



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Adam Mackowski

v

Network Rail Infrastructure Limited

Heard at: Reading (CVP)

On: 18 August 2023

Before: Employment Judge S Moore

Appearances

For the Claimant: In person

For the Respondent: Mr J Crozier, counsel

RESERVED JUDGMENT

- (1) The Claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time and the claim of disability discrimination is struck out.
- (2) The complaint of equal pay is struck out on the grounds it has no reasonable prospect of success.

REASONS

Introduction

1. A Final Hearing has been listed in this matter for six days between 5 and 12 January 2024. This Preliminary Hearing was listed in order to determine:
 - (i) Whether the Claimant was or became a disabled person at any point between 21 July 2021 and 28 October 2022;

- (ii) Whether his equal pay claim should be struck out under rule 37 of the Employment Tribunals Rules of Procedure 2013 or a deposit order made under rule 39; and
 - (iii) To make further Case Management Orders.
2. This judgment deals with matters (i) and (ii). A separate document containing a Case Management Summary and Case Management Orders deals with matter (iii).

Procedural Background

3. The Claimant lodged his Claim Form on 23 June 2022 following early conciliation between 9 and 22 June 2022. He made complaints of race and disability discrimination and claims for “other payments”.
4. He was subsequently ordered to clarify the nature of his disability, to provide further clarity on his race and disability claims, and to provide the Respondent and the Tribunal with the name and sex of anyone with whom he claimed to be entitled to equal pay and set out the basis on which he claimed to be entitled to equal pay with them.
5. The Claimant responded by providing:
- (i) A document entitled “Disability, Discrimination, Harassment, Victimisation” setting out the history of alleged discrimination. This account also details a number of grievances and capability processes since July 2021; and
 - (ii) A document entitled “Unequal Pay” in which he sets out the manner in which he says he was paid less than both male and female alleged comparators, giving the names of five comparators, three female and two male.
6. On 28 November 2022, following his resignation on 28 October 2022, the Claimant applied to add claims of victimisation and constructive dismissal and the Respondent did not oppose this application.
7. At a Preliminary Hearing on 28 April 2023, the Claimant’s causes of action were confirmed as being:
- 1. Direct disability discrimination
 - 2. Disability harassment
 - 3. Direct race discrimination
 - 4. Racial harassment
 - 5. Victimisation
 - 6. Constructive unfair dismissal

8. In an effort to clarify the basis of his claims the Claimant had produced a Scott Schedule, however, rather than identify precise factual and legal allegations, it set out a narrative account of the Claimant's version of events. Further, EJ Gumbiti-Zimuto was not clear that the Claimant was intending to pursue an equal pay claim within the meaning of Chapter 3 to Part 5 of the Equality Act 2010. The Respondent was ordered to respond to the Scott Schedule and the Claimant to confirm his position on equal pay.
9. The Respondent subsequently responded to the Claimant's original Scott Schedule, attempting to distil the factual allegations from the Claimant's chronological account of events and identify the corresponding causes of action. It invited further clarification from the Claimant.
10. The Claimant did not respond to the Respondent's proposed amendments to the Scott Schedule but repeated his equal pay claim in similar terms to those provided previously save for removing a reference to male comparators.
11. On 9 June 2023 the Respondent applied for the equal pay claim to be struck out (or a deposit order made).
12. At the hearing today, I had before me a bundle of documents and the Claimant and his mother, Mrs Ursula Mackowski, gave evidence on the issue of disability.

Disability

Evidence

13. The Claimant's date of birth is 8 July 1979.
14. His evidence was that he had had a mental health condition of anxiety disorder since 2000, that his mental health condition had progressively got worse since 2018 and that since April 2020 he started to suffer with severe depression and anxiety following a family bereavement and being a full-time carer. Further, that his mental health condition had been greatly exacerbated by stress at work and discrimination, in particular he had received a first warning for performance on 3 February 2022, just after the Respondent had failed to uphold his Formal Grievance.
15. In support of his claim to be a disabled person, the Claimant relied on a copy of a print-out of his medical records from his GP surgery dated 15 September 2022 ("the GP Medical Report"). There are also a number of GP "fit notes" in the bundle and an Occupational Health assessment dated 14 March 2022.
16. The Claimant stated there was lots more medical evidence that he could have provided, but he wasn't willing to share it. Even leaving aside the Claimant's obligation to disclose all documentation relevant to the question

of disability, the burden of proof as regards disability is on him and the Tribunal can only make an assessment of disability on the evidence before it.

