EMPLOYMENT TRIBUNALS

Claimant: Mr Aaron Green

Respondent: Driving and Vehicle Standards Agency

Heard at: Watford Employment Tribunal
On: 5, 6, 7 and 8 June 2023

Before: **Judge Bartlett, Mr M Bhatti and Mr T McClean**

Representation:

Claimant: in person
Respondent: Mr Tibbitts

JUDGMENT

1. The claimant's claims to have suffered direct race discrimination under s13 Equality Act 2010 fail.

2. The claimant's belief in "Not taking any form of medication at all unless life threatening or otherwise absolutely necessary" is a protected belief under s10 of the Equality Act 2021.

3. The claimant's claim to have suffered direct discrimination because of his protected belief under s13 Equality Act 2010:

   3.1. Fails in respect of the following 2 allegations:

      3.1.1. "On/around 15th September 2021, the claimant's manager, Jens Gavermark, refused to recognise the claimant's terms and conditions of employment"

      3.1.2. "Between 15 September 2021 and 6 October 2021, JG withheld a number of important emails from Charles Perkins to try and influence the outcome of the investigation into the claimant's grievance"

3.2. Succeeds in respect of the following allegation:

3.2.1. “On/around 1st October 2021, JG refused to allow the claimant to undertake any overtime hours until a risk assessment had been carried out as the claimant had not been double vaccinated the covid 19”

4. The claimant’s claim that he suffered victimisation s27 EqA 2010 fails.

5. The claimant’s claim to have suffered harassment under s26 Equality Act 2010 fails.

REMEDY

1. The Tribunal makes an award of £5,000 in respect of injury to feelings.

2. The Tribunal makes an award of £1336.50 in respect of financial loss which has been calculated as follows:

   2.1. The claimant suffered loss in the amount to £247.50 in respect of the period 2-7 October 2021. 100% of this is awarded;

   2.2. The claimant suffered financial loss in the amount of £2722.50 in respect of the period 1 November 2021 to 17 January 2022 in respect of overtime he was unable to carry out whilst on sick leave. The Tribunal have awarded 40% of this loss which is the amount of £1089.50. The award was reduced to 40% because the Tribunal finds that, applying the normal principles of compensation, there were other causative factors for the claimant's loss which include but are not limited to the contractual dispute which arose in the summer of 2021 and events following those in issue this case.

REASONS

Background

3. The claimant has been employed by the respondent since 20 February 2017. He is currently on an agreed career break with the respondent.

4. The claim form was issued on 23 December 2021 following a period of ACAS conciliation which took place between 15 October 2021 and 25 November 2021.

The Issues

5. Subject to the discussion below about the application to amend, the issues in this case were the list of issues agreed following the CMR which took place on May 2022. These are attached as an appendix to this judgement and in broad summary are as follows:

   5.1. Did the claimant genuinely hold a belief of "Not taking any form of medication at all unless life threatening or otherwise absolutely necessary" and was that belief a protected belief under s10 EqA 2010?

   5.2. Was the claimant subject to direct race discrimination and/or direct discrimination because of his protected belief s13 EqA?

   5.3. Did the claimant suffer harassment s26 EqA 2010?

   5.4. Did the claimant suffer victimization s27 EqA 2010?

Application to amend

6. At around 11 AM on the second day of the hearing which was near the end of the claimant's cross examination, it became apparent that the protected acts for the purposes of the victimisation claim as identified in the list of issues was not the protected act that the claimant relied on. Judge Bartlett asked the claimant some questions about this and he agreed the one in the List of Issues was not a protected act he relied on and instead he relied on an email sent to various individuals including CG on 7 October 2021.

7. The claimant made an application to amend the list of issues at this point. Mr Tibbitts objected for the following reasons:

   7.1. the amendment was in the middle of the hearing and an amendment application should have been made earlier;

   7.2. the appellant had many opportunities to make an amendment application. There was correspondence between the parties about the list of issues following the CMR which took place in May 2022 which was almost a year before the final hearing. In that correspondence the respondent had pushed the claimant to confirm his claim;

7.3. the claimant had made an application to amend the list of issues in April 2023 that had been rejected by EJ Lewis. This application had not related to what the protected act was;

7.4. Judge Bartlett had informed the parties at the start of the hearing that the list of issues was the issues that the tribunal would decide and asked the parties to confirm that they agreed that the litigation was correct. The claimant did not identify at that point any issue with the protected act;

7.5. prejudice would be caused to the respondent because the case had not been prepared on the basis of the new alleged protected act. This would also lengthen the hearing as new evidence would need to be taken on the issue.

