EMPLOYMENT TRIBUNALS

Claimant: Mr K Smith

Respondent: Princess Alexandra Hospital NHS Trust

Heard at: East London Hearing Centre

On: 20-22 June 2023 & 23 June 2023 (in chambers)

Before: Employment Judge S Bedeau

Members: Ms A Berry
Ms W Blake-Ranken

Representation

Claimant: Ms J Moore, Lay representative
Respondent: Mr S Proffitt, Counsel

RESERVED JUDGMENT

1. **The claims of direct disability discrimination, paragraphs 4.1 and 4.6 in the List of Issues, are well-founded.**

2. **The claims of failure to make reasonable adjustments are not well-founded and are dismissed.**

3. **The claims of harassment related to disability are not well-founded and are dismissed.**

4. **The case is listed for a Remedy Hearing on Friday 20 October 2023, at 10.00am, with a time estimate of one day, by Cloud Video Platform.**

REASONS

1. By a claim form presented to the Tribunal on 8 February 2022, the claimant made claims of unfair dismissal, disability discrimination, and breach of confidentiality in relation to private health records. To these claims the respondent denies liability and asserts, in its response presented to the Tribunal on 28 March 2022, and in its Amended Response dated 28 November 2022, that the claimant did not have two years' qualifying period of service to claim unfair or constructive unfair dismissal; that

the Tribunal does not have jurisdiction to hear and determine breach of confidentiality, and that no admissions are made in relation to the claimant's alleged disabilities.

2. At the case management preliminary hearing held on 17 October 2022 before Employment Judge Jones, the claimant applied to add claims of direct disability discrimination and harassment related to disability based on facts as pleaded. His application to amend was allowed. The Judge clarified that the claims he was pursuing to a final hearing are, direct disability discrimination, failure to make reasonable adjustments, and harassment related to disability. The parties were to agree a list of the claims and issues in dispute by 9 January 2023. The case was listed for this final hearing over three days.

3. The claimant has acknowledged that the Tribunal do not have jurisdiction to hear and determine his unfair dismissal claim.

4. The issues set out below are replicated from the agreed list.

The issues

Disability under section 6(1) of the Equality Act 2010 ("EqA")

1. Does the Claimant have a physical or mental impairment? The Claimant confirmed that he has the following conditions: Scheuermanns disease; Severe Fibromyalgia and Pars defect; and he is relying on these conditions as those which amount to a disability. (*The Respondent accepts that the Claimant is a disabled person within the meaning of section s.6 Equality Act 2010 ("EA) by reason of those conditions. However, the Respondent does not admit that the Claimant was impacted by the conditions in the manner described within his impact statement, at the relevant time.)*

2. Was the Claimant advised that he could apply for flexible working under the flexible working policy, if he could work for 26 weeks?

3. What reasonable adjustments were considered to assist the Respondent to access the 26 weeks flexible working policy available for all employees?

   3.1 The above are no longer to be determined by the Tribunal.

Direct Disability Discrimination

4. Did the following occur:

   4.1 Kim Jackson of the Respondent sent the Claimant an email on 24 November 2021 which stated: "In regard to working for NHSP, this would not be something I would want to commit to being that you struggle at times with your health problems and no disrespect to you but I really need to know that shifts would not be cancelled at short notice"

4.2 Sara Tasker of the Respondent advised the Claimant on 24 November 2021 that the Respondent would not consider the reasonable adjustment of part time working for the Claimant as this was not possible.

4.3 Sara Tasker of the Respondent informed the Claimant on 25 November 2021 that she had informed HR that the Claimant had asked for reasonable adjustments and was advised that this was not possible.

4.4 Sara Tasker informed the Claimant on 25 November 2021 in writing that the request for reasonable adjustments was refused.

4.5 The Claimant had his job offer withdrawn on 25 November 2021.

4.6 The Respondent's HR team wrote to the Claimant on 29 November 2021 to say "Unfortunately your disability was not taken into consideration in the advice below and you will receive further communication around this."

5. If so, did this amount to less favourable treatment, compared to a hypothetic comparator, namely: *A job applicant, who does not suffer from Pars Defect, Scheuermann's disease and Severe Fibromyalgia, who applied for and was offered a full-time position as a Band 3 Clerical Co-ordinator role within the Emergency Department and subsequently requested this as a part time position.*

6. Would the claimant be at a disadvantaged compared to an able-bodied applicant in relation to the Trust's 26 flexible working policy?

7. What reasonable adjustments were considered to enable the Claimant to access the flexible working policy after 26 weeks?

8. If so, was this because of the Claimant's disability, namely Pars Defect, Scheuermann's disease and Severe Fibromyalgia?

<u>Reasonable adjustments sections 20 EqA</u>

9. Did the Respondent apply a provision, criterion, or practice ("PCP") by suggesting that the role the Claimant had applied to and been offered had to be undertaken on a full-time basis?

10. If so, did the PCP place the Claimant at a substantial disadvantage in comparison with persons who are not disabled? (i.e. those who do not suffer from Scheuermanns disease; Severe Fibromyalgia and/or Pars defect).

11. If so, did the Respondent know, or ought the Respondent reasonably to have known at the relevant time that:

11.1 the Clamant was disabled?

11.2 the Clamant was likely to be placed at a substantial disadvantage compared with persons who were not disabled?

12. Did the Respondent fail to take such steps to avoid the above disadvantage? In particular, did it fail to offer the Claimant a part time role.

13. Did the Claimant ask for redeployment within the Trust?

14. Was this considered by the Respondent?

15. Would offering the Claimant a part time role have amounted to a reasonable adjustment?

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

16. Did the following occur:

    16.1 The Claimant had his job offer withdrawn on 25 November 2021 without any discussion; Sara Tasker of the Respondent informed the Claimant on 25 November 2021 that she had informed HR that the Claimant had asked for reasonable adjustments and was advised that this was not possible.

    16.2 On 26 November 2021, the Claimant had to file a grievance with the trust in relation to his disability, when the job offer was withdrawn due to a request to be considered for reasonable adjustments. He had to disclose again his rights as a disabled person in relation to reasonable adjustments, after seeking guidance from Scope.

    16.3 On 1 December 2021, the Respondent referred the claimant to Occupational Health for an assessment without obtaining consent or informing him prior to referral (in doing so, ticked the form to state consent had been obtained from the Claimant). (This alleged act was not pursued by the Claimant during the hearing.)

    16.4 On 24th January 2022, did the Respondent write to the claimant to say that Occupational Health had not identified any concerns that would impact his ability to work full time?

    16.5 On [date], Nicola Myers of HR advised the Claimant to provide a sick certificate.

    16.6 On 17 December 2021 Nicola Myers of HR advised the Claimant that he had mistakenly been asked to provide a sick certificate, after he already provided it.

    16.7 On 14 January 2022, Kelly Clements, sent the Claimant an inbox message on Facebook, calling the Claimant naïve for his grievance with the Respondent and states, “I hope you find a job that better suits”. (This alleged act was withdrawn by the Claimant during the hearing.)

    16.8 On 13 December 2021, the Respondent’s HR team stated that the Claimant should not have been referred to Occupational Health as he is not an employee of the Respondent and denied the request for a reasonable adjustment to work part time.

