Long Covid and anxiety/depression but we will then go on to consider whether the cumulative effect of the above conditions would constitute a disability in the event that individually they do not. We also consider it preferable to address the above factors in determining the existence of a disability cumulatively but nevertheless adopting a sequential approach as provided for in Goodwin.

Long Covid / Covid Syndrome

112. The Respondent acknowledges that the Claimant suffered from Long Covid but does not accept that he had this condition in what it says is the Material Period from 1 February 2021 until 14 June 2021.

113. We need to consider when the Claimant started suffering from the physical impairment of Long Covid. Whilst in evidence the Claimant sought to argue that the commencement of Long Covid should be traced back to the date of his first infection with Covid-19 on 17 January 2021 we reject this contention. We consider it relevant that the Claimant says that he had further bouts of Covid in February and April 2021.

114. We apply judicial notice to the varying levels of ill health and periods of recovery from those contracting Covid. Some will have mild symptoms and be fully recovered after the minimum 10 day period of self-isolation whilst others will continue to suffer adverse ill health for several weeks after infection. However, this is not to say that all of those individuals experiencing on going effects beyond the 10 day isolation period have Long Covid.

115. Given that we have accepted that the Claimant had a second bout of Covid in mid February 2021 we do not consider it possible that he would have had Long Covid until at least some weeks after this. This is on the basis that on the balance of probabilities we do not accept the Claimant's evidence that he had a third bout of Covid in April 2021.

116. We take account of the fact that the Claimant was signed off work on 19 February 2021 with Post Covid Syndrome but nevertheless given that he had recently had a second bout of Covid this was in all probability a reaction to two bouts of Covid within the previous month rather than Long Covid. We consider that at the date of the Occupational Health report on 13 April 2021 the Claimant was exhibiting systems consistent with Long Covid. We therefore consider that the physical impairments the Claimant was experiencing at this date were consistent with a disability given that they were in our opinion having a substantial adverse effect on his ability to carry out normal day-to-day activities.

117. The Claimant was not having any treatment for Long Covid so we do not need to consider any issues regarding what the deduced effect would have been without such treatment.

118. The principal issue we need to address is whether the effects of the impairment were long term. Clearly as of 13 April 2021 they had not lasted at least 12 months given that we have dated the inception of the condition as 13 April 2021. Therefore we need to consider whether they were likely to last at least 12 months. We find that they were not. In reaching this decision we have applied the guidance in Boyle that "likely" should be interpreted as "could well happen". We reach this finding for the following reasons.

119. It is important that we consider this question at the time of the acts and omissions in respect of which the Claimant complains which we consider took place in the period 1 February 2021 until 14 June 2021 (the Material Period) when Ms Chinniah responded to the OH recommendations setting out what steps the Respondent was and was not able to take. We accept the Respondent's argument that at 14 June 2021 the claim in respect of failure to make reasonable adjustments had crystallised.

120. Whilst we accept that the Claimant has as a matter of fact experienced substantial long term adverse effects from Long Covid this would involve applying subsequent knowledge as to the course of the condition rather than assessing the likelihood of that condition continuing during the Material Period.

121. Many people experience symptoms after Covid for weeks or months but then recover. Some people exhibit adverse ill effects e.g. fatigue for weeks or months afterwards but not to an extent sufficient to constitute a substantial adverse effect on day-to-day activities.

122. The burden is on the Claimant to show that in the Material Period it could well happen that substantial adverse effects of Long Covid would persist for more than 12 months. We do not consider that he has satisfied this burden.

123. Most individuals who had ongoing Covid symptoms would improve with time. We take account of what the Claimant said at the time, for example, the return to work meeting with Mr Terry at which he said he was feeling better than he had.

124. We also consider that the Claimant's purported position that he had three separate bouts of Covid within a three month period, albeit we found on the balance of probabilities that he did not have Covid in April 2021, would have been highly likely to result in some ongoing adverse health effects. These would be likely to take some time to alleviate but we do not consider that it could be said that it was likely that they would persist for at least 12 months.