8. The tribunal took some time to consider the application and decided to refuse it for the following reasons:

8.1. a tribunal must give due regard to the balance of prejudice in accordance with Selkent Bus Company v Moore [1996] ICR 836 EAT. The tribunal must also give consideration to rule two of the Employment Tribunal Rules of Procedure 2013 which is the overriding objective;

8.2. the refusal of the application would give rise to clear prejudice to the claimant. If he did not rely on the protected act as set out in the list of issues then his claims of victimisation would fail. This was not disputed by the parties;

8.3. some prejudice would be caused to the respondent. The respondent would have to consider its position on the new protected act, it had been accepted that the original protected act was a protected act. It would need to seek new evidence on the matter from its witnesses. None of these witnesses had yet given evidence but it was likely that amended witness statements would need to be produced and potentially evidence in chief taken. This would cause prejudice to the respondent doing it under the time pressure of a hearing that had already started. The tribunal also considered that this may take approximately a further half day of the hearing to deal with the new matter which may have posed jeopardy to the timetable of completing the case in this allocated four days;

8.4. the tribunal gave weight to the very late timing of the application which was near the end of the claimant's cross examination. It considered the recent guidance in Arian v The Spitalfields Practice [2022] EAT 67. He had been given opportunities to raise any disagreement with the list of issues at the start of the hearing, he did not raise an issue about the protected act at the start of the second day it was only when the issue arose during his evidence that he raised an issue. This really is a very late stage. Further, the claimant had the opportunity to raise disagreement with the list of issues for almost 12 months before the hearing. He was aware of his ability to make an application to amend the list of issues as he had done some months previously to the hearing;

9. in these circumstances the tribunal considered that it was not in the interests of the overriding objective as it would offend the principle of fairness to allow the application.

10. As a result of this decision the respondent's claim that his suffered victimisation s 27 EqA 2010 must fail because there is no protected act of which he relies.

The Evidence

11. The Tribunal heard oral evidence from:

    11.1. the claimant;

    11.2. Ms Nadia Sher;

    11.3. Mr Jens Gavermark;

    11.4. Mr Craig Buckwald;

    11.5. Mr Rowland Willians;

    11.6. Mr Darrone Johnson was available as a witness but the claimant indicated that he had no cross-examination for him and therefore it was agreed that his witness statement would be taken as adopted.

12. At the start of the hearing the claimant indicated that he had another witness who would attend on the morning of the second day. On the morning of the second day the claimant stated that this witness' car had broken down and he was not sure when he was able to attend. The tribunal did not hear any further updates and the claimant did not express a further ability or desire to call this witness.

Protected belief

13. The appellant defined his protected belief as:

    "Not taking any form of medication at all unless life threatening or otherwise absolutely necessary"

    The Law

14. Section 10 of the Equality Act 2010 sets out the following:

    "Religion or belief

    (1)Religion means any religion and a reference to religion includes a reference to a lack of religion.

    (2)Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

(3)In relation to the protected characteristic of religion or belief—

(a)a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b)a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."

15. In Harron v Chief Constable of Dorset Police [2016] ILR 481 the EAT held that when determining what constitutes a believe qualifying for protection there is no material difference between the domestic approach under the equality act 2010 and that under article 9 of the ECHR.

16. The House of Lords made clear in R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15 that it is a function of this tribunal to enquire as to the genuineness of a believe as a matter of fact but this enquiry is limited to ensuring good faith. It is not for this tribunal to enquire as to the validity of the bel or test it by objective standards.

17. *Grainger plc v Nicholson* [2010] IRLR 4 establishes that there must be some limit placed upon the definition of philosophical belief and set out the following five criteria:

    17.1. The belief must be genuinely held.

    17.2. It must be a belief and not an opinion or viewpoint based on the present state of information available.

    17.3. It must be a belief as to a weighty and substantial aspect of human life and behaviour.

    17.4. It must attain a certain level of cogency, seriousness, cohesion and importance.

    17.5. It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

18. In Mackereth v Department for Work and Pensions [2022] EAT 99, Eady P set out that, in relation to the second criteria, to amount to a protected characteristic it must be capable of being understood as a characteristic of the individual in question. An opinion can be a manifestation of the belief.