17. If so, was that unwanted conduct?

18. Did it relate to his disability? (i.e. the Claimant’s Scheuermanns disease; Severe Fibromyalgia and/or Pars defect)

19. Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating, of offensive environment for the Claimant?

20. If not, did it have that effect? The tribunal will take into account:

    20.1 The Claimant’s perception;

    20.2 The other circumstances of the case;

    20.3 Whether it is reasonable for the conduct to have that effect.

21. In relation to the alleged events in paragraph 13 (4) is the Respondent vicariously liable for the comments of Kelly Clements.

Remedy

22. If the Claimant’s claim is successful what compensation is appropriate in the circumstances?

22.1 What financial loss, if any, is directly attributable to the element(s) of discrimination found proven?

22.2 What is an appropriate award, if any, for injury to feelings caused as a result of the element(s) of discrimination found proven taking account of the guidelines in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102,

23. Should any award be decreased on grounds including:

23.1 Has the Claimant complied with the duty to mitigate his loss?

23.2 Has the Claimant contributed to loss suffered such that any award for compensation for compensation should be reduced.

5. The claimant gave evidence and did not call any witnesses.

6. On behalf of the respondent evidence was given by Ms Sara Tasker, Service Manager, Accident and Emergency; Ms Mia Browne, Assistant Service Manager; Ms Kim Jackson, Reception Supervisor; and by Ms Nicole Myers, Strategic Human Resources Business Partner.

7. In addition to the oral evidence, the parties produced a joint bundle of documents comprising of 847 pages. Further documents were produced during the hearing. References will be made to the documents as numbered in the bundle and as other documents as referred to by the parties.

Findings of Fact

Fibromyalgia

8. At the outset of the hearing the Tribunal raised with the parties that one member, Ms Anna Berry, suffers from fibromyalgia and invited them to make submissions on whether she was in a conflict situation, namely, as one of the claimant's disabilities is that condition, would a fair minded and reasonable observer possessed of the evidence and issues in this case conclude that there was the appearance of bias? After standing the case down for instructions to be taken, the parties returned stating that they had no objections to Ms Berry remaining on the Tribunal. As disability is admitted, the Tribunal did not see a case for Ms Berry's recusal, applying the judgment in the case of Porter v Magill [2001] UKHL 67, House of Lords of a fair minded and informed observer possessed of all relevant information.

9. The respondent is an NHS Trust based in Harlow and employs 3,500 staff. It serves a population of 350,000 people in West Essex and East Hertfordshire, and provides a range of acute, outpatient and diagnostic services.

10. The claimant suffers from a spinal deformity, Scheuermann's disease, fibromyalgia, and Pars defect. He successfully applied for the Band 2 Clerical Supervisor position in the Respondent's Acute Medicine, after having been interviewed under the

Guaranteed Interview Scheme for disabled people. He commenced full-time employment on 26 July 2021 on a basic annual salary of £18,005.

Band 3 Clerical Co-ordinator- Accident and Emergency

11. On 20 September 2021, he applied for the advertised full-time Band 3 Clerical Co-ordinator role in Accident and Emergency. At the time the respondent was recruiting for a part-time Band 3 Clerical Co-ordinator, but the claimant did not apply for that post. (page 190 of the bundle)

12. He was interviewed on 19 October 2021 by Ms Kim Jackson, Reception Supervisor and by Ms Elizabeth Winder, Assistant Service Manager. He performed very well and at the end of the interviews he was offered the position.

13. In his Pre-employment Health Screening form, he declared his health conditions as he did on the earlier form for the Band 2 role. He stated that he had a disability and gave the above three disabilities. He did not require any special adjustments or equipment. (311 – 312).

14. On 27 October 2021, he was sent a letter by Mr Andrew St Ledger, Recruitment Advisor – Medicine, who confirmed the conditional offer of employment as the Band 3 Clerical Co-ordinator. The offer was conditional upon the following pre-employment checks:

    - Right to work in the UK;
    - Verification of identity checks;
    - Work health assessment checks;
    - Professional registration and qualifications as necessary or required for the post;
    - Criminal records and/or Disclosure and Barring Service;
    - References covering his employment history.

15. It was further stated that as soon as all the pre-employment checks were received and cleared, the respondent would contact him to arrange a start date. A summary of the statement of terms and conditions relevant to the Band 3 position also accompanied the letter. (305 – 308)

16. In the statement of terms and conditions it stated:

    > "As you are an internal candidate, you are only required to complete and return the DBS Self-Declaration Form. We will contact your current Line Manager at the Trust to provide an internal reference for you, so no further action will be required on your part". (307)

17. After the interview process had taken place, the claimant went to the Emergency Department to collect some notes as part of his role as a Band 2 Clerical Co-ordinator, when he encountered Ms Kim Jackson and engaged in a brief conversation with her. He said that he was not sure how much notice he needed to give as the Band 2 Clerical Co-ordinator. Ms Jackson was also not sure. He

asserted that she told him that he should hand in his notice, and she would get him work with NHS Professionals, “NHSP”, as she wanted him to start as soon as possible. He would be working on the Bank until an official start date in the new Band 3 Clerical Co-ordinator role. NHSP is a separate legal entity that provides medical staff to National Health Service hospitals. They are not employed by the hospital where they work but on contract with NHSP.

18. According to Ms Jackson, she recalled a conversation with the claimant about handing in his notice and stated in her witness statement, that it was on 21 October 2021. The claimant had emailed her to confirm that he only needed to provide one week’s notice as he was still in his probationary period. She asked whether he had handed in his notice at that point. In evidence, she stated that she was not suggesting that the claimant should resign. The question was how much notice he should give and a start date. He told her that he had not been given a start date. To support him while he was waiting for an official start date in his new role, she offered him Bank work because he told her that he had tendered his resignation.

19. In his email to Ms Jackson he wrote:

> “Hi Kim,
>
> I have, my last working day is 28/10/21. I will then pick up bank until I can arrange a start date on A&E with yourself after all my checks have come back.
>
> Kind Regards” (249)

20. On 21 October 2021, he wrote to his line manager, Ms Mia Browne, Assistant Service Manager, stating:

> “Dear Mia,
>
> I would just like to take this opportunity to thank you for giving me the chance to join your team, since joining the team, I have had the best welcome I could have hoped for, and they have all been so incredibly amazing with training me.
>
> They are all a real credit and really do work so hard. I would also like to mention that I have also found yourself to be a great support.
>
> I have been offered another opportunity within the Trust which I have accepted, please accept this as my one week notice period as per contract of employment. My last working day with the team will be on 28/10/2021, however I would still be happy to pick up bank shifts with the team if you would be happy for me to do this.” (243)

21. In her witness statement Ms Browne wrote that she was disappointed to lose the claimant from Acute Medicine but was pleased that he was progressing. She explained to him that when applying for an internal position he should wait for a start date as his employment would then just transfer to that role. However, the claimant was clear that he wanted to hand in his notice and pick up Bank shifts through NHSP

while waiting for a start date. As such, his employment with the Trust terminated on 28 October 2021.

22. In her evidence before this Tribunal, she stated when an employee gets his or her unconditional offer, that is when they put in their notice. The conversation she had with the claimant was on Charnley Ward. She said to him that there was a process once you have a conditional offer you do not resign but he was not minded following her advice because he wanted to get on the Bank.

