EMPLOYMENT TRIBUNALS

Claimant: **Ms D. Bouklieva**
Respondent: **Imperial College Healthcare NHS Trust and three others**

London Central **28 June 2023**

Employment Judge Goodman

Representation:
Claimant: **in person**
Respondent: **Emily Skinner, counsel**

PRELIMINARY HEARING IN PUBLIC
RESERVED JUDGMENT

1. The claim of discrimination because of race is dismissed for want of jurisdiction. It is not just and equitable to extend time.

2. The claim of discrimination because of religion and belief is struck out for want of jurisdiction. It is not just and equitable to extend time.

3. The claims of direct disability discrimination in respect of 8(a), age discrimination in respect of 18(c), and victimisation for detriments 29(c)(i) and 29 (d) are struck out under rule 37 because they have no reasonable prospect of success.

REASONS

1. This hearing was listed to decide:

   (a) Whether some the claims should be dismissed because out of time
   (b) Whether some claims should be struck out under rule 39 as having no reasonable prospect of success
   (c) Whether a deposit should be ordered under rule 37 for any claim not struck out.

Conduct of the Hearing

2. A list of issues had been drawn up following two earlier case management hearings. It is appended to this judgment.

3. Of the preliminary issues, the disability issue has been determined by Employment Judge Joffe.

4. Issues 2,3,4,and 5 are those to be determined today. The respondent had, pursuant to order, sent the claimant their skeleton argument for this hearing in very good time, on 21 April ,and the claimant had replied in writing on 6 May 2023. This early exchange was ordered so that the unrepresented claimant had time to think about the arguments.

5. There was a hearing bundle of 344 pages. This contained the pleadings and orders from earlier case management hearings, plus the skeleton arguments, the claimant's witness statements, and medical information. There were also some emails about events mentioned in the claim and the claimant's actions between the ending of employment and ging to ACAS for early conciliation. The claimant expressed concern that she had not seen this until 15 June, on her return from four weeks away from home. She said she had not wanted to read the electronic bundle when away, and had taken with her, a phone but not her laptop.

6. She was also alarmed by having been sent a substantial authorities bundle. I explained that this bundle was for reference. She was not expected to refer to it, and I might not need to read much of it myself, as the legal principles on time limit and striking out claims are not new.. Counsel for the respondent had a duty when posing an unrepresented claimant to draw legal points to the attention of tribunal that might be considered in her favour.

Application to Postpone

7. At the start of the hearing the claimant asked for a postponement. She had hoped to be accompanied by a companion, Paul Skane, but he had told her yesterday afternoon that he was not able to come because he was moving his boat. In answer to questions, he is not a lawyer but an artist and human rights activist, and I understood that he was to be here for moral support. The claimant also explained that she had not been able to read the bundles until recently, because on her return on 15th June she had then worked two night shifts to earn some money, and after that she had been very tired. She had also been hoping other people could come with her today, but had not succeeded.

8. There was a short adjournment for the respondent to take instructions. They were that the application was resisted. This hearing had been listed on 17th March 2023. The case management orders had given her plenty of warning of the arguments for today. Documents had been exchanged on the 19th of May, and the claimant had asked for delivery of the hard copy to be postponed until the 15th of June because of her absence abroad. (The

claimant agreed the time frame was arranged to accommodate her absence). Her health problems – a knee injury, and early menopause-were of longstanding and could have been anticipated. There had been much routine correspondence with respondents about his hearing and she could have asked for a postponement much earlier. This was the fourth preliminary hearing in this case. The claim had been presented in March 2022, and it did not yet have a final hearing. It needed to make progress.

9. I did not agree to postponement. The health difficulties were recurring problems and nothing new. She had had three months warning of the hearing. She knew when the hearing date was set that she was going to be away from 4 weeks. She had had plenty of notice of the arguments for today, as those documents had been sent before she went away. Almost all the documents in the bundle were items she had seen before. It was not fair to the claimant when they had come prepared to make their applications today, that they should be sent away. The age of the case was relevant -some of the events go back to 2020, and the claims are based on oral evidence, which does not improve with keeping. We were unlikely to get a final hearing date in a long case until mid 2024. Delay is bad for justice.

Application to amend claim.

10. The list of issues is appended to this judgment. We went over the list of issues and how it was prepared. The claim form itself, with its attached grievance, is long, detailed, and unorganised. It was discussed in two earlier case management hearings, before Judge Snelson and Judge Grewal, and a list is attached to each of their case summaries. The claimant was taken aback that it had no indirect disability claim. She also said there had been more than one protected act in the vicitmisation claim. She had not raised this before this morning. She had not formulated what the list should say. In discussion I understood her to mean that when she was required to work in a cold workplace in 2020 without extra clothing, this was a requirement or condition which had a disparate impact on her because of her health conditions, in particular low blood pressure. She says she was told that everyone had to work in those conditions. Her particular fear was that she would develop cold or flu and therefore have to do a COVID test, to which she objected.