Findings and Decision

19. The claimant had provided limited information in his witness statement and other documentation in this claim about his protected belief. He was asked some questions about this in cross examination. Judge Bartlett and Mr McClean also asked the claimant a number of questions on this matter. The claimant's evidence was that:

19.1. he was asked and he said that he believed his belief was held at the same level as a religious belief;

19.2. he was raised not to have trust in medication, that the body heals itself and putting things into your body weakens it;

19.3. when asked how this belief had affected his everyday life he said that he suffered more than the average person because it would take longer for him to recover, he suffers more pain and discomfort than somebody using medication;

19.4. his belief is only manifest when he was sick. His return to work forms identified that he did not seek medical attention and did not take medication;

19.5. he gave an example of where he recently had a gastroscopy he declined the anesthetic but agreed to a spray to be used on his throat. However, this meant that only three swabs from his stomach could be taken rather than the usual six because of the difficulties in not using medication in the procedure;

19.6. in response to being asked where his belief came from he stated that he grew up in care and he was forced to take medication and he is now scared to ingest medication. The first record of this forced medication was when he was 15 months old and goes on until he was a teenager;

19.7. the claimant has not had any vaccinations against covid-19 and does not wish to do so;

19.8. he accepted that he was currently on medication;

19.9. he does not refuse all medications. He takes those he considers necessary, necessary is not used in the sense of life-saving.

20. His witness Ms Nadia Sher gave evidence that the claimant talked to her and others at work about his belief in the terms as defined in this claim. She had seen him sick several times at work and he had refused the offer of medication from others including herself.

21. In the notes of the meeting between CB and Sharon Collyer CB stated *"[the claimant] didn't make a secret of not wanting to get vaccinated. It was during general discussions but can't remember if it was in front of the whole office.*". We find that this indicates that the claimant manifested his belief in front of colleagues. This is further supported by Ms Sher's evidence.

22. The tribunal found that the claimant's belief was genuinely held. He repeated it, gave examples of how this had manifested itself, an account of from where the belief had arisen and Ms Sher's evidence supported his own in this regard. Initially the claimant was reluctant to speak about from where his belief came but when he spoke about from where this belief came, which was related to childhood experiences and onwards, he spoke viscerally and movingly. He was emotional and the tribunal found that these were deep seated beliefs, generally held and for cogent reasons.

23. We find that it is a belief and not an opinion or viewpoint. We find that the belief is a facet of the claimant's right to decide about his own bodily integrity. This is clearly a fundamental human right. We consider that the manifestation of the belief can be a viewpoint about something such as a given medication which can change. However, we considered that the belief the claimant has articulated is what underlines its manifestation.

24. We find that the right to determine one's own bodily integrity is a very weighty and substantial aspect of human life. It is correct that if one does not have ongoing health conditions, it is not something which will require an individual to make decisions every day of their lives according to that belief. Instead, there are limited incidences when the belief will be expressed and those will be when the claimant suffers from ill-health. We do not consider that the fact the claimant does not have to make decisions every day according to the belief in any way diminishes it because the decisions it pertains to are of fundamental importance. We therefore find that the belief is to a weighty and substantial aspect of human life and behaviour.

25. In relation to the fourth criterion, the respondent challenges the cogency of the claimant's belief because he did take some medications which he himself admitted, such as painkillers after he had been in a rear end shunt and the hospital procedure to which he had referred. We accept that none of these situations were ones in which it was absolutely necessary to take medication in the sense that the situation was not life-threatening. However, we conclude that this does not undermine the cogency of the claimant's claim because he was able to articulate that he determined what to do in any given situation where medication may be recommended. As with religious beliefs one does not have to be a fundamentalist or absolutist to hold a serious, cogent, cohesive and important belief. We are all individuals and we all interpret the beliefs we hold differently. The belief is a constant framework against which he assess decisions about medications and he will make pragmatic decisions.

26. In relation to the fifth criteria, it is set out above that we found that the belief related to a fundamental human right, it does not conflict with human dignity or the fundamental rights of others and it is worthy of respect in a democratic society.

27. Mr Tibbett submission was not that the respondent held that the belief could not be a philosophical belief protected under the Eq Act 2010, it was that the evidence presented to the tribunal does not establish that the claimant holds that belief or that it meets the Grainger criteria. We have set out our finding on this above.

The Law relating to s13 and 26 EqA 2010

28. S13 of the Equality 2010 sets out the test for 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.

(5)If the protected characteristic is race, less favourable treatment includes segregating B from others…"

29. In Dziedziak v Future Electronics Ltd UKEAT/0270/11, [2012] EqLR 543 the EAT found that the conduct complained demonstrated an intrinsic link with nationality which was sufficient in itself to pass the burden of proof to the respondent and the respondent had failed to establish another non-discriminatory reason.