23. In cross-examination, it was put to Ms Browne that the claimant did not have that conversation with her. She replied that the conversation did take place, but she could not remember the length of it because at the time she was covering three areas. The claimant had already arranged his Bank shifts.

24. We find as fact, after observing the claimant in cross-examination, that he chose to resign without being coerced into doing so but was unaware of how it would affect his continuity of employment with the respondent. We further find that Ms Browne explained to him that when applying for an internal position, he should wait for a start date as his employment would then just transfer to that role. She did not explain to him the significance of continuity of service. We accept that he was aware that he had resigned but did not appreciate the wider implications of losing continuity of service.

25. From 28 October 2021, he was engaged in Bank work.

Request to work part-time

26. This case, to a large extent, turns on how the claimant's request to work part-time was treated and whether his treatment was discriminatory based on his disability. Events start while he was on Bank. He worked three long shifts which aggravated his fibromyalgia. On 24 November 2021 at 12:32, he emailed Ms Tasker copying Ms Jackson, requesting that he should work part-time. He wrote:

> "Good afternoon Sara/Kim,
>
> As you are aware, I am still awaiting all checks to be completed so that we could arrange a formal start date for full-time hours.
>
> Unfortunately, in the short time since the interview and the change in the weather, I am having difficulties with my health, and I feel I would not be able to cope with a full-time position at this time.
>
> I feel at this stage it would be highly unfair of me to continue with the process for full-time hours when I would not be able to ensure that the reliability you and the Trust deserve.
>
> I have just completed three consecutive shifts and it has taken a toll on me therefore I know at this stage I would not be able to do more, resulting in me potentially having to let you down for shifts.

I am enjoying working in A&E and getting to know the team and I do wish to continue working in A&E.

Would it please be possible to do part-time?

I do fully understand that it may not be possible as I know it is a full-time position that you were recruiting to, if this is not possible, would I please be able to stay on bank and work with you.

I am so so sorry and this is not what I wanted but due to my health conditions I have to face the reality that this is the best I can do at the moment". (403 – 404)

27. Ms Jackson replied thirteen minutes later stating:

"Good afternoon Karl,

Sorry to hear this, but unfortunately it would not suit the needs of the business for a part-time position, as you know, we have run short staff for quite some time, and I really want to get the team back up to full numbers. In regards to just working on NHSP, this would not be something I would want to commit to being as you struggle at times with your health problems and no disrespect to you, but I really need to know that shifts would not be cancelled at short notice.

Are you saying that you will not be taking the position now?

As for shifts this week that you have allocated, are you not able to do them?

Keep me posted on your decision etc. and hopefully we can resolve the problem". (403)

28. The claimant responded later that evening at 6:55pm apologising for not being able to do full-time hours because of his fibromyalgia as he was finding it difficult and was in a lot of pain.

29. He then wrote:

"If I was to accept full-time hours, I would fear letting you down as doing the three consecutive shifts, I have just done has taken a lot out of me and so I know I would not be able to manage five days a week, every week. If there was any way to do part-time, as I would still love to work on A&E, I feel I could do two regular shifts a week and when I am able, I could perhaps pick up extra through NHS fee". (402)

30. On the same day at 7:28pm, Ms Tasker replied:

"I am sorry to hear you are poorly and are struggling at the moment.

Unfortunately, as Kim has said, this is a full-time role and was advertised as such. We successfully recruited into the part-time role we advertised and need a full-time person to fill our rota.

If you are unable to commit to a full-time post, could you let me know as soon as possible so that I can update recruitment, and then would halt the recruitment process.

I wish you well with whatever decision you take". (402)

31. The claimant confirmed in a follow-up email to Ms Tasker on the same day that he was unable to engage in full-time employment in the new post because of his disability. He was hoping she would have made reasonable adjustments to enable him to join her team but after having read the email, he was under the impression that that was not possible (402).

32. The following day Ms Tasker wrote after considering his request under the respondent's Flexible Working Policy. She stated that "staff must be in post for 26 weeks before an application for flexible working is considered." She then referred to the provisions in the policy on the eight business reasons for rejecting a request for flexible working, such as, "burden of additional costs; inability to reorganise work among existing staff; inability to recruit additional staff; a detrimental impact on quality; a detrimental impact on performance; detrimental effect on ability to meet customer demand; insufficient work for the periods the employee proposes to work; planned structural changes." She concluded that the claimant's request fell within four of the eight business reasons and was unable to consider his request to work part-time. She was sorry that he would not be able to join her team and wished him well for the future and that he would, occasionally, work on Bank. (400-401)

33. On 25 November 2021, an automated email message was sent to him via the respondent's recruitment system called, TRAC. It stated that his application for the position of Band 3 Clerical Co-ordinator role was marked as "withdrawn" by a member of the recruitment team at 15:17pm on 25 November 2021. (430, 598)

34. We are satisfied and find as fact that the decision was taken by an unidentified member of staff.

35. We further find that with regard to the email, the respondent was unclear, as was the claimant, whether the claimant's employment had terminated as he was not sent a P45; a Leaver's form was not completed; and he received his salary for November and December 2021.

36. On 26 November 2021, he lodged a grievance with Ms Nicole Myers, Strategic Human Resources Business Partner, alleging that the respondent had failed to consider reasonable adjustments and that he had been discriminated against because of his disability as he requested part-time work, but the responses were unsupportive. He asserted that the respondent had failed in its duty to make reasonable adjustments as there were no discussions with him prior to taking the decision. It was unlawful discrimination because of something arising in consequence of disability. He further stated that Ms Tasker had informed him that it was Ms Myers' decision to use the flexible working policy against him and that his application was to be withdrawn if he was unable to meet the hours. He wrote that he asked Ms Tasker whether reasonable adjustments had been considered but she refused to answer his question. No evidence had been provided to suggest to him that reasonable adjustments were considered. His grievance stated, "No conversations were had with me about this and no reasons were given as to why you were unable to make reasonable adjustments. As a result, you withdrew my application". He then claimed that he was protected under the Equality Act because of his disability. He left his previous

role to join A&E and was now without a job. He invited Ms Myers to respond within 7 days. (405 – 407)

37. There followed emails between him and Ms Tasker in which he challenged the refusal to allow him to work part-time. Ms Tasker repeated that it was due to the business needs of the A&E Department. (399 – 402)

38. In an email from Ms Myers to him dated 29 November 2021, she wrote:

> "Dear Karl,
>
> Thank you for the email attachment.
>
> As per the informal stage of the grievance policy (see attached) I am including Sara's manager here (Kelly French) who will respond to you tomorrow as he is on leave today.
>
> Unfortunately, your disability was not taken into consideration in the advice below and you will receive further communication around this. Sara is also on leave today and will be back tomorrow.
>
> In the meantime, please let me know if you have any questions." (398)

39. We find that Ms Tasker did not disclose the claimant's disability to Ms Myers when Ms Myers gave advice to her about the claimant's request to work part-time.

40. We further find that Ms Myers wanted to establish whether the claimant was cleared by Occupational Health to work full-time. She was not accepting that he should have had his request to work part-time hours granted or that he had been subjected to discriminatory treatment. She then contacted Ms Tasker to discuss the next steps and advised her to review the claimant's Occupational Health clearance which should have been part of the recruitment process. If needed Ms Tasker should make a further referral to Occupational Health for advice on the hours the claimant could work, also to explore what adjustments may be needed to support him in the role. She was aware that he had been working in Acute Medicine until October 2021 and there were no recommended adjustments for him in that role. (432).