Depression/Anxiety

125. In assessing this question we draw a distinction between clinical depression and what could be considered a reaction to adverse circumstances.

126. The Claimant has provided no objective evidence that in the Material Period he was suffering from anxiety or depression as opposed to feelings of anxiety as a result of concerns pertaining to Covid. It is relevant that none of the Claimant's sick notes in the Material Period refer to anxiety or depression. Whilst he disclosed a letter from MIND dated 16 June 2021 referring to his appointment on 20 May 2021 this does not provide clear evidence of him suffering from anxiety and/or depression having a substantial adverse long term effect. It is relevant that it referred to bereavement counselling. We reject the Claimant's contention that this was a generic reference to counselling services but consider it far more probable that it pertained to him having suffered a bereavement.

127. We do not consider that the Claimant's GP letter dated 30 January 2022 provides clear evidence that he was suffering from anxiety and/or depression in the Material Period. We find that this is a generic letter without specific time periods and focusses primarily on the Claimant suffering from Long Covid. No indication is given as to the time point at which he started suffering from anxiety and/or depression and the extent to which these conditions had a substantial adverse effect on his ability to carry out normal day-to-day activities. Further, the Claimant did not disclose his GP records as ordered. Therefore, it is not possible

for us to determine the likely start date for him experiencing adverse effects from depression and/or anxiety.

Cumulative effect of Long Covid and anxiety/depression

128. We consider that the Claimant's experience of anxiety and depression, which we consider existed, was wholly or mainly as a result of his concerns pertaining to Covid and his work arrangements. We accept that the Claimant, together with millions of other people in the UK, had serious concerns regarding the health consequences for him and his family of Covid. We accept that the Claimant experienced adverse health effects from his repeated infections with Covid and understandably was concerned of potential further infection and the ongoing consequences to his health.

129. Nevertheless, for the reasons set out above in respect of both Long Covid and anxiety/depression we do not consider in the Material Period it likely that these effects would have a long term substantial adverse effect.

Time limits relating to disability

130. Notwithstanding our findings that the Claimant did not have a disability in the Material Period we set out our findings in relation to all of the issues as pleaded.

131. In respect of disability any acts or omissions prior to 21 March 2021 would be out of time unless we consider that they formed part of a continuing course of conduct or exercise our discretion on the basis that it would be just and equitable to do so.

132. We find that the events relied upon by the Claimant from 1 February 2021 in respect of his claims of disability discrimination were part of a continuing course of conduct. We reach this finding given that all events from 1 February 2021 broadly included the Claimant's same or similar contentions that the Respondent had failed in its obligation to make reasonable adjustments on account of what he contended constituted a disability. We do not draw a distinction between his being deployed to the Tower on 1 February 2021 and his subsequent deployment to P3 from 1 April 2021.

133. Alternatively, we consider that it would be just and equitable to exercise our discretion to extend time. We reach this finding in the context of the gradually evolving understanding by the Claimant of the extent and possible duration of his adverse health effects and also that during the Material Period he contends he was suffering from anxiety and/or depression and his ability to take proactive steps in order to protect his legal position would arguably have been compromised. We also do not consider that the Respondent suffers significant prejudice as a result of this discretion being exercised given that it would go in any event, have to address acts and omissions subsequent to 21 March 2021.

Direct disability discrimination (s.13 EQA)

Respondent's knowledge of the Claimant's alleged disabilities

134. We find that prior to the OH report of 13 April 2021 the Respondent did not have actual or imputed knowledge of the Claimant suffering from Long Covid. Further, we find that the Respondent did not have actual or imputed knowledge of the Claimant suffering from anxiety and/or depression during the Material Period. Whilst the Respondent was aware that the Claimant was anxious regarding his work situation this is not sufficient to constitute actual or imputed knowledge of the existence of a condition potentially amounting to a disability.

Did the Respondent do the following things?

On 6 May 2021 in a meeting, the Claimant's team complaining about him not working as hard as them?