30. In Amnesty International v Ahmed [2009] IRLR 884, [2009] ICR 1450, EAT, Underhill P set out:

"In other cases—of which Nagarajan is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling James v Eastleigh and Nagarajan. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

31. This has been confirmed in a number of subsequent cases including more recently by Linden J in Gould v St John's Downshire Hill [2020] IRLR 863, [2021] ICR 1, EAT(a case of alleged discrimination because of marriage):

"…the logic of the requirement that the protected characteristic or step must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied – but for the protected characteristic or step the act complained of would not have happened – and/or where the protected characteristic or step forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic or step itself did not materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. This point is very well established in the field of employment law generally where, for example, an employer may be held to have acted by reason of dysfunctional working relationships rather than the conduct of the claimant which caused the breakdown in those relationships (see e.g. the cases on the distinction between dismissals related to "conduct" and dismissals for "some other substantial reason", such as Perkin v St Georges Healthcare NHS Trust [2006] 617 CA; and the cases in relation to public interest disclosures such as Fecitt & Others v NHS Manchester (Public

Concern at Work Intervening) [2012] ICR 372 CA and Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 EAT).

32. S.23 of the Equality Act 2010 sets out the law relating to comparators:

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

33. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that

> "*the comparator required for the purpose of the statutory definition of the discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."*

Burden of Proof

34. S136 of the Equality Act 2010 sets out the burden of proof which applies to discrimination cases:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

35. In Igen Ltd v Wong the Court of Appeal approved the guidance given in Barton v Investec Securities Ltd [2003] IRLR 332 concerning the burden of proof in discrimination cases which is that:

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of

s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail….

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive."

36. In Madarassy v Nomura International plc 2007 ICR 867, CA Lord Justice Mummery stated:

"The bare facts of a difference in status and a difference in treatment 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."

Direct Discrimination

Allegation 1 - "On/around 15th September 2021, the claimant's manager, Jens Gavermark, refused to recognise the claimant's terms and conditions of employment"

37. The discussions around this between the claimant and JG are set out in the bundle. There is series of emails which are sent between the two on 26 August 2021 about this issue. The minutes of meetings which formed part of Sharon Collyer's investigation show this dispute had arisen prior to the end of August 2021 and that it had generated ill feeling on the part of the claimant and JG. The event the claimant complains about is an email from JG on 15 September 2021 at 9:51am in which JG writes, after taking advice from HR about the issue. It includes the following wording:

> Referring to our conversation, you have a contract of 36 hours per week the, business does not recognise the ARVATO letter of said hours per day as being contractual. You also said that you

38. The ARVATO letter is a reference to a letter from the respondent to the claimant dated 10 December 2019 confirming that the claimant's request to change hours is approved and effective from 1 February 2019 and which sets out:

> Your hours will be at 7 hours and 12 minutes per day, this adds to a total of 36 hours per week.
>
> If you are in agreement to this new working arrangement, please sign and return the attached copy of this letter.

39. The contents of these emails is not disputed. A dispute arose because the claimant considered that the letter of 10 December 2019 was a contractual change and JG did not agree with this.

40. In evidence the claimant took this further and expressed that this created a concern that all his terms and conditions of employment were not recognised which made him feel insecure.

41. The email of 15 Sept 2019 expressly refers to the ARVATO letter and that the hours of work it contained were not contractual. It did not make any comment about his wider terms and conditions. We find that it cannot be reasonably read as implying a wider lack of recognition of his terms and conditions.

42. These discussions arose because of the respondent looking to increase the number of tests taken by full time employees to 8 tests per day and a pro rata amount for part time employees. The claimant had been working part time which was 36 hrs as opposed to 37 hours full time employment. Working 7hrs 12 mins a day meant that 8 tests per day could not be included in the claimant's working pattern.

43. On 15 September 2021 the claimant submitted a written grievance to HR about this. He received a formal outcome on 7 October 2021. On 13 October 2021 the claimant agreed a working pattern with Nigel Prince. In the event, this was not implemented.

44. The formal outcome sets out that Chas Perkins, who dealt with the complaint, asked the claimant about discrimination and the claimant made it clear that he was not alleging discrimination. The outcome letter says:

> I asked about the discrimination aspect of your complaint, and you said that it wasn't involved in this complaint. Although you had put it in the original letter, you also made it

45. In oral evidence, the claimant stated that the discrimination to which he referred was not race but it was about his beliefs relating to taking medication. The claimant indicate that he held a belief that he had been racially discriminated against because of a cumulation of events which he felt were inexplicable.

46. We find that the message JG is conveying in the email of 15 September 2021 could have been expressed with more clarity and empathy. We understand that this communication irritated the claimant.

47. We find that:

    47.1. the email of 15 September 2021 arose in the background of organisational change to working patterns applicable to all Driving

Examiners (DEs) as a result of a long waiting list for tests arising from the cessation and disruption of tests for reasons related to Covid-19;

47.2. JG had sought advice from HR in responding to the claimant's queries and followed that advice;

47.3. we recognise that there was a disagreement about the contractual nature of the AVATARO letter but JGs interpretation was not obviously unarguable.