41. On 1 December 2021, Ms Tasker duly made a management referral to the respondent's Occupational Health advisors, SHaW. She described the claimant's shift pattern, the total hours of work being 37.5, and that the job comprised of computer work, standing and night working. In relation to the reason for the referral, she wrote:

> "Karl applied for a post in ED reception and was successful at interview. He knowingly applied for a full-time post and was offered a full-time position via recruitment. He then asked to work part-time only due to his disability. This was declined as this could not be accommodated within reception. He had lodged a complaint. We need to understand if he can physically only work part-time. He had Occupational Health clearance in July 2021 and no amendments were listed then and he has worked in AAU on long days (12-hour days) since July 2021. I need to understand if he cannot work shorter shifts (8hours) due to his disability. What has changed in his conditions since July 2021". (645 – 646)

42. We find that Ms Tasker could have given a more supportive account of the claimant's circumstances. She neither conferred nor consulted with him prior to or after making her management referral, about adjustments or about the reason/s for the referral to Occupational Health.

Telephone consultation with Occupational Health on 24 December 2021

43. The claimant told the Tribunal that he had a consultation by telephone with an Occupational Health Advisor on 24 December 2021, Ms Amanda Tan, during which they discussed suitable adjustments. One of the adjustments was working part-time which, he said, the Occupational Health Advisor agreed was a reasonable adjustment and was going to recommend it to the respondent. It transpired, however, that the Occupational Health Advisor's view was that, as the claimant was at that time no longer an employee of the respondent, she was unable to give a full report.

44. In the TRAC record, in relation to the Occupational Health Advisor's note, it is written "fit with adjustments" and that "applicate [applicant] wishes to be part-time". (598, 637)

45. The respondent's position is that the reference to, the "applicate wishes to be part-time", is that the claimant preferred to work part-time, and it was not a recommendation by the Occupational Health Advisor. However, the respondent did not explore what the phrase "fit with adjustments" meant in practice, or what adjustments the OH advisor might recommend. The claimant, however, was the only one who gave evidence in relation to the conversation and said that the Occupational Health Advisor was going to recommend that he work part-time, and that she was going to recommend other adjustments to the respondent. The respondent did not call the Advisor as a witness. Ms Tasker told us in evidence that reference to "applicate wishes to be part-time", she took to mean that the claimant, "wishes" to work part-time but it was not, she considered, a recommendation by Occupational Health.

46. Having considered the matter, we accepted the claimant's evidence and find that reference to "applicate wishes to work part-time" at the time, was to the Occupational Health Advisor recommending that the claimant should work part-time as a reasonable adjustment. In coming to this decision, we note that the OH report stated that the claimant was "fit with adjustments". We further find that this recommendation was not pursued by Ms Tasker or anyone acting on behalf of the respondent as a reasonable adjustment for the claimant but a discussion on this would have to be on the basis that there was a clear return to work date. We do not criticise the respondent for not making an adjustment at the time in view of the fact that the claimant did not have a clear return to work date.

47. The claimant wrote to Ms Myers on 2 December 2021, in relation to his grievance, stating that he had received a voice mail message from Ms Tasker asking him to call her and he responded saying that he would prefer that communication be in writing. He had been struggling with his mental health and the stress "which has flared disability up further". His doctor had prescribed him medication and had signed him off sick until February 2022. He stated that as far as he was aware, his application had been

withdrawn and that he was no longer an employee. No-one had informed him otherwise. He received an email to say that he had been referred to SHaW but had not had any correspondence about it beforehand. He opened an email which stated that Ms Tasker had made the referral. He was unhappy about the wording of the email as it suggested that she did not believe his disability was a problem because he had worked full-time in his previous role. He then wrote,

> "Due to the lack of support and the continued failure to fully recognise my disabilities, I do not feel it is viable for me to work in the Emergency Department. I do not feel confident that they have the training, insight or understanding to support a member of staff with disability and the impact this will have on me both mentally and physically – it is enormous…. I would like to humbly ask that HR review my situation to see if there is another post within the Trust that I can be allocated to, so that I can continue to be an employee of the Trust in an area I feel comfortable and confident as a disabled person. As you will see from my previous appointment at the Trust, I have been a reliable employee, who works hard and contributes effectively to the team.". (415)

48. Ms Myers' response was on the same day in which she explained to the claimant that Ms Taker's referral to SHaW was a supportive measure because he wanted to reduce his hours due to his underlying health condition. When he was recruited to the Acute Unit, there were no restrictions on his working. In order to determine the impact of any changes in his underlying health condition on his working pattern and how best to support him, Ms Tasker referred him to SHaW for advice. Ms Myers reminded the claimant that this was part of the recruitment process and was not that Ms Tasker did not believe him, but that further guidance was needed on how best to support him in light of the fact that the previous SHaW report stated that there were no restrictions on his working hours, and it was expected that he would be able to undertake full-time hours. Ms Myers informed him that as he was moving jobs internally, he should have continued to work in the Acute Unit until his start date in the Emergency Department was agreed. As he stopped working in the Acute Unit and thereafter took on Bank work, he had been overpaid for the month of November 2021. He was instructed to contact Mr Kelly French, who was covering Ms Mia Browne's absence on annual leave until 15 December, to provide a copy of his sick note. Ms Myers encouraged him to engage with SHaW in order that any support mechanisms be explored. (413 – 414)

49. The claimant provided fit notes dated 26 November and 13 December 2021, to Mr French as instructed by Ms Myers. In them, we find that the doctor did not recommend either a phased return, altered hours, amended duties, or workplace adaptations. They certified that the claimant was unfit for work from 24 November 2021 to 23 February 2022. The claimant also sent a covering email to Ms Myers on 17 December 2021, in which he challenged the request to provide the fit notes as he was no longer an employee, and it was an "unreasonable request for private information as it has no bearing on the recruitment process or my interaction with ShaW". (447 – 448)

50. On 25 November 2021, at 13:13pm, he emailed Ms Jackson regarding his Bank shifts stating that he had noticed that they had been removed and asked whether it was an error. The response from Ms Jackson, 23 minutes later, was,

> "I have not put any shifts on bank, I have removed shifts from rota as you still have no start date etc. and the rota cuts off so I do not want to confuse things with payroll".

WhatsApp messages

51. We were sent a series of WhatsApp messages between Ms Jackson and the claimant on working Bank shifts, as a separate attachment. In her message to him on 24 November 2021 at 19:13, she asked whether he could work on 27 November as she was struggling because some staff members were off sick. He replied that he could not do the 27th which Ms Jackson understood. On 25 November, at 18:09, Ms Jackson asked him whether he could do shifts for the following week and asked for his availability, but he did not respond. On 26 November, at 09:34am, she asked him whether he would like to work nights the following day. Later that morning she sent him a further message apologising as she had forgotten that he was busy that night and the following day. We find, contrary to his oral evidence before us, that he did receive the messages and had read them. We find this because there were two blue ticks on the WhatsApp messages, indicating that the messages have been seen.