11. After hearing from the respondent I decided not to allow an amendment of claim to add indirect discrimination because of disability. Although the facts are fully pleaded already, a new head of claim would require some evidence on disparate impact, and some additional argument. In other relevant factors, it was about old facts. The claims and issues had already been discussed at two case management hearings and she had not mentioned indirect discrimination on either occasion. The respondent had already had to amend its response once after her she had given further information and the issues have been defined. She already had a claim of failing to make reasonable adjustments for disability in respect of these facts. Allowing an amendment at this stage afforded little extra advantage to the claimant, with many claims

already before the tribunal, but would increase the costs available by respondents. Having regard to the balance of prejudice and the practical consequences of making the amendment as set out in **Selkent Bus Company v Moore** and **Vaughan v Modality Partnership,** it should be refused.

12. Later in the hearing the claimant mentioned that there was more than one protected act in the victimisation claim, but in discussion it was hard to discern what she meant or when this was. From her description, this appeared to be covered by the broad time period of the protected act, details which come from her further information. Because of the lack of clarity I did not take this as an application to amend. It is of course open to the claimant to make an application later if she wishes.

The Respondents Applications

13. The claimant was called to give the evidence in her witness statement about why she presented the claim when she did, and she was questioned about it by counsel for the respondent.

14. I then asked counsel for the respondent to make her applications in separate points, and when she had spoken on each point I summed up the gist of her argument and asked the claimant what she wanted to say about that.

Factual Summary

15. Having heard the evidence and read relevant documents for the period, I understand that when the claimant learned that she had not been successful in her application for one of the new fixed term contracts, she made a complaint, and was told by Owen, the educator, to take it her team leader, Jayne Holliday. Initially she understood that she must wait for a reply from the matrons before she could go to ACAS and present a claim, but it is clear that by mid- November 2021 she understood that she had three months in which to present a claim, and that she must go to a ACAS within that time. She got a reply from one of the matrons on 17th November, which asked her to be clearer about what she was saying, but the claimant did not write back. She had a discussion, which sounds as if it was with the ACAS helpline, and then set about looking for legal advice. She prepared a long account of what happened so that solicitors could understand what the case was about (there was an example in the bundle of a detailed account she had prepared on 5 January). Several said they were too busy. She used the Internet to search for solicitors to approach, Including asking the Law Society to refer someone in her area. She tried without success to go to a Citizens Advice Bureau. She did not think she could go to ACAS until she had consulted a solicitor because she would not know what to put on their form. She did speak to a solicitor later in January. He explained the deadline was the 19th January 2022, which had already passed, adding that as it was just two days she could maybe argue it in the courts.

16. The claimant started early conciliation on 23 January 2022. This was more

than 3 months after she had been told on 21 October she would not get one of the new fixed term contracts. An early conciliation certificate was issued on 5 March. That gave her a month to present a claim. It was presented on 29 March 2023.

17. The claimant explained that during this period she was also busy completing an application for a DBS certificate which she had to do each year to be able to continue in employment as a nursing assistant.

18. Asked why she had not presented claims about earlier events, those in 2020 and the beginning of 2021, until her fixed term contract expired, she said that she was worried that if she complained she would not have her contract renewed. She agreed that at the end of August 2020 she had said she would like to sue all of them for saying she was breaking the law by not agreeing to vaccination, but had decided not to. On 16 September she was offered a job in an area where swabbing was not mandatory. She had been told on 22 September 2020 that she could continue working as normal whatever her vaccination status. After these three incidents, there is no claim for less favourable treatment until the October 2021 non-renewal of her contract.

19. She also agreed that her complaint of race discrimination, which s about the claimant being penalised for being late on shift in December 2020 and April 202 relied for comparison on Anita not being penalised for sleeping on shift in January 2021, and that she had considered at the time that was unfair discrimination because Anita was black and in her view managers turned a blind eye to black staff's faults in case they were accused of discriminating.

20. She agreed that her contract, which initially ran from May to August 2020, had been extended to March 2021, and then to September 2021. The interview was for a new post, and took place on 19th October 2021. She learned on the 21st October that she had not succeeded, and complained about it on the 25th October. Her contract expired on 31st October 2021. Since then she has worked on the nursing bank, doing 6 to 8 shifts a month.