48. The prima facie burden of proof lies on the claimant and we find that he has not been able to establish that there was something more than a disagreement about contractual terms in a context which does not raise any concerns about discrimination. The claimant has not been able to establish the something more.

49. His claim that this was direct discrimination for reason of race and/or protected belief fail.

Allegation 2 - "Between 15 September 2021 and 6 October 2021, JG withheld a number of important emails from Charles Perkins to try and influence the outcome of the investigation into the claimant's grievance"

50. It is not disputed that JG did not send 2 emails to Charles Perkins in relation to the investigation of the claimant's grievance. One of these is the email of 15 Sept 2021 at 9:51 quoted above.

51. The claimant asserts that these were withheld deliberately to influence the grievance outcome. JG asserted that it was a mere mistake, that he had searched his inbox by using the claimant's name as the sender but that these 2 emails had not come up. The claimant was a recipient or sender of these emails and so he sent them to CP eventually. The respondent submitted that these emails were not materially different in content or tone to the emails that were sent to CP by JG. We accept this submission though we recognise that it is the wording of the email of 15 Sept 2021 with which the claimant takes issue.

52. We do not accept that JG acted deliberately and we cannot discern that he had anything to gain from withholding these emails. Particularly as the claimant's grievance is a general complaint about the situation not about particular wording used by JG. We find that JG's actions were an accidental omission.

53. As a result, the claimant cannot discharge the prima facie burden of proof because there is nothing more than an unintentional omission which did not have a material impact on the claimant.

Allegation 3 - "On/around 1st October 2021, JG refused to allow the claimant to undertake any overtime hours until a risk assessment had been carried out as the claimant had not been double vaccinated the covid 19"

54. It is not disputed that this is what occurred. JG used the term paused overtime but this is immaterial as the effect was to deny the claimant the ability to undertake over time from around 4-7 October 2021.

55. We find that:

    55.1. the claimant routinely carried out overtime of around 1 test per day and some tests on a Saturday;

    55.2. on or around 1 October 2021 the claimant put in an overtime request to work similar overtime levels as he usually did for the whole month of October;

    55.3. on the same date NS requested overtime of 6 hours on a Saturday;

    55.4. the claimant's usual line manager, David Bussell, was away and Craig Buckwald was acting as his line manager so the overtime request went to him for approval;

    55.5. the claimant said that he was at work on 1 October 2021 and NS' witness statement gave evidence to the effect that both of them had returned from self isolation on 1 October 2021. However, NS also accepted that TARS would accurately set out if they had carried out tests on a given day. We were provided with a print out of TARS (which is the respondent's internal log of tests undertaken by DE's) relating to 1 October 2021, which sets out that both of them did not undertake any tests that day and were marked as absent due to covid-19 isolation. We find the TARS compelling and accept that the claimant was absent on 1 October 2021;

    55.6. CB authorised NS' overtime request without escalation to JG;

    55.7. CB tried to contact the claimant at least twice around 1-1:30pm to discuss the request on 1 October 2021 but was unable to reach the claimant. CB then phoned JG raising the issue that the claimant had been on and continued to be on a period of isolation and had requested overtime. JG suggested to CB that a risk assessment should be carried out in respect of the claimant and that his overtime should be paused pending the outcome. CB said he had not carried out a risk assessment previously and did not feel he could do that. It was agreed that Rick Fox would carry out the assessment. CB agreed with Rick Fox that CB would observe the risk assessment as a learning opportunity;

    55.8. The claimant was the only DE whose overtime request was not approved.

56. CB's evidence was that he sought guidance from JG about how to deal with the claimant's overtime request because the claimant had had two periods of self isolation in quick succession and he had asked for overtime Mon-Fri and on Saturday amounting to 9 hours per week throughout October.

57. CB drew a distinction between NS and the claimant on the basis that NS had requested 6 hours overtime on a Saturday which was less than the claimant

and, though she had been on a period of self isolation at the same time as the claimant, at the end of Sept/start of October, she had not had 2 periods of self-isolation in quick succession. In cross examination, CB was referred to two white DEs who had not had their overtime paused. He accepted one had not been vaccinated at all but stated that he had had no periods of absence and that the other was seeking to have vaccinations.

58. Judge Bartlett asked CB when he became aware of the claimant not having had the vaccination against covid-19 and he said he could not recall. He was then asked would he have asked the claimant about it and he replied that he did not think he would as it is an individual thing. However, an email from CB to JG on 1 October 2021 at 14:26 sets out a plan to ask the claimant about his vaccinations and to refuse overtime until the Claimant confirms his vaccination status. It also seeks advice from JG what to do about overtime if the claimant confirms he will not be having the vaccination.