Withdrawal of the conditional offeror the Band 3 Clerical Co-ordinator role

52. On 15 December 2021, Ms Myers emailed him referring to a discussion she had with Ms Browne in relation to his resignation, who had returned from annual leave. Ms Browne was of the view that his leaving date from the Acute Unit was at the end of October 2021. Ms Myers wrote that he said to Ms Browne that he did not want to wait until he was given a start date for the new role in the Emergency Department and was happy to work Bank shifts, if necessary. In Ms Myers' view that did not change the recruitment process he was going through for the Emergency Department role and that a Leaver's Form should have been processed when he left the Acute Unit. He would be contacted about the overpayment of salary received for November. Ms Myers further wrote that the recruitment team would be in touch with him in relation to the Emergency Department Receptionist role while his Occupational Health appointment was pending. Clearance from Occupational Health was required before a start date could be agreed. She further stated that she had included Ms Tasker in her response to him to enable her to update Occupational Health with information. The next step was to wait for Occupational Health clearance for the role. (450 – 451)

53. The claimant replied the same day stating,

> "I am a little confused about things.
>
> Please could you let me know if I am being treated as an employee? Am I entitled to sick pay?"
> (450)

54. We find from this email, that he was still confused about his continuity of service and queried whether he was an employee notwithstanding that he tendered his resignation.

55. Ms Myers' response on 17 December was to inform him that he was being considered as an applicant not an employee going through the recruitment checks. She wrote:

> "You are currently an applicant and still going through recruitment checks. I understand you were due to have your SHaW appointment yesterday, but this was cancelled due to staff sickness and will be rescheduled shortly. Once SHaW clearance is received and all other recruitment checks completed, you will be offered a start date.
>
> I have included Sara here to answer any other questions you may have". (449)

56. On 16 December 2021, it is recorded that the claimant's application was re-activated, and he was given a conditional offer for the Emergency Department Band 3 Clerical Co-ordinator role. (502)

57. On 17 December he emailed Ms Myers thanking her for clarifying his position and for confirming that he was not an employee. He again questioned why he was required to send in his fit note, which was private and confidential, if he was not an employee. He repeated that it was an unreasonable request as the information was private and had no bearing on either the recruitment process or his interaction with the Occupational Health Advisor. (453)

58. Ms Myers' response on 20 December 2021, was to clarify the request. She wrote:

> "At the time of requesting that information, I believed you were an employee as indicated in my email communication but have since received clarification from Mia as below.
>
> I have now deleted the sick note copy from my emails and requested Kelly, Mia and Sara to do the same". (453)

59. We find that on 17 December 2021, the claimant knew that he was not an employee of the respondent, and that the reason why Ms Myers asked him for his fit note at the time was that she believed that he was an employee of the respondent. (453)

60. On 7 January 2022, he was informed that he had successfully completed all pre-employment checks and that his line manager would contact him to arrange a start date. (474).

61. On 20 January 2022, Ms Tasker emailed him stating:

> "Please can you make contact with Kim to negotiate a start date in reception. As per your offer letter, this is for full-time hours". (479), (305)

62. Both Ms Jackson and Ms Tasker tried to contact him to agree a start date and had left voice messages, but he did not respond (479) (486 – 493).

63. On 20 January 2022, he emailed Ms Myers stating:

> "I have just received an email from Sara which indicates once again that reasonable adjustments have not been considered for me to apply to take the role offered at the Trust. There has not been any discussion with me around which reasonable adjustments have been considered and why these are not considered reasonable for the Trust. No explanation whatsoever has been offered, nor have I received a copy of the OH report.
>
> My formal grievance for discrimination has not been addressed in any capacity.
>
> On top of this, I have received messages from a lady who I have never met and do not know, in relation to my position at PAH. It later transpired that this lady is Sara's daughter. It is very clear from the messages I have received that Sara has discussed my confidential record with her.
>
> All of the above have made the position completely untenable for me.
>
> I will be seeking further advice on taking legal action about the above matters as I feel I have been discriminated against and my right to confidentiality has been breached". (482)

64. Ms Myers' response was four days later, on 24 January 2022, in which she wrote:

> "Sara is the recruiting manager for the role and so would contact you to make arrangements for a start date once OH clearance has been received. Unlike a normal OH referral, recruiting managers are advised once a prospective member of staff have received OH clearance and given no further information unless there is anything to be concerned about. OH reports are not normally sent during the recruiting process but you can request a copy. I will ask Sophia Wrenne (Recruitment Advisor) to send you a copy as I understand you have received OH clearance. This is why Sara contacted you and asked you to get in touch with her or Kim about a start date.
>
> There was nothing of concern highlighted in your OH clearance other than you have requested to work part-time. If there was a health concern that impacted on your work, then that should have been highlighted in your OH clearance. However, none was stated. As you applied for a full-time role, I had previously advised that an OH referral would be made (this was when it was thought you were an employee) to try and establish whether your underlying health condition is impacted by working full-time. However, after speaking with your previous line manager and as you previously stated in a previous email, you were not an employee and therefore OH clearance was sought as per standard Trust recruitment process. This initial OH referral was used to support you and would have formed part of the grievance process which was halted when it was established that you were not an employee. However, OH clearance that was received did not identify any areas of concern.
>
> As explained previously, the team cannot accommodate a part-time member of staff. Furthermore, at the time that you applied for the job, there was a part-time role at the time which you did not apply for. Once you contact Kim/Sara, I have now deleted the sick note copy from my emails and requested Kelly, Mia and Sara to do the same". (453)

65. Ms Myers did not address the claimant's allegation of discriminatory treatment save for writing that the grievance process was stopped when it was discovered that he was no longer an employee.

66. As the claimant did not reply to the messages, on 10 February 2022, Mr St Ledger, Recruitment Advisor, emailed him stating:

> "I hope you are well.

> Regarding your application for the above role, we have been concerned by the lack of contact we have had from you since the completion of your pre-employment checks.
>
> You were notified of the completion of your pre-employment checks on 7 January 2022, and since then both myself and my colleagues in recruitment, as well as the ED reception team have attempted to get in touch with you to arrange your start date with no success. Given that it has now been over a month since your checks have been cleared, we are not confident that you are still interested in undertaking this role.
>
> It is with regret that on this basis, we will be withdrawing the offer effective immediately." (497)

67. In the claimant's evidence to the Tribunal, he told us that he did communicate with Ms Tasker and Ms Jackson prior to January 2022. What he was hoping for was a meeting to discuss how the respondent could support him. Instead, all the correspondence he received were for him to start work on full-time hours. He also said that he believed that Ms Tasker and Ms Jackson would have used the sickness policy to terminate his employment. He was anxious to return to work on a part-time basis as a reasonable adjustment as he enjoyed working for the respondent.

<u>Ms Tasker and Ms Jackson's email exchange</u>

68. In an email exchange between Ms Tasker and Ms Jackson on 24 January 2022 at 08:21am, Ms Tasker asked Ms Jackson whether she had heard from the claimant. At 08:30am Ms Jackson replied two minutes later:

> "Nothing at all….." Then 14 minutes after Ms Tasker wrote:
>
> "Hopefully he isn't starting". This was followed by Ms Jackson at 08:41:
>
> "Hopefully not, but how long is it left before a decision is made?"

69. Ms Tasker response six minutes later was:

> "I will ask X". (484)

70. While we accept that the communication was private between Ms Jackson and Ms Tasker, what it does reveal at that time, was that they did not want the claimant to work in the Emergency Department. They both regretted the comments made but stressed that by late January 2022, they had become frustrated not knowing whether the claimant would be returning to work as he did not reply to their messages. Their emails were not malicious.