135. We accept that during the meeting on 6 May 2021 the Claimant's team complained about him not working as hard as them. We reach this finding given that many of the Respondent's witnesses referred to their perception that the Claimant had become increasingly difficult and demotivated arguably as a result of his failure to achieve the promotion he twice sought. Further, it is self-evident that Mr Belhocine was concerned that the Claimant was not pulling his weight given that on 5 May 2021 he had been concerned where he was and actively sought to locate him and then found him sitting on a sofa in the nurses' rest room.

136. In these circumstances we consider that it was inevitable that the Claimants' colleagues would have a feeling that he was not contributing at a time when there was inevitably additional pressure on resources given the Covid situation and crowded hospital wards.

137. We do not, however, consider that the Claimant was treated any differently to how any other employee would have been treated regardless of the existence of a disability. Any comparator without a purported disability, who was not actively working and was found sitting on a sofa during working time, would in all probability have experienced the irritation of their colleagues.

On 6 May 2021 the Claimant's team storming out of the meeting

138. We find that Mr Reeve left the meeting abruptly, however, we do not consider that this constituted "storming out". It is apparent that Mr Reeve and Mr Cunha were exacerbated by the Claimant's attitude and what they referred to as his continuously interrupting and talking over them. In these circumstances we consider that it was understandable that they would have left the meeting on the basis that it was not productive. In any event we consider that they would have responded exactly the same way in the case of an individual not alleging that they were suffering from a disability.

On 6 May 2021, Mr Belhocine manhandling the Claimant when he was taking a break and saying he needed to start working

139. As set out in the findings of fact we reject the Claimant's contention that Mr Belhocine manhandled him. His evidence on this issue was inconsistent. Further, had such manhandling/assault taken place we consider that the Claimant would inevitably have raised a contemporaneous complaint. He did not do so. Whilst he raised concerns regarding the meeting of 6 May 2021 these were in generic terms regarding the working environment rather than specifically in respect of a manhandling.

On 6 May 2021, Mr Cunha telling the Claimant to go home if he was not going to perform his full duties

140. We find that Mr Cunha said this. However, we consider that he was justified in doing so given that he and his colleagues were of the view that the Claimant was not performing any productive work duties. The Claimant's own evidence was to the effect that he was not able to/did not perform his work duties to any material extent from 1 April 2021 onwards. Further, we find that the Respondent would have dealt with any employee not alleging they had a disability in exactly the same way.

Ms Stark doing nothing to address the bullying after the Claimant complained to her about it

141. We reject this contention. Whilst the Claimant told Ms Stark that he had been told to go home, he did not mention bullying. Further, Ms Stark passed that onto Ms Singh and Ms Chinniah. In any event we accept that the reason Ms Stark took no further action was because Ms Chinniah had already responded to the Claimant and he was not in her team. As such we find that there was no material from which we could draw an inference that the treatment was because of or related to disability.

Ms Chinniah not addressing the bullying of the Claimant and pretending nothing had happened

142. We find that this did not happen. In response to the Claimant's email to Ms Stark, Ms Chinniah emailed him asking that he set out his concerns in writing. He replied saying that a meeting needed to take place and indicating his health was getting worse but he did not make a complaint of bullying or expand on his allegation of a "hostile environment".

143. Further, we do not consider that there are grounds to infer that Ms Chinniah was consciously or unconsciously influenced by the Claimant's purported disability in the way that she dealt with the matter.

144. Therefore we find that the Claimant did not suffer less favourable treatment on account of his alleged disabilities.

Reasonable adjustments (s.20 and s.21 EQA)

145. We find it more logical to deal with this element of the claim prior to addressing the allegations of direct and indirect race discrimination.

146. We consider it preferable to address each of the adjustments, together with what steps could have been taken to avoid the disadvantage, conjunctively rather than separately to avoid the judgment becoming unwieldy.

Requiring employees to work at the Tower

147. We accept that this requirement existed and it constituted a PCP. However, as set out above we find that there was not compulsion on any individual employee to accept this deployment and that the Respondent would have taken into account any specific objections an employee may have had whether on health or other grounds. The Claimant put forward no objections prior to his deployment to the Tower.