> Aaron has requested early morning overtime for the whole of October 2021. As discussed, until Aaron has contacted me and confirmed his covid vaccination situation and when/if he will be getting the 2nd, no overtime has been requested for him. Please advise what I should do if he confirms that he will not be having the 2nd vaccination or refuses/cannot provide the booking details for the 2nd vaccination with regards to any overtime he is requesting

59. We recognise that this email is seeking confirmation of the way forward with JG. This email was not raised by either party with the tribunal so no witnesses were questioned about it. The claimant's witness statement said that CB told him that overtime would not be approved until after a risk assessment had been carried out and this was because he had not had been double vaccinated. We accept the claimant's evidence about this which is supported by NS' evidence. It is also partly consistent with the respondent's evidence.

60. The notes of the meeting between JG and Sharon Collyer make it clear that JG was aware of the claimant not having had the vaccination and that this was a relevant factor in the decision to require a risk assessment and not to approve the claimant's overtime. Those notes state the following:

> SC has he been vaccinated- JG no but he is not a cause for concern has not had time off.
>
> JG How can I treat AG differently when the circumstances are different? You can't compare. [redacted] manages life and doesn`t get pinged, AG gets pinged and we support him. If I don't do anything and AG is not supported, that is discrimination. Situation different- one been off self-isolation, another not. Looking at staff at Southall history and vaccination all different. The one person who has no vaccine and has self-isolation is AG, that is why a risk assessment was considered.

61. As we have set out above, we find that the claimant not having a Covid-19 vaccination is a manifestation of his belief which we have found to be a philosophical belief protected under the EqA 2010. We do not think that it is coherent to separate the belief from the expression of that belief, the expression of that belief here being that the claimant did not have the covid-19 vaccination. If the belief but not its expression was protected this would amount to no real protection of the belief that all.

Findings on Direct Discrimination because of the Protected Belief

62. The evidence from the respondent's witnesses was that it was the claimant's two periods of self-isolation in quick succession which gave rise to concerns about future absences and some reference was made to personal choices he was making relating to his exposure to Covid 19. We must remember, as the respondent rightly pointed out, that these events took place in the autumn of 2021 and the circumstances at that time surrounding Covid 19, self-isolation, track and trace, the impact of vaccination and opinions about those who were vaccinated or unvaccinated were very different to what they are now and the importance or at least effect of them was much greater than it was now. These are matters to which very little thought is given now but they were ever present and at the forefront of many people's minds at that time.

Comparators

63. We find that NS was not a comparator because, rightly or wrongly, in the respondent's opinion she had had one vaccination and was engaging in the vaccination process. This was materially different to the claimant who had expressed that he would not have the vaccinations because of his philosophical belief.

64. The claimant also relied on a hypothetical comparator to which we have given due consideration.

Less Favourable treatment

65. We find that refusing to approve the claimant's overtime request was less favourable treatment because he was denied the ability to carry out overtime and received pay in respect of this.

66. We must also consider whether or not the conduct complained of was becuse of the protected characteristic.

67. We have given consideration to Dziedziak v Future Electronics Ltd UKEAT/0270/11, [2012] EqLR 543 and Lady Hale's guidance Essop v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558

"even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used … exactly corresponds with a protected characteristic … and is thus a proxy for it."\

Discharging the burden of proof

68. We find the claimant has discharged the prima facie burden of proof. We find that the respondent refused to allow the claimant's overtime until a risk assessment had been completed because of the manifestation of his protected belief which meant that he did not take the covid-19 vaccination and had no intention of taking it.

69. The respondent's argument is that the requirement was partly taken to see if any changes could be made to protect the claimant but also because of

business need. The claimant's argument was that it was incoherent to say that he was able to carry out tests during his normal working day but this became unacceptable in relation to overtime. CB drew a distinction between normal hours of work in which tests had been booked a long time in advance and overtime tests which would have been booked at short notice. We found that that distinction was untenable. It is arguable that those who had had bookings for months who were cancelled at short notice would be disadvantaged more than those who had only booked one month or a few weeks in advance.

70. We find that the respondent has not discharged the burden of proof which lies on it because we:

    70.1. do not accept that the risk assessment could be primarily intended to benefit or protect the claimant;

    70.2. do not accept that a distinction can be maintained between the normal working hours and overtime. As result the respondent's reasons for imposing the requirement cannot be maintained.

Race

Comparator

71. We repeat the findings we have made above.

Less Favourable treatment

72. We find that refusing to approve the claimant's overtime request was less favourable treatment because he was denied the ability to carry out overtime and received pay in respect of this.