21. The respondent's case on the pleadings was that they had only been able to secure funding for a limited number of unregulated staff (the claimant was not subject to regulation by the Nursing and Midwifery Council), fewer than the number whose fixed term contracts were expiring. They therefore invited all to apply and made a selection. The claimant was placed too low in the ranked results to be offered a new contract. She was one of six who were not offered a new contract.

Are Claims out of Time?

Relevant Law

22. The time limit for claims brought under the Equality Act is set out in section 123. A claim must be presented to the employment tribunal by three months from the act complained of. If the complaint is about conduct extending over a period, the three month starts when the period ended. The three months can

be extended by going to ACAS for early conciliation before the time is up.

23. If a claim is out of time, the tribunal still has a discretion to allow it to proceed out of time if it is considered just and equitable. On whether it is just and equitable to extend time, in **British Coal Corporation v Keeble (1997) IRLR 336**, it was suggested that employment tribunals would find the list of relevant factors in the Limitation act illuminating, but in **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA Civ 640**, tribunals were told not to use Keeble as a comprehensive checklist, but to focus instead on the length of delay and the reason for it, and any other factor that might be relevant to why the claim was late. The burden is on the claimant and there is no presumption that time will be extended. As **Ahmed v Ministry of Justice UKEAT/0390/14** explains:

> "It is for the Claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension. Relevant matters will generally include what are known as the "Keeble" factors."

24. A tribunal may take into account when deciding what is just and equitable the fact that allowing an out of time act to proceed when that act is itself the end of a course of conduct some of which may be very old may be more prejudicial for that reason- **Adediji v University of Birmingham Hospitals NHS Foundation Trust (2021 ICR D5.)** It is also to permissible to weigh in the balance of prejudice the strength or weakness of the claim on the merits – **Kumari v Greater Manchester Mental Health NHS Trust (2022)**, because there is less prejudice in not being allowed to pursue a weak claim.

25. For claims under the Fixed Term Regulations 2022, regulation 7 provides:

> Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—
>
> (a)in the case of an alleged infringement of a right conferred by regulation 3(1) or 6(2), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;
>
> (b)in the case of an alleged infringement of the right conferred by regulation 3(6), with the date, or if more than one the last date, on which other individuals, whether or not employees of the employer, were informed of the vacancy.
>
> (3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.
>
> (4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2)(a)—
>
> (a)where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;
>
> (b)a deliberate failure to act contrary to regulation 3 or 6(2) shall be treated as done when it was decided on.
>
> (5) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of paragraph (4)(b) to decide not to act—
>
> (a)when he does an act inconsistent with doing the failed act; or
>
> (b)if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act if it was to be done.

26. This is similar to section 123 of the Equality Act, but has no provision about conduct extending over a period. Instead, the regulations speak of “a series of similar acts or failures comprising the less favourable treatment”.

Discussion - Time

27. The respondent asks the tribunal not to extend time in respect of the claims of discrimination because of race, discrimination because of religion and belief, and fixed term employee regulations.

28. In the race claim, the acts complained of precede by many months the non-renewal of the fixed term contract. They are not alleged as any other claim of discrimination or victimisation. The comparison material is also old. The respondent will have to investigate matters which are now very old indeed in order to defend the claim. Respondent argues that as the claim was not entitled to be paid until she arrived at work there is no detriment, but this is a weaker argument, Anita, was not working when she was asleep, so the claim that white people who were East European were less favourably treated might be an evidential comparison, if it was not a material comparison. Taken overall, I conclude that it is not just and equitable to extend time for these events, and therefore for the race discrimination claim. The claimant is not explained why she did not present the claim before. Investigating an old matter, particularly as it relies on evidence which is unlikely to have been recorded in writing, does prejudice the respondent. Time limits have been prescribed for a reason, and claimant has not shown why prejudice to her is greater than to the respondent.

29. In the belief claim, items (a) (b) and (c), in August and September 2020 are all over a year old by the time she was interviewed for a post on October 2021. In the meantime she had had her contract twice extended. The claimant argues that because she dissented from that coded vaccination policy, she was marked down in the October 2021 assessment. Against the fact that she was able to work without impediment unvaccinated, with her contract twice renewed, this is improbable.

30. Taking the 2020 detriments by themselves, they are well out of time, they will require detailed investigation about what happened and why, requiring work and costs on the part of the respondent, and the signs are that the claimant did not consider them substantial detriment, because although she threatened to sue, she decided not to. Her threats suggest that she was considering legal claims at the time. If it is right that she was threatened with dismissal, which was never pursued, and if her belief was protected under the Equality Act (a point which will have to be determined), there may well be an injury to feelings. The only reason given for delay is concern that she would be treated unfairly for bringing a claim. It is more likely that she decided not to bring a claim she continued to work as before – whatever threat was made was not carried out. Weighing prejudice to the respondent against prejudice to the claimant, it is not just and equitable to extend time for the August and September 2020 detriments alleged as discrimination because of religion and

belief.