148. We do not accept that requiring the Claimant to work at the Tower put him at a substantial disadvantage compared to other employees not having a purported disability. There was, at the time of his deployment, no reason to believe that he would suffer any greater ill effects and/or anxiety by working at the Tower than any other employee. Given that the Claimant had returned to work following his first bout of Covid on 27 January 2021, after the minimum 10 day period of self isolation there was no reason to believe that he had suffered any untoward adverse ill health effects from his infection.

149. We therefore find that the Respondent could not have been expected to know that the Claimant was likely to be placed at a disadvantage. Further, we find that the Respondent required some of its Supply Chain Officers to work at the Tower, and if it was not the Claimant it would have been someone else, and there was no reason to perceive that he would be any more disadvantaged than any other employee with or without a disability.

150. In any event, when the Claimant returned to work on 1 April 2021, following further periods of ill health, the Respondent reassigned him to P3. We accept that they did so with a view to minimising the impact on him of his working arrangements given his health concerns. We find that in doing so the Respondent took such steps as it was reasonable to take to avoid any disadvantage to the Claimant. We reject the Claimant's contention that there was an interchangeability between the Tower and P3. This is wholly inconsistent with the evidence as to the position during the Material Period.

Requiring employees to work in conditions where social distancing was not possible (exacerbating the Claimant's anxiety and depression)

151. We accept that social distancing was not always possible. This was inevitable in the context of a hospital building which was not built to enable two metre social distancing. If this had been a requirement the hospital would not have been able to operate. Therefore we accept that the maximum extent of the Respondent's reasonable obligation was to minimise personal interaction

between colleagues and patients rather than an absolute obligation to maintain a minimum two 2 metre social distancing.

152. P3 only involved the Claimant having to come into contact with staff and patients who were required to have negative Covid tests.

153. We reject the Claimant's contention that a reasonable adjustment would have been for the Respondent to move him to Grafton Way. Grafton Way was also not designed for social distancing, so from April 2021 onwards when it opened, it would not have been possible to socially distance there either. Further, he would have come into contact with external contractors and delivery drivers and been required to undertake manual handling and having to push and pull up heavy loads which was not compatible with his fatigue. Further, there was no requirement for further Supply Chain Officers at Grafton Way.

154. We consider that the Claimant's position regarding redeployment was uncertain as to whether he wanted to go to Grafton Way, West Moreland Street, or some other location. For example, he asked via his GP to return to West Moreland Street and not Grafton Way.

Requiring employees to work in corridors with Covid patients and medical personnel with Covid patients (exacerbating the Claimant's anxiety and depression)

Requiring Supply Chain Officers to check stock areas which were in Covid zones

155. We accept that in the 9 days the Claimant worked at the Tower he had at times to work in corridors with Covid patients and medical personnel in contact with Covid patients. Further, he had to check stock in Covid zones. We do not, however, accept the Claimant's ambiguous evidence that he had any significant necessity to enter Covid wards.

156. At P3 we accept that this constituted a "green zone" and that there were no Covid patients.

Requiring employees to work without adequate PPE

157. We reject the contention that the Claimant, and other employees, were required to work without adequate PPE. Supply Chain Officers were provided with FFP3 face masks.

Requiring employees to work without Covid training

158. We accept that the Claimant and his colleagues were provided with Level 1 PPE training and infection control training. Whilst the Claimant has raised general criticisms of lack of training he has not specified what further training he required. In any event we struggle to perceive what training any employee could have needed in wearing a FFP3 mask or appropriate standards of hand and other hygiene.

Requiring employees to work in an environment which was not adequately cleaned

159. We find that this relates to the Claimant's concerns pertaining to Maple House. We find that these were addressed, but in any event the Claimant was only occasionally required to attend Maple House, given that it did not have any patients and we understand was largely confined to store and meeting rooms.

Requiring employees to work without adequate access to lifts

160. We reject this contention. We accept that employees had access to lifts via the main entrance and a separate staff only goods lift. In any event it would not have been reasonably practicable for the Respondent to have added additional lifts given the timescale and configuration of the hospital buildings.