<u>Recruiting for a part-time Band 3 Clerical Co-ordinator role</u>

71. In examination-in-chief by Mr Proffitt, Ms Tasker was asked whether her department could accommodate the claimant's part-time hours request. Her response was:

"It would be difficult, not impossible. That is why we engage an Occupational Health, to find out the difficulties for this applicant and how as a department we would work around those."

72. Mr Proffitt then asked her whether she had made enquiries of Occupational Health about the claimant going part-time. Her response was, "No".

73. In Ms Jackson's evidence she stated it would have been possible to convert the claimant's full-time post to a part-time one. To do so would have required engaging the recruitment process which would take several months to complete as it is slow. Her department was heavily stretched at the time because of the effects on staff due to Covid-19.

74. Ms Tasker said that recruiting for a part-time position would have taken six months during which time the Emergency Department would continue to be seriously understaffed. She had 160 direct reports.

75. We find that at the time, in 2021, the Emergency Department was losing staff and Ms Jackson was engaged in recruitment. Some staff were self-isolating and others shielding. One member of staff had passed away.

76. We find that while the claimant was working as a Band 2 Clerical Co-ordinator and on Bank, he was considered a capable, reliable, and competent worker.

Submissions

77. We have read the detailed written submissions by Ms Moore, on behalf of the claimant, and by Mr Proffitt, Counsel on behalf of the respondent. We have also taken into account their oral submissions and the cases referred to.

78. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.

The law

Disability

79. Section 6 Equality Act 2010, "EqA 2010", states:

"(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."

80. Section 212(1) EqA defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1) and where a sight impairment is correctable by wearing spectacles or contact lenses, it is not treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities, schedule 1(5)(3).

81. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

82. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24.

Direct discrimination

83. Under section 13, EqA direct discrimination is defined:

> "(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."

84. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

85. Section 136 EqA is the burden of proof provision. It provides:

> "(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 provisions 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."

86. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the Tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a Tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the Tribunal is in a position to make positive findings on the evidence one way or the other.

87. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

88. "Could decide" must mean what any reasonable Tribunal could properly conclude from all the evidence before it. This will include in that case, evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential

treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The Tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

89. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the Tribunal, at the first stage, from hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the Tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

90. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, such as, race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment but for a non-discriminatory reason.

91. This approach to the burden of proof test was approved by the Supreme Court in the case of Royal Mail Group Ltd v Efobi [2021] UKSC 33, Lord Leggatt.

92. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory, B-v-A [2007] IRLR 576, a judgment of the Employment Appeal Tribunal.

93. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex, Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

94. In the case of Abertawe Bro Morgannwg University Health Board v Dr M Ferguson [2013] ICR 1108, Mr Justice Langstaff, held that "subjected to" does not apply to the failure to fulfil an expectation that the employer would behave in a certain way.

The President held that, ""subjected to" were words of causation, appropriate to encompass both direct acts and deliberate omissions to act, and did not require the actor to control the circumstances giving rise to detriment: that a "deliberate failure to act" presupposed a duty or power/ability to take action (an expectation would not be sufficient)…" The case focused on the wording in section 47B Employment Rights Act 1996, on public disclosure detriment not on direct discrimination.

95. The protected characteristic must have a significant influence on the decision to act in the manner complained of. This is subjective, Gould v St John's Downshire Hill [2021] ICR 1, a judgment of the EAT.

The duty to make reasonable adjustments

96. Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1) Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have taken to avoid disadvantage."

97. An employer's failure to adhere to its own time limits during a disciplinary procedure could not amount to either a provision, criterion, or practice and "taking care" cannot amount to a reasonable step. "Incompetence, a lack of application or a failure to stick to time limits cannot properly be characterised as a provision, criterion or practice.", Carphone Warehouse Ltd v Martin [2013] EqLR 481.

98. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

99. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20, a judgment of the EAT. An Employment Tribunal in considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment, must identify:

(1) the provision, criterion or practice applied by or on behalf of an employer, or

(2) the physical feature of premises occupied by the employer;

(3) the identity of a non-disabled comparator (where appropriate), and

(4) the identification of the substantial disadvantage suffered by the claimant may involve consideration of the cumulative effect of both the provision,

criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

100. A Tribunal in deciding whether an employer is in breach of its duty under section 20 EqA 2010, must identify, with some particularity, what "step" it is that the employer is said to have failed to take.

101. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

102. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ. 283, [2007 ICR 1359, the Court of Appeal held that increasing the period during which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

103. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift,

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

104. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

105. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

106. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do

not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

107. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

108. The test is an objective one. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

109. The duty to make reasonable adjustments applies when the employee who is on sickness absence, is expected to return to work, "the trigger point", Home Office v Collins [2005] EWCA Civ 598, in which Pill LJ, held that since the claimant had not provided a return-to-work date consideration of part-time work did not arise, paragraph 31. This was supported by Ousely LJ, paragraph42. Other cases in support of the "trigger point" are NCH Scotland v McHugh [2006] 12 WLUK 396; Tarbuck v Sainsbury Supermarkets UKEAT/0136/06, and Doran v Department of Work and Pensions, UKEAT/007/14. In Doran the EAT emphasized that the duty to make reasonable adjustments was not triggered as there was no prospect or indication of a return to work.

Harassment

110. Harassment is defined in section 26 EqA as,

> "26 Harassment
>
> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

111. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

112. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that,

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

113. Whether the conduct relates to disability "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ. 1049.

114. In a case in which the claimant was outed after having disclosed his sexual orientation, being gay, to his work colleagues at a different office, Lord Justice Elias, delivering the lead judgment, held:

> "..In my view there can be no detriment because having made his sexual orientation generally public, any grievance the claimant has about the information being disseminated to others is unreasonable and unjustified. Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was in no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment.", Grant v HM Land Registry and Others [2011] EWCA Civ 769, paragraph 47.

Conclusion

Direct Disability Discrimination Section 13 Equality Act 2010

115. The claimant suffers from Scheuermann's disease, severe Fibromyalgia and Pars Defect, and there is no dispute that these are disabilities within the meaning of Section 6, Schedule 1 Equality Act 2010.

116. As his employment had terminated because he resigned, he was an applicant under section 39(2) EqA 2010, and not an employee. Sub-section 39(2)(d) applies in relation to "subjecting an applicant to any detriment".

117. We have regard to the issues as set out in the List of Issues. Sub-paragraph 4.1, is the claim that Ms Kim Jackson sent the claimant an email on 24 November 2021, stating, "In regards to working for NHSP, this would not be something I would want to commit to being that you struggle at times with your health problems and no disrespect to you but I really need to know that shifts will not be cancelled at short notice."

118. The respondent knew of the claimant's disabilities as they were disclosed on his first pre-employment checks form. He disclosed the fact that because of his medical conditions he was unable to work long shifts. On 24 November 2021, he

was engaged in Bank work for NHSP while awaiting the outcome of his pre-employment checks for the Band 3 role. On that day he emailed Ms Tasker, copying in Ms Jackson, stating that he was unable to work full-time shifts as the long hours aggravated his medical conditions and requested part-time work.