31. The fourth action alleged as discrimination because of religion and belief is the claimant's failure to be selected for one of the new fixed term contracts following her interview on 19 October 2022, a decision made known to her on 21st October. As complained of, this act is out of time, by three days. The weighting of the balance of prejudice shifts because the prejudice to the respondent of having to investigate an old claim is much less. Looking at why the claimant did not present a claim in time, the tribunal finds it important that by mid-November, well within time, the claimant had decided not to pursue her grievance, at any rate for the time being, but was instead seeking advice from ACAS, and then from solicitors and advice centres, about bringing a claim. This activity shows that she was aware that she could make a claim to the employment tribunal. It will also have taken her to the ACAS website where how to make a claim for early conciliation is simply and concisely explained. Both the website, and the experience of employment tribunals, suggest that claimants without advice are well able to find out that they have to fill in the short online form for ACAS, or telephone, to give details of their dispute, so as to obtain an early conciliation certificate. Her postponement application shows that she has a laptop and a mobile phone, so that she had the means to find information, even if in fact she hand wrote and posted the ET1 claim form to the tribunal. The detailed account that she wrote and emailed to a firm of solicitors 2 weeks before her time ran out shows that she was capable of doing this. The claimant did not say in terms that she was unaware of the time limit until she spoke to a solicitor, but there seems no reason why her ignorance was reasonable. The ACAS website and Citizens Advice Bureau website information is very clear about time limits - what they are, and what has to be done.

32. The claimant submitted that she had ongoing health problems in this period. However, they were persistent problems. They did not prevent her from continuing to work the same number of shifts on the bank as when a contracted employee -6-10 a month. They did not prevent her from approaching solicitors and advice centres or from writing detailed accounts for them of what had occurred.

33. It was argued for the respondent that allowing this claim out of time brings with it the events of August and September 2021, whether because the claimant seeks to prove a discriminatory course of conduct, or as background evidence tending to show her belief was a reason for not being selected in October 2021. Even if it is not a course of conduct, the respondent is obliged to investigate and provide its own account of these old events.

34. The third category which the respondent seeks to have struck out because there are out of time is the claim of less favourable treatment for being a fixed term contract worker. The detriments complained of occurred in May or June 2020, soon after the claimant started work. She was told that the hooded tops were only for permanent staff, as were lockers. These are substantially out of

time. Even if, as negative actions, a decision has to be made when decided not to give fixed term staff hooded top or a locker, it is likely to be made during or at a stretch July 2020, which still places it well out of time. The claimant has not explained why she did not present a complaint about this before. These are the only fixed term contract claims, and discrete from all other matters. There is prejudice to the respondent in having to investigate what was said and done at the time, or whether it affected other fixed term contract staff. It will add to the costs of the hearing because of the time to present the evidence, and to make submissions about a separate set of regulations. It is not shown that it is just and equitable to extend time.

Prospects of Success
Relevant Law

35. Order 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

> At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> a. that it is scandalous or vexatious or has no reasonable prospect of success;

36. Striking out claims at a preliminary stage, before evidence has been heard, is a draconian measure, only to be taken in an obvious case. In any case where there is a "crucial core of disputed facts", those should be decided after hearing the evidence, and not at some kind of "impromptu trial" based on pleadings and written statements, save where there is, for example, incontrovertible contradictory evidence in a document. In whistleblowing (public interest disclosure) and Equality Act cases, which are important in a democratic society, over and above the interest of the individual claimant, and particularly fact sensitive, tribunals should be especially careful – **Anyanwu v South Bank University and another UKHL (2001)1;**, **Tayside Public Transport Company Ltd v Reilly (2012) IRLR 755; Ezsias v North Glamorgan NHS Trust (2007) IRLR 603**. The tribunal must first decide whether there is no reasonable prospect of success and then whether to exercise discretion to strike out – **Balls v Downham Market High School and College (2011) IRLR 21.**; **Hasan v Tesco Stores Ltd UKEAT/ 0098/16**.