Discharging the burden of proof

73. We find that the claimant has not established that his race played a part in the actions against him. JG implemented the instruction not to approve the overtime because the claimant's situation relating to absences and overtime approval had been raised with him by CB. No other person's overtime request was raised with JG. The claimant would have to establish that JG took advantage of the situation which presented itself to discriminate against the claimant or instructed CB or was in cahoots with CB to act in a racial discriminatory way towards the claimant. There is simply nothing more than an assertion by the claimant. There is nothing more.

74. Even if we were wrong, we find that respondent has discharged the burden of proof which fell on it. The email from CB to JG on 1 October 2021 at 14:26 identifies all the claimant's absences and about making enquiries about his vaccination status. The claimant's evidence was that CB told him he could not do overtime because of not having had a double vaccination. We note that there was a background of ill feeling between the claimant and JG because of the contractual dispute in the summer of 2021 but again this has no connection to the claimant's race. The respondent's actions cannot be connected to race.

Harassment S26 EqA 2010, the only allegation of harassment was "Did JG instruct three managers to attend to undertake the claimant's risk assessment on 7 October 2021?"

75. We have considered the guidance set out in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 "*violating is a strong word which should not be used lightly. The case law emphasises the critical importance of context*." and Betsi Cadwaladr University Health Board v Hughes and others UKEAT/0179/13:

    "*12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence*."

76. We find that even taking this allegation at its highest, it cannot have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

77. In any event we do not accept that JG issued this instruction. We accept the evidence from JG and CG that CG was only to attend as an observer. In relation to the third manager, Michelle, there is no evidence to support the claimant's claim that Michelle had been instructed or intended to participate in the claimant's risk assessment. The claimant does not allege that Michelle was named on any documentation nor that she tried to attend the risk assessment meeting. Therefore, as a matter of fact this allegation is not made out.

78. Even if they had all attended the risk assessment, we do not accept that that behaviour would be sufficiently strong to meet the statutory definition. Even if we were wrong and that we find that it is not reasonable for the claimant to perceive this conduct would violate his dignity, etc. At the most these would have been managers attending a meeting which managers may reasonably attend. The claimant's concern was that there were three of them, however even if there were three of them we do not find that that would be unreasonable. However, as set out below three of them did not attend the meeting and did not seek to attend the meeting. We also find they were not instructed to attend the meeting.

79. For these reasons, the claim relating to harassment must fail.

Remedy

80. As we have found that there was only one incident of discrimination which was a one off we find that this falls towards the lower end of the lowest band of the Vento guidelines.

81. We do not accept the claimant's claim that it is the discrimination which has caused all of his problems and is the reason why he was absent from the respondent between one November and 17 January 2022 we have identified above that there were some difficulties in the employment relationship that did

not relate to discrimination and we consider that those were a more significant cause of his absence and his distress.

82. Therefore, we decided to make an award of £5000 in respect of injury to feelings.

83. In relation to the financial loss, the respondent submitted that though they had some minor disagreements with the way the loss was calculated ultimately did not significantly disagree with the figures stated by the claimant. We therefore largely accepted the claimant figures were presented to a us. However, we did not accept that he worked three bank holidays during the Christmas and New Year period. We consider that it is more likely than not that no driving test took place on such days as the respondent is a public body of sorts.

84. The financial loss the claimant claims is all related to overtime he was not able to carry out because he was on sick leave.

85. The Tribunal decided to make an award of £1336.50 in respect of financial loss which has been calculated as follows:

    85.1. the claimant suffered loss in the amount to £247.50 in respect of the period 2-7 October 2021. 100% of this is awarded;

    85.2. the claimant suffered financial loss in the amount of £2722.50 (calculated as 11 weeks x £247) in respect of the period 1 November 2021 to 17 January 2022 in respect of overtime he was unable to carry out whilst on sick leave. The Tribunal have awarded 40% of this loss which is the amount of £1089.50. The award was reduced to 40% because the Tribunal finds that, applying the normal principles of compensation, there were other causative factors for the claimant's loss which include but are not limited to the contractual dispute which arose in the summer of 2021 and events following those in issue this case.

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Employment Judge **Bartlett**

Date_19 June 2023_____

JUDGMENT SENT TO THE PARTIES ON

12 July 2023

GDJ
FOR THE TRIBUNAL OFFICE

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Judgments and reasons for the judgments are published, in full, online at

www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Appendix 1

List of Issues

Protected Characteristics

1. The Claimant relies on 'race' as a protected characteristic pursuant to s.9 EqA 2010. The Claimant defines his race as being that of *'Black British with a mixed cultural heritage'*.

2. The Claimant also relies on 'philosophical belief' as a protected characteristic pursuant to s.10(2) EqA 2010. The Claimant defines his belief as *'Not taking any form of medication at all unless life threatening or otherwise absolutely necessary'*.