Requiring Chain Supply Officers to carry out a full workload

161. We reject this contention. We accept the Respondent's evidence that the physical demands of work at P3 were lower than at other locations.

162. We accept the Respondent's evidence that there were no desk based or sedentary roles available for the Claimant. Further, whilst the Claimant referred to the possibility of a position in procurement no such roles were available and nor did he have the required skills.

163. We further accept that the Claimant did not in the Material Period actively express interest in Trust wide redeployment.

Providing a phased return to work

164. We reject this contention given that on his respective returns to work on 1 February and 1 April 2021 the Claimant requested a phased return to work. It was therefore reasonable for the Respondent to perceive that he was able to carry out his normal duties. In any event they sought to alleviate some of the demands on him by transferring him from the Tower to P3.

Reducing the amount of manual handling the Claimant was required to do

165. We accept the Respondent's evidence that the move to P3 reduced the amount of manual handling the Claimant was required to undertake. Further, on the basis of the Claimant's own evidence, it would not appear that he undertook any significant manual handling during his brief period of active employment at P3.

Harassment related to disability (s.26 EQA)

166. Given that allegations 7.1.1 to 7.1.6 in the list of issues repeat the issues we have already addressed in relation to direct disability discrimination it is not necessary for us to repeat our findings. These allegations therefore fail.

Ms Chinniah, Mr Weier and Maptfuwa asking invasive questions about the Claimant's health at a meeting on 7 May 2021

167. We reject this allegation. Whilst some questions were inevitably asked regarding the Claimant's wellbeing and health this was entirely understandable in the context of the meeting. Further, we understand that the Claimant objected to being asked "how are you?" at the beginning of the meeting. It would appear that he wanted to address redeployment entirely in isolation from his underlying health conditions. We find this to be wholly unrealistic and inconsistent with the Claimant's contention that the Respondent needed to make reasonable adjustments on account of his disabilities.

Ms Chinniah repeatedly ignoring OH recommendations about the Claimant

168. We reject this contention. We find that she did not. Subsequent to the OH report dated 13 April 2021 she contacted OH with follow up questions, undertook a risk assessment, arranged a meeting with OH and HR and considered then to respond to the OH recommendations orally in the meeting. Further, she sought to undertake a stress risk assessment and staff manual handling risk assessment which the Claimant did not want her or Mr Kontoh to undertake. We therefore consider that the Claimant was adopting an obstructive approach to such assessments being undertaken.

169. In any event the alleged treatment does not relate to disability. Further, we do not consider that even if such alleged acts had taken place they have the purpose or effect of violating the Claimants dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Direct race discrimination (s.13 EQA)

Ms Chinniah not addressing the Claimants complaints of bullying

170. As set out above we do not accept the Claimants contention that she failed to do so. Further, we find no evidence in any event to infer that any purported failure was on account of the Claimants race.

171. Whilst the Claimant has named Peter Dooley as an actual comparator he has provided no evidence in this respect. Further, we find that Mr Dooleys circumstances were not materially the same as per s.23 EQA in that he had not raised complaints of bullying to Ms Chinniah.

The Claimant not being allowed a phased return, reduced manual handling and a transfer to another site on his return from sickness absence (compared to Mr Reeve)

172. We do not accept that Mr Reeves circumstances were materially the same as the Claimants given that when he went off sick with Covid he was on secondment to the Atticus Programme doing a largely desk based role. The Claimant was not.

173. In any event Mr Reeve was not given a phased return to work, a reduction in his manual handling and he subsequently resumed to his normal role and was later working on P3 concurrent to the Claimant.

174. It is also relevant that the Claimant did not ask for reduced manual handling or a phased return when he returned from sick leave. There is absolutely no evidence to infer that the above treatment of the Claimant was in any way influenced by his race.

Indirect race discrimination

Requiring employees to work at the Tower

175. As set out above we accept that the Respondent had a PCP of requiring some employees to work at the Tower. Further, as set above the Claimant was not compelled to accept this posting.