119. Mr Proffitt submitted that the claimant frequently attributed detrimental treatment to the respondent arising from his expectation of how they would or should act. We accept that an expectation is not the same as subjecting the claimant to detrimental or less favourable treatment. The claimant's case is not based on an expectation but on his treatment on 24 November 2021. The operative date and time is the response from Ms Jackson, thirteen minutes after the claimant's email on 24 November 2021.

120. We apply the judgment in Madarassy. There was no clear date when the claimant was going to take up his Bank 3 post. He was, therefore, reliant on income from his Bank work. Although NHSP is a different legal entity, Ms Jackson allocated work to staff in her team not employed by the respondent. The claimant was a conscientious, committed, and capable employee. He informed Ms Tasker and Ms Jackson about his disabilities affecting his capacity to work long shift hours. The response from Ms Jackson, almost immediately, was that she was unable to offer him Bank work. The hypothetical comparator is someone either without the claimant's disabilities or a non-disabled person who could no longer work full-time. The question to address is, would they have been treated any differently? We conclude that they would be treated more favourably because Ms Jackson would not have made reference to their health conditions and would not have given this as a reason why she would not "want to commit" to giving them the opportunity to work on the NHSP Bank and would not have cancelled their shifts at short notice. Reference to the claimant's health conditions could only have been to his disabilities. In particular, his Fibromyalgia.

121. The detriment was that she had not committed herself to the claimant working on Bank. We accept that she enquired and offered work on to the claimant for the following three days, but we have to look at her response thirteen minutes after his email to her. Her statement to the claimant indicates that his disabilities significantly influenced her decision not to commit herself to him working on Bank. The impact on him was that he felt it was an unjustifiable attack on his commitment to work and created an uncertain future for him. He went on sick leave two days later. In view of our findings above, we have come to the conclusion that this claim is well-founded.

122. In sub-paragraph 4.2, the complaint is that Ms Sara Tasker advised the claimant on 24 November 2021, that the respondent would not consider the "reasonable adjustment" of part-time working as it was not possible. Compared with the hypothetical comparator, we conclude that Ms Tasker would not have treated that person any differently. If they were unable to work full-time, Ms Tasker would have reminded them that the role was advertised and recruited as full-time. Ms Myers explained to the claimant that he was recruited to the full-time role. We conclude that the claimant has not established less favourable treatment at the first stage of the burden of proof test. The statement by Ms Tasker was unrelated to his disability but was a reference to the role being full-time. This claim, therefore, is not well-founded.

123. As regards sub-paragraph 4.3, the complaint here is that Ms Tasker told the claimant that on 25 November 2021, she informed Human Resources that he had asked for reasonable adjustments and was advised that it was not possible. The adjustment being to carry out his work on a part-time basis.

124. Would the hypothetical comparator have been treated any differently? Faced with someone who was offered the role full-time and had requested to go part-time, we conclude that Ms Tasker would have sought advice from Human Resources on how to deal with the request. The reason being that the role was offered and accepted on a full-time basis. To change would bring into play the respondent's business reasons. It would not have been within Ms Tasker's remit to circumvent the recruitment policy without first seeking advice from Ms Myers. In that regard the claimant was not treated any differently. This claim is not well- founded.

125. Sub-paragraph 4.4 states that Ms Tasker informed the claimant on 25 November, that the request for reasonable adjustments was refused. We agree with Ms Moore's submissions that if a disabled person requests an adjustment and that request is promptly refused without any reason being given, it is capable of constituting direct disability discrimination. However, the claimant requested to work part-time and was referred to the Flexible Working Policy by Ms Tasker in her email of 25 November 2021, in which she considered the requirements for flexible working and had taken into account four business reasons as well as the requirement to work a period of 26 weeks. After considering those factors his request was refused. Would the hypothetical comparator unable to work in the full-time position and requested part-time work, have been treated any differently?

126. This is a claim of direct disability discrimination and not the failure to make a reasonable adjustment. There is no evidence to suggest that the flexible working policy would not have been considered for the comparator and rejected on the basis that the comparator would not have had 26 weeks' continuous service and that there were business reasons for rejecting the request. We conclude that there would be no difference in treatment. On this basis, the claim is not well-founded.

127. In relation to sub-paragraph 4.5, the complaint is that the claimant had his job offer withdrawn on 25 November 2021. This was without his knowledge at the time. It is unclear who took that decision and why. We conclude that the failure to work full-time in the role would have resulted in the hypothetical comparator's job offer being withdrawn. The claimant did not apply at the time for the part-time Band 3 Clerical Co-ordinator position in September 2021 but the full-time role. Accordingly, this claim is not well-founded.

128. In relation to sub-paragraph 4.6, that being that Ms Myers wrote to the claimant on 29 November 2021, stating that, "Unfortunately your disability was not taken into consideration, in the advice below and you will receive further communication around this."

129. Ms Myers acknowledged that the claimant's disability was not taken into account in the decision to refuse to allow him to work part-time. On the face of it, this failure to take his disability into account was discriminatory. It was less favourable treatment because we conclude that the particular circumstances of the comparator, for example, with caring responsibilities, would have been set out when seeking advice from Human Resources. The claimant's circumstances were simply omitted when

seeking advice from HR. We, therefore, conclude that this was direct disability discrimination.

130. The detriment he suffered was that his disability was ignored leading to an ill-informed decision by the respondent about his particular circumstances at the time resulting in him having to raise his treatment with Ms Myers. This claim is well-founded.

Failure to make reasonable adjustments

131. The provision, criterion or practice was requiring the Band 3 Clerical Co-ordinator role be full-time. This placed the claimant at a substantial disadvantage, in that, he was unable to work long shift hours on a full-time basis. Applying Environment Agency v Rowan, the respondent was under a duty to make reasonable adjustments. In considering "the steps" to be taken in order to prevent or ameliorate the substantial disadvantage, the claimant's fitness had to be considered. He was signed unfit for work by his doctor from 26 November 2021 to 23 February 2022. (448)

132. We accept that he did engage in a telephone consultation with the Occupational Health Advisor, Ms Amanda Tan, who wrote, "Fit with adjustments" "applicate wishes to be part-time". We also bear in mind that the evidence given by Ms Tasker and Ms Jackson was to the effect that although difficult, it was not impossible to consider part-time work after going through the respondent's lengthy recruitment procedure.

133. The difficulty here for the claimant is that he was unfit for work from 26 November 2021 to 23 February 2022. His doctor did not advise on a phased return, reduced hours, amended duties, or workplace adaptations. Following the cases of Collins, Doran, NCH Scotland, there has to be a return-to-work date when the employee, or job applicant, is or would be fit for work, to trigger the duty to make reasonable adjustments, "the trigger point". We agree with Mr Proffitt in his submissions, that the duty was not triggered as the claimant was unfit for work until 23 February 2022. The pre-employment checks concluded in January 2022. Accordingly, his failure to make reasonable adjustments claims are not well-founded.

134. The respondent's alternative argument is that even if the claimant was fit for work and there was a return-to-work date, when he could commence the work, it would not have been objectively reasonable to have offered him part-time work. The recruitment process takes six months in the Emergency Department. Having regard to the pandemic and its effects on the respondent undertakings, there was an urgent need for the role to be full-time. It needed staff to work in Reception twenty-four hours a day. Some members of staff were off sick, and the Department was operating below capacity. Even if the respondent had granted the claimant's request, it would have meant covering the additional hours through recruitment which would have taken six months. There is much force in those submissions, but our judgment is on whether the claimant was fit for work in order to consider reasonable adjustments and he was not.