17. Mrs Ursula Mackowski stated the Claimant suffered from clinical anxiety and depression that was diagnosed in his early twenties. This impacted his normal day-day activities by making him constantly anxious, having nausea and headaches, causing frequent panic attacks, difficulty in going to social places because of panic attacks and fainting, difficulty in using public transport for fear of having panic attacks, and family holidays being cancelled because of his anxiety disorder. Since the Claimant's early twenties he had been prescribed medication for many years by his GP as well as being referred to a specialist doctor at the Royal Berkshire Hospital for anxiety disorder and receiving counselling from a family friend. From April 2020 onwards his anxiety and depression had got significantly worse and he had severe anxiety, palpitations and depression, severe nausea, frequent headaches, and high blood pressure, feelings of being overwhelmed and unable to concentrate, being extremely exhausted and fatigued, severely distressed, socially withdrawn, and having suicidal thoughts.
18. The Claimant was employed by the Respondent between 21 September 2014 and 28 October 2022 as a Route Isolation Planner.
19. It is common ground that from 2018 onwards he was placed on various Performance Improvement Plans.
20. The first fit note and reference to sick leave in the bundle is dated 1 May 2020, when the Claimant was signed off work until 25 May 2020, on grounds of "Bereavement, death of father" (although he was in fact absent from work between 13 April – 25 May 2020).
21. A "Return to Work" form dated 27 May 2020 records the Claimant being asked by his line manager, Danielle Pound: "Any underlying issues?" and "Are you on any medication?". The Claimant replied "No" to both questions. As regards a query in respect of "Expectation of improvement" the form records the answer as being "N/A – one off instance". In evidence the Claimant said the notes on the form were incorrect, that he did have underlying issues at the time, and that Ms Pound knew he was suffering from anxiety and depression.
22. I don't accept the Claimant's evidence in this respect. An email exchange between Ms Pound and the Claimant dated 27 May 2020 records Ms Pound stating "Please see the attached fit note from our return-to-work discussion. As we can't sign the form you just reply to say happy with the form" and the Claimant responding, "Yes happy with the form". Later in the chronology there is an example of the Claimant contesting the accuracy of meeting notes, so I am satisfied that on this occasion, at the time, the Claimant considered the notes to be accurate.

23. On 21 July 2021 the Claimant raised a Formal Grievance alleging, broadly speaking, that he was paid less than other Route Isolation Planners, that confidential information about his father's death had been broadcast in the workplace in a data breach, and that he had been subject to discriminatory treatment.
24. In December 2021 and/or January 2022 the Respondent took decisions upholding the Claimant's grievance in relation to the data breach but not in relation to the other matters. The Claimant appealed this outcome,
25. At a similar time (or shortly thereafter) the Claimant was invited to a disciplinary hearing regarding his performance.
26. On 10 February 2022 the Claimant was signed off from work until 5 March 2022 on grounds of "stress-related illness".
27. On 16 February 2022 a "Record of Contact" form with the Claimant records Ms Pound stating "[The Claimant] felt overwhelmed, exhausted, his heart was racing/palpitations. The GP had prescribed beta blockers. [The Claimant] mentioned that he has a history of depression and anxiety from many years ago, that he thought he had moved on. We talked about antidepressants, that he had been on them previously, that he was recommended the type he had tried before and didn't get along with... [The Claimant] raised that the GP mentioned getting out of the situation. I said I would ask about the redeployment list for him. [The Claimant] spoke about job applications that he had in progress."
28. From 5 to 14 March 2022 the Claimant was on annual leave.
29. On 14 March 2022, Ms Marie Brocklehurst, provided an Occupational Health Report in respect of the Claimant. That report provides:

"As you are aware [the Claimant] has been absent from work due to work related stress since 10 February 2022. He reports a number of issues in the workplace as building over a period of time and raised a grievance in July 2021 which he states is still ongoing...He currently reports symptoms of palpitations, insomnia, feeling anxious all the time and feeling constantly overwhelmed. He was very anxious and agitated throughout his assessment today. He states he has consulted his GP who has prescribed treatment for his palpitations and has suggested anti-depressants may be helpful...I have undertaken an assessment using nationally recognised questionnaires to determine the extent of his symptoms. The results indicate that he is experiencing severe symptoms of anxiety and depression, which in themselves would be a barrier to him returning to work at the present time. I am unable to determine the timeframe for a return to work at this time, this is wholly dependent upon the work issues being resolved...Following assessment today, I can advise that [the Claimant] is unlikely to return to work until workplace issues are addressed or resolved."