37. As an alternative to striking out, a tribunal can order a deposit to be paid as a condition of proceeding with any claim if it considers that it has little reasonable prospect of success. Rule 39 of the Employment Tribunal Rules of Procedure 2013, which concerns deposit orders. It states:
Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or a argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument". The amount of the deposit is set having regard to the party's ability to pay, and must not be so high as to bar access to justice; the real deterrent effect of a deposit order is the risk of paying costs. If at final hearing the claimant loses because of substantially the same weakness in his case as identified in the deposit order he is likely to have to pay the other party's costs. Making a deposit order also requires the tribunal to take the decision in two stages,

38. Applications are decided on the basis of the pleaded case and available documents, without taking oral evidence. The tribunal should consider the prospects of establishing the case on the basis of what is pleaded, and may also take into account the party's prospects of establishing the facts pleaded – **van Rensburg v Royal Borough of Kingston on - Thames UKEAT/0095/07**. A deposit order can have a chilling effect in what is largely a no-costs jurisdiction, and should not be done lightly, or bar access to justice in practice. The guidance to tribunals in **Hemdan v Ishmail (2017) IRLR 228** is:

> "the purpose of the deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit".

Discussion

39. The respondent applies to strike out the allegations of reducing weekend shifts between May 2021 and October 2021, which are alleged as detriment because of direct disability, detriment because of age, and victimisation. It is argued that the claimant that these shifts were reduced at her request. For her, the relevance is that she could not cope with the workload because of her disability, so asked for fewer shifts. This is recorded by EmploymentJudge Grewal in her note of the preliminary the case management on 26 January 2023, noting the matter would be relevant if the claim for failing to make reasonable adjustments to disability succeeded.

40. A detriment is something that a reasonable person would consider a disadvantage - **De Souza v AA 1986 ICR 51**. Reduced weekend shifts could not be a disadvantage if that was what the claimant wanted. A claim based on detriment because of reduced weekend shifts is misconceived. It has no reasonable prospect of success.

41. For that reason, the claims of direct disability discrimination, 8(a) on the list of issues, and the claim of age discrimination in the reduction of weekend shifts, 18 (c) on the list of issues, are struck out for having no reasonable prospect of success.

42. On victimisation, the detriment of reduced weekend shifts, 29(d) on the list of issues, is struck out for the same reason.

43. The claim of not answering requests in March 2021 is struck out because the protected acts identified by the claimant occurred in Summer 2021, three months after this alleged detriment. Although the list of issues says she commented on the lack of Eastern European staff from May 2020, she has given no information on when or to whom these were made, even after being

ordered to give for further information. If she cannot state this now, there is no reasonable prospect of her proving she spoke of this before summer 2021.

44. A separate decision on the deposit order application has been prepared.

Employment Judge Goodman
Dated 10 July 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

11/07/2023 .

. .....

FOR THE TRIBUNAL OFFICE

APPENDIX

LIST OF ISSUES

INTRODUCTION

By way of an ET1 lodged on 29 March 2022, the Claimant brought claims of:

a. Direct disability discrimination;

b. Failure to make reasonable adjustments;

c. Direct age discrimination;

d. Direct race discrimination;

e. Direct belief discrimination;

f. Victimisation;

g. Automatic unfair dismissal on the grounds of whistleblowing;

h. Detrimental treatment on the grounds of whistleblowing; and

i. Detrimental treatment on the grounds of fixed-term worker status.

It is accepted that the Claimant is of Eastern European nationality and was 49 years old at the date of bringing her claim.

PRELIMINARY ISSUES

TIME LIMITS

2. Are the claims relating to acts or omissions relied upon by the Claimant that occurred wholly before 24 October 2021 out of time for consideration by the Tribunal?

3. Do such acts/ omissions constitute part of conduct extending over a period for the purposes of EqA 2010 s.123(3)(a) which ended on or after 24 October 2021?

4. If so, is there any just and equitable basis upon which the Tribunal may exercise its discretion to extend the time limit for presentation of claims that occurred wholly before 24 October 2021?

5. If not, should these claims be struck out on the basis that the Tribunal does not have jurisdiction to hear these claims or that they have no reasonable prospect of success by reason of their being out of time?

DISABILITY

6. Was the Claimant disabled within the meaning of section 6 of the EqA 2010 at the time of the alleged discrimination? The Claimant alleges that she is disabled by way of the following conditions:

(i) Soft tissue problems; and

(ii) Premature menopause.

7. If so, did the Respondent know, or could reasonably have been expected to know, that the Claimant was disabled at the time of the alleged discrimination, as alleged or at all?

SUBSTANTIVE CLAIMS

DIRECT DISABILITY DISCRIMINATION

8. Did the Respondent directly discriminate against the Claimant contrary to section 13 Equality Act 2010? In particular, it is alleged that the Claimant was subjected to the following treatment:

a. Reducing the Claimant's weekend shifts between 23 May 2021 and 30 October 2021;

b. Pre-determining the result of the Claimant's 19 October 2021 job interview;

c. Lillian Davies overloading the Claimant with work in April 2021 by assigning her too many consecutive shifts with insufficient gaps for her to recover.