135. It follows from our conclusions, sub-paragraphs 9 – 15 in the List of Issues, the failure to make reasonable adjustments, are not well- founded.

Harassment related to disability

136. In order to succeed in a harassment claim, a claimant must show that the respondent had engaged in unwanted conduct that had either the purpose or effect of violating his or her dignity or of creating an adverse environment on one or more of the prohibited grounds. The respondent should not be held liable merely because their conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred. The Tribunal has to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created, Dhaliwal.

137. We have to take the wording in section 26 seriously and should not cheapen them, Grant.

138. We have taken the above guidance into account.

139. In relation to the List of Issues as set out in sub-paragraphs 16.1 – 16.8 but not 16.3 and 16.7, as they have been withdrawn, we consider them in turn. In sub-paragraph 16.1, the claimant's complaint is that the job offer had been withdrawn and Ms Tasker informed him that she had been advised by Human Resources that reasonable adjustments were not possible. This is capable of being unwanted conduct, in that, he was told that reasonable adjustments were not possible. It was related to his disability or disabilities. The purpose, however, was not to violate his dignity or of creating a hostile, intimidating, degrading, humiliating or offensive environment, the proscribed consequences, as the decision was to reject his request for part-time work. The respondent was restating its position in that the post was full-time. He knew that the post was full-time and did not apply for the part-time role in September 2021.

140. In relation to sub-paragraph 16.1, did the content of Ms Tasker's email withdrawing the offer have one or more of the above proscribed effects? The claimant knew that he had applied for the full-time Band 3 post. The Emergency Department was very busy and short staffed due in large part because of the Covid-19 pandemic. He knew that the respondent wanted someone to work full-time and, looking at the circumstances objectively, it was not reasonable to have the proscribed effects. We, therefore, have come to the conclusion that this claim is not well-founded.

141. The complaint in sub-paragraph 16.2, is that the claimant had to lodge a grievance on 26 November 2021, about his treatment and rights as a disabled person who had requested reasonable adjustments. This is not unwanted conduct by the respondent but a response by the claimant to his treatment. In this sub-paragraph he is relying on his conduct and not on any unwanted conduct by the respondent. Section 26 requires that the claimant establishes unwanted conduct related to disability but that has not been established. This claim is not well-founded.

142. In sub-paragraph 16.4, the complaint is whether the respondent, writing to the claimant on 24 January 2022, stating that Occupational Health had not identified any concerns that would impact on his ability to work full-time, constituted harassment related to disability? The respondent did inform the claimant of its

reading of the brief Occupational Health report was that it did not show he was unable to work full-time. It was not unwanted conduct but the respondent's interpretation upon reading it. The respondent took the view that he "wishes" to work part-time, and it was not a recommendation by Occupational Health. Even if it amounted to unwanted conduct, the purpose was not to create one or more of the proscribed consequences or situations as set out in section 26(1), nor having objectively considered the report, did it have one or more of the proscribed effects. We rely on our conclusions in this paragraph. This claim is not well-founded.

143. Sub-paragraph 16.5 is the complaint that Ms Myers advised the claimant on 2 December 2021, to provide a sickness certificate, or fit note. This was at a time when the claimant was not an employee. This must be seen in context. The claimant had left his previous Band 2 role on 28 October 2021. The respondent believed that he was still an employee as there was no completed Leaver Form and he was being paid as an employee. Even the claimant questioned whether he was an employee. The request for a fit note was based on Ms Myers' mistaken but genuinely held belief that the claimant was at the time an employee of the respondent. Although the request was unwanted, it was not related to the claimant's disability but to his employment status. Furthermore, even if it was unwanted and related to disability, the purpose was not the proscribed situations as set out in section 26(1). Its purpose was to ascertain the claimant's medical conditions and the reason or reasons for his absence.

144. Moreover, it was not reasonable for the request to have had the proscribed effects as the claimant was also unclear about his employment status. He wrote on 15 December 2021 to Ms Myers, "I am a little confused about things. Please could you let me know if I am being treated as an employee? Am I entitled to sick pay?" (450)

145. Taking into account the claimant's perception, namely his employment status being unclear at the time, and the fact that the request was made in order to get an understanding as the reason or reasons for his sickness absence, considering these objectively, it is not objectively reasonable for the request to have had the proscribed effects. Accordingly, this claim is not well-founded.

146. In relation to sub-paragraph 16.6, that on 17 December 2021, Ms Myers advised the claimant that he had mistakenly been asked to provide a sickness certificate, after he had provided it. For the reasons set out in the above paragraphs with regard to paragraph 16.5, as they are linked, stating that the respondent was mistaken was not unwanted conduct but a statement of fact and not a positive act on the part of the respondent related to disability but to the claimant's status. Further, it was not objectively reasonable for Ms Myers' correspondence on 17 December to have had the proscribed effects. This claim is not well-founded.

147. The complaint in sub-paragraph 16.8 is that, on 13 December 2021, the respondent's Human Resources team stated that the claimant should not have been referred to Occupational Health as he was not employed by the respondent and had been denied the request for a reasonable adjustment to work part-time. The first part of this claim ties in with the above two claims to which we rely on our above reasoning in paragraphs 143 144.

148. In relation to being denied the request for a reasonable adjustment to work part-time, we find that the refusal was unwanted conduct and was related to disability. Did that conduct have the proscribed purposes? We have come to the conclusion that it did not. The refusal was in line with the respondent's stated position that it wanted the post to be full-time. The claimant understood that to be the case as he wrote in his email to Ms Tasker and Ms Jackson on 24 November 2021, "I do fully understand that it may not be possible as I know it is a full-time position that you were recruiting to, if this is not possible, would I please be able to stay on bank and work with you." (403-404)

149. Did the refusal have one or more of the proscribed effects? We take into account the claimant's perception that the respondent, he understood, wanted someone to the carry out the Band 3 role full-time. As regards the other circumstances, such as, the Emergency Department was busy at the time; Covid-19 was still prevalent affecting members of staff's health depleting those who turned up for work; although it was possible to recruit for a part-time post, the process would have taken too long, about six months and would not have addressed the respondent's immediate concerns to provide an adequate number of staff members to run the Department. Considering these matters objectively, it was not reasonable for the refusal to have had the proscribed effects as set out in section 26(1). This claim is not well-founded.

150. As the claimant was not fit for work and had not responded to repeated requests to contact the respondent since the completion of the Pre-employment checks on 7 January 2022, the decision was taken and communicated to him on 10 February 2022, to withdraw the offer of employment.

151. In our judgment, we concluded that only two of the direct disability discrimination claims, sub-paragraphs 4.1 and 4.6, are well-founded. The claims of failure to make reasonable adjustments and harassment related to disability, are not well-founded. The case is listed for a **Remedy Hearing on Friday 20 October 2023**, **at 10.00am,** for one day, before this Tribunal by Cloud Video Platform, if not settled.

152. The parties are to agree a date for the exchange of witness statements, if any from the respondent. The claimant's statement should give an account of his injured feelings as a result of being directly discriminated because of his disability.

153. The parties must also agree a joint bundle of documents relevant to remedy.

Employment Judge S Bedeau
Date: 28 August 2023