30. Ms Brocklehurst's opinion was that the Claimant's anxiety was unlikely to be considered a disability because "- it has not lasted 12 months nor is likely to last longer than 12 months; - is not having a significant impact on his ability to undertake their normal daily activities; - would not have a significant impact on normal daily activities without the benefit of treatment".
31. On 15 March 2022 the Claimant was signed off work from 14 March 2022 until 28 March 2022 on grounds of a "stress-related problem".
32. The Claimant said in cross-examination that had suffered from depression and anxiety for long time and the stress at work simply exacerbated his pre-existing condition. That the GP's notes signing him off work on grounds of stress were written that way because the doctor was being compassionate and only recording what the Claimant wanted the doctor to tell the Respondent. However, since the GP was not at the Tribunal to give evidence to the contrary, I must assume that the GP's fit notes accurately reflect their assessment of the situation at that time.
33. On March 2022 the Claimant had a Welfare Meeting with Danielle Pound. The notes of those meeting record, amongst other things, the Claimant referring to a GP prescribing him "anti-depressants that I had years ago" and saying "...many years ago I had something similar I was off for about 9 months..." Ms Pound also referred to the OH Report and the reference to the Claimant experiencing severe symptoms of anxiety and depression. The Claimant is recorded in the notes as stating "I don't know about depression, maybe a bit."
34. The Claimant took issue with the notes at the time, stating "There meeting's minutes are very poorly written. Symptoms as discussed: stress-related illness, anxiety, overwhelmed, headaches, nausea, palpitations. GP and mental health doctor had been seen already by this point meeting minutes say GP not seen first answer. Where is the part about discussion of what specific support do I get when you advised that morning call and afternoon call is what support I receive? That should be contained within the minutes. About 90% of the minutes are inaccurate and need-re-writing."
35. On 28 March 2022 the Claimant was signed off work until 25 April 2022 on grounds of "stress-related illness and anxiety".
36. On 28 April 2022 the Claimant was signed off work from 25 April 2022 until 6 June 2022 on grounds of "stress related illness, anxiety and depression".
37. The Claimant said in cross-examination that during April 2022 nothing changed in relation to his symptoms and that he was continuing to apply for other jobs. The issues at work he had with the Respondent remained and continued to cause him stress. He further agreed that between August 2021 and August 2022 he applied for approximately 400 jobs.

38. On or about 14 June 2022 the Claimant returned to work. In a back-to-work interview the Claimant stated that since taking Sertraline anti-depressant he didn't have as much of the "unable to cope feelings". The interview also records the Claimant requesting a potential move to a different department that had no contact with route planning and stating this was "one of the main things that is affecting my wellbeing".
39. In cross-examination the Claimant agreed he had said this but disagreed with the suggestion that the central and immediate cause for his problems was how work made him feel, he said he had suffered with anxiety and depression for a long time.
40. A Welfare Meeting took place on 1 July 2022. The notes of that meeting record the Claimant stating, amongst other things, that his "anxiety is workload related with all the "nonsense" going on. [The Claimant] was feeling depressed and unable to cope and says anyone would feel the same in the position he was in. [The Claimant] states A & D is related to work and after his father passed away it was too much. [The Claimant's] mother is ill so the Claimant is trying to be strong for her. [The Claimant] believes work was affected due to bereavement as he was grieving and working and could not concentrate".
41. The Claimant remained at work between mid-June 2022 and mid-September 2022.
42. On 15 September 2022 the Claimant was signed off work until 29 September 2022 on grounds of "Mixed anxiety and depressive disorder" and his GP Medical Report was printed out.
43. The GP Medical Report records the following information:
44. First, under the heading "Problems: Active" the notes record a list of the following matters:
- | | |
|-------------------|---------------------------------------|
| 15 September 2022 | Mixed anxiety and depressive disorder |
| 15 September 2022 | Stress at work |
| 5 October 2000 | [X] Phobic anxiety disorders. |
45. Secondly, the report refers to the Claimant being prescribed Sertraline in 50 mg tablets and Propranolol in 10 mg tablets, both on 15 September 2022 (although there is a reference to the Claimant being advised to "Restart Sertraline").
46. Thirdly, the report records the Claimant's Covid and flu vaccinations between May 2021 and December 2021, and early historic vaccinations in 1979, 1980 and 1984.
47. Fourthly, there is a reference to the Claimant's "Last 3 Consultations", all dated 15 September 2022. As regards the Claimant attending an appointment on 15 September 2022, by the heading "History", the notes