9. If the treatment occurred as alleged, was it less favourable treatment because of the Claimant's disability, more specifically:

a. Who is the relevant comparator? The Claimant relies on the other members of the HCA staff who did not suffer from her alleged disabilities.

b. Are there facts from which, in the absence of an explanation, a finding of discrimination could be made?

c. If so, has the Respondent established an explanation for the treatment which is nothing to do with the Claimant's disability?

FAILURE TO MAKE REASONABLE ADJUSTMENTS

10. Were the Respondents obligated to make reasonable adjustments to accommodate the Claimant's alleged disability pursuant to section 20 Equality Act 2010? The specific alleged reasonable adjustments are as follows:

a. The removal of bulky items such as beds, big linens-cages from near main doors or passages;

b. The removal of items or equipment from the premises and/or places they were not required to be stored;

c. Not allocating the Claimant to big sectors of the ICU ward (for example, 2 bays together including their isolation rooms, or 1 bay including its isolation rooms plus all the other 5 isolation rooms in the corridor), and to limit the Claimant's workload to 4-6 patients;

d. Not re-organising the work-allocation of the HCAs for some of the shifts;

e. Not reorganising the Claimant's consecutive shift patterns during Covid.

11. Were such steps reasonable and, if so, when did it become reasonable to take any such step?

12. Did the Respondents fail to take any such reasonable step at the appropriate time?

13. Did the Respondents apply a provision, criterion or practice ("PCP") which had the effect of putting the Claimant at a substantial disadvantage in comparison with someone without the Claimant's alleged disability in the same circumstances?

14. The PCPs the Claimant relies upon are:

a. The requirement that the Claimant roll patients and lift their legs during toilet and hygiene-care;

b. Items and/or equipment being left near main doors or passages or other places they were not required to be stored;

c. Allocation of the same number of patients and duties to all staff.

d. Requiring staff to work on consecutive night shift patterns.

15. If so, did any of the alleged PCPs put the Claimant at a substantial disadvantage in comparison to persons who are not disabled? In particular, the substantial disadvantage alleged for each alleged PCP is that:

a. The Claimant as a result of her disability struggled to navigate around bulky items/equipment and was injured;

b. The Claimant struggled to complete tasks as a result of the Respondent allocating all staff the same number of patients and requiring them to complete the same duties;

16. At the time that each of the alleged PCPs were applied, did the Respondents know, or could they be reasonably expected to know, that the Claimant was likely to be placed at a substantial disadvantage by each alleged PCP?

17. Did the Respondents fail to make any adjustment(s) that it was reasonable to make that would have had the effect of removing or mitigating any disadvantage experienced by the Claimant as a result of her alleged disability?

DIRECT AGE DISCRIMINATION

18. Did the Respondent directly discriminate against the Claimant contrary to section 13 Equality Act 2010 by treating her unfavourably as a person in an age group approaching 50 years old? In particular, it is alleged that the Claimant was subjected to the following treatment:

a. The First Respondent failing to extend the Claimant's contract;

b. The Second and Third Respondents pre-determining the result of the Claimant's 19 October 2021 job interview;

c. The First Respondent reducing the Claimant's weekend shifts and spacing them out in the period between 23 May 2021 and 30 October 2021; and

d. Sarah Robinson and Natasha Manning overloading the Claimant with work on 28 October 2021 when the Claimant says she was required to operate half of the ICU alone, whilst 4 HCAs were assigned to work on the other half of the ICU.

19. If the treatment occurred as alleged, was it less favourable treatment because of the Claimant's age, more specifically:

a. Who is the relevant comparator?

i. For 18(a)-(c), the Claimant says the relevant comparators are

(i)Jacqueline Dadd (who the Claimant believes is around 63 years-old), and

(ii) other HCAs who were younger than the Claimant.

ii. For 18(d), the Claimant says that Jacqueline Dadd (who the Claimant believes is around 63 years-old) is the relevant comparator, and was more favourably treated as she had three younger HCAs around her on the day.

b. Are there facts from which, in the absence of an explanation, a finding of discrimination could be made?

c. If so, has the Respondent established an explanation for the treatment which is nothing to do with the Claimant's age?

20. Has the Respondent shown that its alleged treatment of the Claimant was a proportionate means of achieving a legitimate aim?