176. We accept that the PCP of requiring employees to work at the Tower applied to both white and black employees.

Did the PCP put black employees at a particular disadvantage when compared with white employees in that black employees were at greater risk from Covid and the Tower presented a greater risk than other sites?

177. In evidence the Claimant stated that he self identified as “black African. He invited the Tribunal to in effect apply judicial notice of the increased risk to black Africans as to the adverse effects of Covid than the general population. He sought to explain that black Africans had greater vulnerability to Covid and ongoing adverse effects as result of the poorer quality health care in Africa which had potential on going affects. He further referred to his own experience both in his work but also his home life in Edmonton that the black population were disproportionately affected.

178. We are not able to give judicial notice to any purported additional risk to black Africans. Whilst we acknowledge that there was a general consensus that the BAME population may have been disproportionately affected by Covid, to include Covid related deaths, this is not the same as saying that when pre-existing health conditions and structural/economic relative disadvantages are taken account, that any given black African employee had greater risk than an equivalent white employee. We do not accept that evidence exists to support this contention and nor has the Claimant provided any statistical or expert evidence. Whilst we acknowledge his own personal experience of tragedy in his family and wider community this is not the same as objective evidence. Therefore whilst we accept the Claimants understandable concern regarding the effects of Covid on him and his family/wider community this is not the same as evidence upon which the Tribunal can rely.

179. Further, the OH doctor who assessed the Claimant on 2 June 2021 described him as falling into the “low risk category of vulnerability taken into account his personal and health risk factors”.

Was the PCP a proportionate means of achieving the legitimate aim of: providing stability and resilience so that service needs and demands could be met and/or ensuring that the greater demand for Supply Chain team members to support the Covid Response Teams work at UCH could be met and/or to ensure continuity of service and provide support to other team members?

180. We accept that it was a legitimate aim during the pandemic for the Respondent to seek to ensure the demands of the Covid response teams work at UCH could be met and to seek to supply Supply Chain Officers to work in the Tower to undertake that work. As such we find that this was a proportionate means of achieving that aim.

Victimisation (s.27 EQA)

Was the Claimants letter to Ms Singh of 8 February 2021 a protected act?

181. We find that it was not. Whilst the Claimant raised various concerns in this fairly long document none of them specifically related to allegations pertaining to disability and/or race. The initial focus of the letter was in the context of the team meeting the Claimant had attended on 6 May 2021 and concerns regarding potential adverse consequences to his health and wellbeing were in generic terms and not specifically referable to a disability. Further, the Claimant made no allegation that he was being directly or indirectly discriminated against on account of his race.

182. In any event we find that there was no evidence that Ms Chinniah and Ms Stark not dealing with the Claimants complaints of bullying and the Respondent deploying the Claimant to P3 was because of his allegation that he had undertaken a protected act.

183. We have already found that the Respondent had not failed in its obligation to make reasonable adjustments and any such failure was not in our view in anyway influenced by the Claimants letter of 8 February 2021.

Final Conclusions

184. The Claimant’s complaints of direct disability discrimination, failure to make reasonable adjustments, harassment on account of disability, direct and indirect race discrimination and victimisation therefore fail and are dismissed.

Final comments

185. Whilst we acknowledge that the Claimant had a genuine sense of heightened concern and anxiety regarding his personal situation and vulnerability to Covid and its ongoing affects this is not the same as him as fulfilling the definition of having a disability under s.6 EQA. We find that the Claimant had

progressively developed a level of dissatisfaction pertaining to his employment which was not solely related to the Covid pandemic but arguably related to his irritating that he had not received the promotion he considered consistent with his abilities and self evident intelligence. We consider that this dissatisfaction morphed into a more general rejection of all efforts made by the Respondents, to include Ms Chinniah but others, to address his concerns and we find that increasingly the Claimants position was one of a confrontational and obstructive stance both in respect of his team members but also to those in managerial positions seeking to address the concerns he had raised.

Employment Judge Nicolle

Dated: 15 May 2023

Sent to the parties on:

15/05/2023

For the Tribunal Office