3. Did the Claimant genuinely hold the belief set out in Paragraph 2 above at the material times in question and if so, is the tribunal satisfied that such a belief amounts to a 'philosophical belief' that qualifies for protection under s.10 EqA 2010?

Direct Discrimination (s.13 EqA 2010)

4. Has the Respondent subjected the Claimant to the following treatment falling within s.39 EqA 2010, namely:

4.1 On / around 15th September 2021, the Claimant's manager, Jens Gavermark, refused to recognise the Claimant's terms and conditions of employment;

4.2 Between 15th September 2021 and 6th October 2021, Jens Gavermark withheld a number of important emails from Charles Perkins to try and influence the outcome of the investigation into the Claimant's grievance;

4.3 On / around 1st October 2021, Jens Gavermark refused to allow the Claimant to undertake any overtime hours until a risk assessment had been carried out as the Claimant had not been double vaccinated for Covid 19;

5. Did any of the above alleged treatment amount to less favourable treatment? Namely, did the Respondent treat the Claimant less favourably than it would have treated a comparator who was not in materially different circumstances?

5.1 The Claimant relies on an actual / evidential comparator, Nadia Sher, who the Claimant contends was treated differently to him, is of Asian / Pakistani

origin and who also had not been 'double jabbed' for Covid 19;

5.2 The Claimant relies on a hypothetical comparator in the alternative.

6. If so, has the Claimant proven primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of his race (i.e. that the reason for the difference in treatment was materially influenced, consciously or subconsciously, by the fact that the Claimant was Black British with mixed cultural heritage)?

7. Alternatively, has the Claimant proven primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of his philosophical belief (i.e. that the reason for the difference in treatment was materially influenced, consciously or subconsciously, by the fact the Claimant would not take any form of medication at all unless it was life threatening or otherwise absolutely necessary)?

8. If so, what is the Respondent's explanation? Has the Respondent proven, on the balance of probabilities, that it had a non-discriminatory reason for any proven treatment?

Harassment (s.26 EqA 2010)

9. Has the Claimant been subjected to unwanted conduct? Namely did Jens Gavermark instruct 3 managers to attend to undertake the Claimant's risk assessment on 7th October 2021?

10. If so, did that unwanted conduct have either the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

11. In determining whether such unwanted conduct had the 'effect' referred to above, the tribunal will consider pursuant to s.26(4) EqA 2010:

11.1 The perception of the Claimant himself;

11.2 The other circumstances of the case;

11.3 Whether it is reasonable for such conduct to have had that effect.

12. If so, has the Claimant proven primary facts from which the tribunal could properly and fairly conclude that the unwanted conduct was related to the Claimant's race (i.e. that the Claimant was Black British with mixed cultural heritage)?

13. Alternatively, has the Claimant proven primary facts from which the tribunal could properly and fairly conclude that the unwanted

conduct was related to the Claimant's philosophical belief (i.e. that the Claimant would not take any form of medication at all unless it was life
threatening or otherwise absolutely necessary)?

14. If so, what is the Respondent's explanation? Has the Respondent proven, on the balance of probabilities, that any unwanted conduct was not related to either the Claimant's race or philosophical belief?

Victimisation (s.27 EqA 2010)

15. On / around 18th October 2021, during a meeting with Rowland Williams, did the Claimant make an allegation of racial discrimination?

16. If so, taking account of the context and all relevant circumstances, did the Claimant do a protected act within the meaning of s.27(2) EqA 2010?

17. Was the Claimant subjected to a detriment? Namely did Craig Buckwald threaten the Claimant with disciplinary action and/or otherwise treat the Claimant in an aggressive or threatening manner by the emails and texts sent to the Claimant in the morning of 29th October 2021 and during an alleged phone call later that day?

18. If so, has the Claimant proven primary facts from which the tribunal could properly and fairly conclude that the reason Craig Buckwald subjected the Claimant to such detriment was materially influenced, consciously or subconsciously, by the fact that the Claimant had done a protected act?

19. If so, what is the Respondent's explanation? Has the Respondent proven, on the balance of probabilities, that the reason the Claimant was subjected to any such detriment was not because the Claimant had done a protected act?

Remedy

20. If any of the Claimant's claims under the EqA 2010 succeed, then the following further issues require determination:

20.1 Should the tribunal make a recommendation that the Respondent take certain steps, and if so, what should it recommend?

20.2 What financial loss has any proven unlawful act under the EqA 2010 caused the Claimant?

20.3 Has the Claimant taken reasonable steps to mitigate any such financial loss?

20.4 If not, what award for financial loss should the Claimant be compensated for?

20.5 What injury to feelings has any proven unlawful act under the EqA 2010 caused the Claimant and how much compensation should be awarded for that?

20.6 Should interest be awarded and if so how much?