The Respondent relies on the following legitimate aims:

i. Regeneration and opportunities for new members of the workforce;

ii. Avoidance of inequitable allocation of premium pay shifts at weekends; and

iii. Ensuring fair distribution of work and effective allocation of resources

DIRECT RACE DISCRIMINATION

21. The Claimant identifies as being of Eastern European nationality.

22. Did the Respondent directly discriminate against the Claimant contrary to section 13 Equality Act 2010? In particular, it is alleged that the Claimant was subjected to the following treatment:

a. On 29 December 2020, after arriving to her shift 10 minutes late to due to public transport delays, the Claimant's lateness was recorded on her time sheet and her salary was cut; and

b. On 22 April 2021, after arriving to her shift 15 minutes late due to public transport delays, the Claimant had her salary cut and her lateness recorded as her fault on the rota.

23. If the treatment occurred as alleged, was it less favourable treatment because of the Claimant's race, more specifically:

a. Who is the relevant comparator? The Claimant says the relevant comparator is Anita (the Claimant does not remember her last name), a bank-shift HCA who is from the BAME community. The Claimant says that she was disciplined for being late to work when Anita was not disciplined for sleeping on shift.

b. Are there facts from which, in the absence of an explanation, a finding of discrimination could be made?

c. If so, has the Respondent established an explanation for the treatment which is nothing to do with the Claimant's race?

DIRECT BELIEF DISCRIMINATION

24. What is the Claimant's belief or beliefs? The Claimant says her belief is:

a. That the mortality from Covid-19 is almost two times less than that of the mortality of flu (types A, B and C);

b. That Covid-19 is not that deadly;

c. That a lot of media is corrupted and controlled by companies or individuals;

d. That Covid-19 was designed to generate money and manipulate the public;

e. People were used as 'guinea-pigs' for the development of biological weapons, and were 'marked' and injected with micro-chips, in order to be manipulated mentally and physically;

f. That the Covid-19 vaccine is ineffective and dangerous;

g. That matrons and the Trust have been lying to the staff that "according to the new law now the Covid self-testing is obligatory for all members of staff.

25. Is the Claimant's belief protected under the Equality Act 2010?

26. Did the Respondent directly discriminate against the Claimant contrary to section 13 of the Equality Act 2010? In particular, it is alleged that the Claimant was subjected to the following treatment:

a. She was required to self-test for Covid between June and September 2020;

b. She was made to believe/was told that she would be dismissed because she refused to self-test for Covid;

c. She was asked to resign in August 2020;

d. She was not selected after a job interview on 19 October 2021 for a post.

27. If the treatment occurred as alleged, was it less favourable treatment because of the Claimant's belief? More specifically:

a. Who is the relevant comparator? The Claimant says the relevant comparators are Jacqueline Dadd (HCA), Dilruba Naher (HCA), Grace (the Claimant cannot find her last name), Israel Lire, Fernando Ruiz (HCA) and Nurses Rachel and Noriel and Senior Nurse Inez Martinez, who were given new contracts in about November 2021, when the Claimant was not. The Claimant says the relevant comparators never expressed any negative views about the vaccines.

b. Are there facts from which, in the absence of an explanation, a finding of discrimination could be made?

c. If so, has the Respondent established an explanation for the treatment which is nothing to do with the Claimant's belief?

VICTIMISATION

28. Was the following a protected act carried out by the Claimant in accordance with section 27(2) Equality Act 2010?:

a. Raising concerns about being the only HCA of Eastern European origin between 19 May 2020 and October 2021. The Claimant says she raised these concerns verbally to Sarah Robinson when they quarrelled in a side room in summer 2021, and to Sarah Robinson and Natasha Manning in a job interview on 19 October 2021.

29. If so, was the Claimant subjected to a detriment because she had carried out, or because the Respondent believed she had carried out, a protected act? The Claimant relies on the following detriments:

a. The workload and attitude of Sarah Robinson, Natasha Manning, and Jayne Holiday towards the Claimant becoming worse after her conversation with Sarah Robinson in summer 2021.

b. Delay in responding the Claimant's following communications:

i. Letters to her team leader, J. Holliday on 28 October 2021, 1 November 2021 and 20 November 2021. The letters related to a request to refer the Claimant to Occupational Health.

ii. Text messages to J. Holliday on 4 August 2021 and 28 August 2021, and 5, 8 and 16 November 2021.

iii. Letters to the Matrons Sarah Robinson and Natasha Manning on 8 February 2022 about delayed study leave payment;

iv. Letter to Matron N Manning on 1 September 2021;

v. Letter to Matrons S. Robinson, N. Manning and Marian Joven on 5 October 2021 ;

vi. Letters to Matrons S. Robinson and N. Manning on 4 January 2022 and 25 January 2022.