state “history of depression and anxiety, particularly in early 20s. Found 2020 very hard, Dad passed away, now become a carer for Mum...Home life – can manage. At work – struggling to concentrate, very anxious – chest tightens, SOB palpitations, pins and needles, can feel like might pass out, tries to get up and go outside to ease symptoms, wakes up being sick first thing, very stressed. Now performance managed at work, getting warnings, “toxic environment”, now feels that line manager has sided with bullying manager, now being isolated from the team can’t find information needed to do job, has been put onto a different area of work. 4 weeks ago put in another grievance for victimisation, nothing done, few weeks later received a final warning. Trying to find a new job or move department within the company, has interviews lined up. Has seen occupational health a few times, discussed this with them. Have advised network rail to carry out a stress risk assessment – haven’t done it. Feels as if being managed out of the company. Feels as it has relapsed back to where he was in early 20s.”

48. It is clear from the information contained in this narrative that these are the GP’s notes of the Claimant’s history as described by the Claimant to the GP.
49. Fifthly, the GPs examination record the Claimant’s heart rate and blood pressure and describe him as being “very tearful at times”. The “problems” are identified as (1) “Stress at work” and (2) “Mixed anxiety and depressive disorder”.
50. On 28 September 2022 the Claimant was signed off work until 31 October 2022 on grounds of “Mixed anxiety and depressive disorder”.
51. On 28 October 2022 the Claimant resigned with immediate effect.

Conclusions

52. The question is not whether the Claimant has, or has ever had, problems with his mental health but whether he has shown that he satisfied the statutory definition of being a disabled person within the meaning of the Equality Act 2010 at any point during the relevant part of his employment with the Respondent, namely between 21 July 2021 and 28 October 2022.
53. In this respect, section 6 of the Equality Act 2010 provides:
 - (1) A person (P) has a disability if-
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”
54. In this case the impairment relied upon for the purposes of section 6(1)(a) is a mental impairment of anxiety and/or depression and/or phobic anxiety disorders.

55. Section 6(1)(b) provides that a mental or physical impairment amounts to a disability if it has both a substantial and a long-term adverse effect on a person's ability to carry out normal day-to-day activities.
56. As to the meaning of substantial, section 212(1) of the Equality Act 2010 and paragraph B1 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011 ("the Guidance"), state that the requirement that an adverse effect on normal day-to-day activities should be a substantial effect reflects the general understanding of disability as a limitation going beyond normal differences in ability which may exist among people and that a substantial effect is one that is more than a minor or trivial effect.
57. As to the meaning of long-term, paragraph 2 of schedule 1 of the Equality Act says:
- "(1) The effect of an impairment is long-term, if-
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
 - (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."
58. Also relevant is the authority of **J v DLA Piper UK LLP (EAT) [2010] ICR 1052**.
59. At paragraph 40(2) the court held that when analysing the questions of impairment and adverse effect the tribunal should not proceed by rigid consecutive stages, and that where there is dispute about an impairment it may make sense to start by making findings about whether a claimant's ability to carry out normal day to day activities is adversely affected on a long-term basis and to consider the question of impairment in the light of those findings.
60. At paragraph 42 the court drew a distinction between two states of affairs which can produce broadly similar symptoms, the first being a mental illness and an impairment within the meaning of the Equality Act 2010, the second being a reaction to "adverse life events", such as problems at work. The court continued by pointing out that the distinction can be difficult to apply in practice but may be resolved by first considering the long-term effect requirement: if a Tribunal finds that a claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more that was likely to suggest "clinical depression" since reactions to adverse life events were not normally long-lived.

61. Here, the Claimant's case is that he has suffered from a mental impairment which has had a substantial adverse effect on his ability to conduct normal day to day activities since 2000. He relies on the fact that his GP Medical Report lists the item "5 October 2000 Phobic anxiety disorders" as an active problem. On this basis he argues that he was a disabled person within the meaning of the Equality Act 2010 from the outset of his employment with the Respondent.
62. I am not satisfied this is the case.
63. While I accept that something happened in 2000, when the Claimant was about 20 years old, which is described in his medical notes as "Phobic Anxiety Disorders", there is no evidence before me in respect of that matter and, in particular, whether it had a significant adverse effect on his ability to carry out normal day to day activities for a period of 12 months or more. Moreover, as Mr Crozier put it in submissions, that matter has no subsequent footprint in the Claimant's medical records, other than simply being listed as an active problem in the GP Medical Report. There are no medical records of the Claimant seeing a GP about anxiety related problems, having any treatment or medication for anxiety related problems, or having time away from work for anxiety related problems at any time prior to April 2020, nearly 20 years later. This, even though the GP Medical Report does list some historic matters such as the Claimant's vaccination record.
64. To the contrary the notes of the "Return to Work" form dated 27 May 2020 record the Claimant saying he had no underlying issues, the "Record of Contact" dated 16 February 2022 records the Claimant mentioning that he had a history of depression and anxiety from many years ago that he thought he had moved on from, while the GP Medical Report itself records the Claimant as having told the GP on 15 September 2022 that he felt as if had relapsed back to where he was in his early 20s.
65. Further there's no medical evidence to indicate that as at October 2000 the phobic anxiety disorders the Claimant was then experiencing were likely recur as he got older and I cannot simply assume that they were likely to do so (see **J v DLA Piper UK LLP** at para 45).
66. It therefore follows that even if the Claimant was a disabled person within the meaning of the Equality Act 2010 in or around October 2000, he had ceased to be a disabled person by the time he started working for the Respondent in 2014.
67. The next question is whether the Claimant became a disabled person by reason of a mental impairment in or about April/May 2020 when he was signed off work until 25 May 2020, on grounds of "Bereavement, death of father".
68. Here, I consider the evidence points clearly to the Claimant suffering a reaction to a traumatic life event rather than a mental impairment within the meaning of the Equality Act 2010. As noted above the Return to Work"

form dated 27 May 2020 records the Claimant stating he had no underlying issues, that he was not on medication and that the matter was a once off instance. Further, there is no contemporaneous medical evidence to suggest the Claimant was suffering from a mental impairment of depression or anxiety rather than a natural reaction to the death of a much-loved parent.

69. The next relevant period is February to June 2022.
70. During this period of time, the Claimant's fit notes describe him being signed off work for "stress-related illness"; "stress-related problem"; and "stress-related illness and anxiety" and I am not satisfied that the mental health problems he was then experiencing were a mental impairment within the meaning of the Equality Act 2010, rather than a normal reaction to workplace stress that was likely to resolve if his work issues were addressed to his satisfaction. Notably the commencement of the Claimant's sick leave took place shortly after his grievance was partially rejected and he was issued with a performance warning, while the OH Report of 14 March 2022 describes the Claimant as being absent due to work related stress and expressly links his return to work with the resolution of his workplace issues. Furthermore, the Welfare Meeting of July 2022 records the Claimant stating his anxiety was workload related "with all the nonsense going on" and said that anyone would feel depressed and unable to cope in his position.
71. The final period of time is from about mid-June to 28 October 2022.
72. The Claimant remained at work from mid-June to mid-September. However, on 15 September 2022 he was signed off work on grounds of "mixed anxiety and depressive disorder". Further the GP Medical Report details the Claimant as suffering from both stress at work and mixed anxiety and depressive disorder, describes him presenting as "very tearful at times", and records that he was prescribed Sertraline and Propranolol.
73. The Respondent accepts, correctly in my judgment, that at this point the Claimant's condition, which until that point had been a normal stress reaction to an adverse situation at work, had become a medical condition and mental impairment within the meaning of the Equality Act 2010, no doubt triggered by the continuation of the Claimant's work-related stress.
74. The next question is therefore whether that mental impairment had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities.
75. While Mr Crozier did not seek to argue that the Claimant's impairment did not have a substantial adverse effect on his ability to carry out normal to day activities, he submitted the impairment was not likely to last 12 months because it remained focused on the Claimant's work-related stresses and was not likely to recur.
76. I accept this submission.