vii. Letters to Booking Team on 25 September 2021, 27 October 2021,and 22 January 2022.

c. Lack of attention being paid to the Claimant when they stated they were in pain and needed assistance from other HCAs. The Claimant relies on the following:

i. Communications with J. Holliday over two weeks in March 2021, requesting appointments to know when she could speak to her. The Claimant also says it was hard to get in touch with J. Holliday in August 2021 and that she was often on holiday.

ii. In June or July 2021 the Claimant complained to Senior Nurse Sarah Robinson that there were no other HCAs assigned to the Claimant's sector and the HCA on the sector was not assisting her. Senior Nurse Sarah is said to have not assisted the Claimant and to have, on the third time the Claimant approached her, discussed with her in a side-room that she could not change anything or hire more people in a discussion the Claimant says was unpleasant.

iii. On 20 October 2021 the Claimant was working alone in the ICU and raised this to Marian Joven, Jaimie Vizhalayil, and Ines Martinez

d. Reducing the Claimant's weekend shifts in the period of time between 23 May 2021 and 30 October 2021. The Claimant says that Matrons Robinson and Gorham approved the shifts.

e. Failing to renew the Claimant's fixed-term contract.

AUTOMATIC UNFAIR DISMISSAL (WHISTLEBLOWING)

30. Was the reason or principal reason for the Claimant's dismissal that she made a protected disclosure?

31. The Claimant relies on the following alleged disclosures:

a. Concerns raised to Lillian Davies verbally in the autumn of 2020 regarding a nurse changing the dressing of a wound with the same gloves used to clean the patient;

b. Challenging decisions of senior nurses and/or matrons to put more tasks on the HCAs, such as pharmacy duties, including:

i. on 16 June 2021 verbally and on 16 or 17 June 2021 in a letter challenging Sarah Robinson about giving Pharmacy Duty to HCAs;

ii. on 19 October 2021 verbally challenging Caoimhe O'Dwyer for giving her a task the Claimant says was normally done by Porters;

c. A letter dated 5 October 2021 to the Second Respondent, Third Respondent and Marian Joven informing them of 4 boxes of ready to use syringes and 25 loose syringes being found in bays 12-15 of the pharmacy room which expired in January, April and July 2021;

d. Letters sent on 4 January 2022 and 25 January 2022 to the Second and Third Respondents informing them of machinery being kept in the toilets of Bays 17-21 and 27-32;

e. Verbally alerting nurses in charge of Bays, namely Salina (the Claimant does not know her last name, but describes her as from Indian origin with long hair), Sarah Robinson, Annie (the Claimant does not know her last name, but describes her as from the Phillippines), Senior Nurse Joven, Matron Davies and Team Leader Jayne Holliday, and other nurses on shift in September, October and December 2020, and January, April and June 2021 of machinery being kept in the toilets of Bays 17-21 and 27-32. The Claimant does not remember specific dates;

f. Verbally raising multiple times between May and August health and safety issues and danger as a result of the cold. The Claimant does not remember specific dates aside from the period between 23 May 2020 and August 2020;

and

g. Raising that fixed-term workers were not properly protected from cold compared to permanent staff, to Lillian Davies in July 2020 and to multiple other people during the period May 2020 to August 2020 (including Sarah Robinson, Claire Goram, the technicians, and others).

h. Raising that expired Enoxaparin was in the pharmacy with her team leader and a nurse in charge on 5 October 2021.

32. Do the matters set out at 31(a) – (g) above, separately or cumulatively, amount to a disclosure of information?

33. Did the Claimant reasonably believe that the above matters tended to show one of more of the following The Claimant alleges that she reasonably believed the above matters tended to show:

a. That a criminal offence has been committed, is being committed or is likely to be committed;

b. That a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject; and/or

c. That the health or safety of any individual has been, is being or is likely to be endangered.

34. Did the Claimant reasonably believe that the above matters were in the public interest?

35. Did the Claimant make the above disclosures to her employer or another responsible person?

FIXED-TERM EMPLOYEES (PREVENTION OF LESS FAVOURABLE TREATMENT) REGULATIONS 2002 ('FTER 2002')

36. It is accepted that the Claimant was on a fixed term contract under FTER 2002.

37. Did the Respondent treat the Claimant less favourably than it would treat a comparable permanent employee by:

a. On one of the day-shifts in June 2020 Matron Davies telling the Claimant that 'fluffy tops with hoods' are just for permanent staff; and

b. Not providing the Claimant with a locker.

38. Can the Respondent objectively justify the alleged unfavourable treatment?

26 January 2023