77. It is plain from the chronology of events set out above that the deterioration of the Claimant's mental health was very much linked to the unfair treatment he felt he was experiencing at work, namely the failure, as he saw it, of the Respondent to address his grievances and the disciplinary process being brought against him from January 2022 onwards. Notably the GP Medical Report refers to the Claimant telling the GP on 15 September 2022 about having recently received a Final Warning, about the "toxic environment" at work and that he was trying to find a new job or move department within the company, and that he had interviews lined up. By contrast the notes record him stating that he could manage his home life. As at September 2022 the evidence therefore suggests that if the Claimant's work problems were to resolve to his satisfaction, or he were able to secure a satisfactory new job, it is likely his mental impairment would also resolve. There is no medical evidence prior to his resignation on 28 October 2022 to suggest his mental health impairment would persist beyond the resolution of his workplace issues or was likely to recur.

78. I am therefore not satisfied the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at any point during his employment with the Respondent and it follows that his claim for disability discrimination must be struck out.

Equal Pay

79. The Respondent submits that the Claimant's complaint of equal pay has no reasonable prospect of success within the meaning of section 37(1)(a) Employment Tribunals Rules of Procedure 2013.

80. When he first set out the basis of his equal pay claim, the Claimant identified five comparators, three female and two male comparators.

81. In that document the Claimant complained (i) that Christopher Hall was paid more than him, despite, the Claimant alleged, working on more limited routes than the Claimant and the Claimant having to cover Christopher Hall's workload for over a year; (ii) that he became more aware of the pay disparity after he saw roles advertised with very different salaries depending on location; (iii) that female comparators were paid significantly more than him although he had 8 years' service; (iv) that Mathew Brakspear had been given a significant pay increase to prevent him leaving, despite him having less experience than the Claimant; (v) his pay had always been at the low end; and (vi) despite his complaints and grievances the Respondent had not addressed the matter.

82. When required to clarify the nature of his claim, the Claimant removed his references to the two male comparators. He complained that (i) he became even more aware of the unequal pay across the Respondent as Isolation Planner roles were advertised internally; (ii) Sharra Lock was paid the same as the Claimant when she first joined the Respondent despite

having no prior Isolation Planning experience; and (iii) despite his complaints and grievances the Respondent had not addressed the matter.

83. At the hearing today the Claimant referred to the fact that there were approximately 12 Isolation Planners working for the Respondent, and that he had been paid less than all or most of them. Three of them were female (the ones identified in his documentation). He stated that he had covered the workload of Christopher Hall for over a year and had received no credit for that and that Christopher Hall had been paid at least £12,000 per annum more than him. Sharra Lock was given a pay rise to more than the Claimant had been earning although she was doing the same job as the Claimant. She hadn't magically out-performed him, rather the Respondent was trying to belittle him. He had been paid less than a female for doing the same work and that was unfair. The Claimant said he had given the Respondent his all and he expected to be paid properly.
84. The essence of an equal pay claim is that a claimant alleges that they have been paid less than a comparator of the opposite sex doing equal work because of their sex.
85. It's true that if the Claimant were able to establish that he did work that was equal to Sharra Lock (or either of the other two female comparators named in his documentation) it would be for the Respondent to prove that the difference in pay was not because of the Claimant's sex (within the meaning of section 69 of the Equality Act 2010). However, I consider there is no reasonable prospect the Respondent would not be able to discharge this burden, given (i) since the Claimant was one of the lowest paid Isolation Planners he would have been paid less than about eight other male Isolation Planners (as well as the three female Isolation Planners); (ii) the Claimant accepts the Respondent raised the pay of certain Isolation Planners in order to retain them (including males such as Matthew Brakspear); (iii) the Claimant accepts that the pay of Isolation Planners varied according to location; and (iv) the Claimant accepts the Respondent pursued disciplinary proceedings against him because it considered there were issues with his performance (although he does not accept the disciplinary proceedings were justified).
86. Further and in any event, the Claimant's complaints appear to be that the pay of Isolation Planners across the Respondent was unequal and unfair because he was paid less than other Isolation Planners – both female and male – for no good reason, that he wasn't remunerated fairly for his work or experience and that when he raised these matters with the Respondent his complaints and grievances weren't addressed properly.
87. While these complaints are matters that the Claimant can advance in the context of his claim for constructive unfair dismissal (and, perhaps, race discrimination), they do not disclose the basis of an equal pay claim within the meaning of Chapter 3 of Part 5 of the Equality Act 2010, where the difference in pay must be because of sex.

88. For these reasons I consider the Claimant's complaint of equal pay has no reasonable prospect of success and must be struck out.

Employment Judge S Moore

Date: 23 August 2023

Sent to the parties on: 23 August 2023

For the Tribunal Office