EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000160/2022

Held in Edinburgh on 12-14 September 2023

Employment Judge Sangster
Tribunal Member Grime
Tribunal Member Currie

Mr A Smith	**Claimant** **Represented by** **Mr Stevenson** **CAB Representative**
Lothian Health Board	**Respondent** **Represented by** **Mr R Davies** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The claimant's complaints of disability discrimination and harassment related to disability do not succeed and are dismissed.
- The claimant's application to amend his claim to include a complaint of victimisation is refused.
- The claimant's complaints of age discrimination and unauthorised deductions from wages are dismissed, following withdrawal by the claimant.

REASONS

Introduction

1. The claimant presented his claim on 24 November 2022, having engaged in early conciliation from 26-28 October 2022. He remains employed by the respondent.

2. At the time he lodged his claim form, he was unrepresented. Mr Stevenson indicated that he had been instructed to act for the claimant on 23 January 2023. Since that date, there have been two preliminary hearings for case management (1 February and 19 May 2023) and the claimant has lodged three sets of further particulars (on 24 March, 9 May and 29 June 2023).

3. A joint bundle of documents, extending to 143 pages was lodged in advance of the hearing. A further 3 pages were added, with consent, at the commencement of the hearing.

4. The claimant gave evidence on his own behalf.

5. The respondent led evidence from 4 witnesses, namely:

   a. Louise Masterton (**LM**), Domestic Supervisor;
   b. Janice Macbeath (**JM**), Deputy Domestic Manager;
   c. Catriona Kennedy (**CK**), Soft FM Site Manager; and
   d. Sasha Hill (**SH**), Soft FM Area Manager.

6. The other individuals referenced in this judgment are:

   a. Natalia Burdess (**NB**), Domestic Services Deputy Manager.

Issues to be Determined

7. At the commencement of the hearing, the issues to be determined were discussed. It was confirmed that the only complaints before the Tribunal were of disability discrimination. The other asserted complaints, of age discrimination and unauthorised deductions from wages, having been withdrawn previously. Parties had prepared separate lists of issues, which differed in three respects. Two of these were resolved by agreement, following discussion. The third required to be determined by the Tribunal. The conclusion reached by the Tribunal, for the reasons given orally at the time, was that a complaint of harassment in relation to a meeting on 9 July 2022 could proceed. It was also confirmed, for the respondent, that knowledge of disability and/or

substantial disadvantage, was not disputed, in the event that disability status was established.

8. During submissions, the respondent confirmed that it was no longer disputed that the claimant was a disabled person at the relevant times, as a result of having shoulder, neck and knee pain. The claimant also indicated in their submission that the following complaints were no longer insisted upon and were, accordingly, withdrawn:

   a. The complaint of direct discrimination – namely that the claimant was subjected to less favourable treatment on 9 July 2022 by being instructed by JM to carry out work which he was incapable of doing.

   b. Complaints that the following amounted to harassment related to disability:

      i. Belittling the claimant at a meeting on 13 September 2022, pressing him to return to work subject to an OH Report and asking him to sign a minute of the meeting which he believed was inaccurate; and

      ii. Managing the claimant without addressing his work limitations, following the commencement of his absence

9. The remaining issues to be determined by the Tribunal were as follows:

Harassment – s26 EqA

10. Did the respondent engage in unwanted conduct by belittling him at a meeting on 9 July 2022 and requiring him to do work he was incapable of?

11. If so, was this related to disability?

12. If so, did the conduct have the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Discrimination Arising from Disability – s15 EqA

13. Was the claimant treated unfavourably on 9 July 2022 by being instructed by JM to carry out work in A&E?

14. If so, was this due to something arising in consequence his disability, namely his inability to do the work?

15. If so, was the treatment a proportionate means of achieving a legitimate aim, the legitimate aim being to ensure the hospital is clean?

16. Was the claimant treated unfavourably by the respondent failing follow occupational health advice received in October 2022?

17. If so, was this due to something arising in consequence of his disability, namely what the respondent believed the claimant was capable of, standing their knowledge and belief of his physical limitations?

18. If so, was the treatment a proportionate means of achieving a legitimate aim, the legitimate aim being to address a relationship breakdown before attempting a return to work?

Reasonable Adjustments – s20 & 21 EqA

19. Did the respondent have a PCP of requiring cleaners to carry out cleaning work in all areas of the hospital, without adjustment to duties?

20. If so, did that PCP put the claimant at the substantial disadvantage, in comparison with persons who are not disabled at any relevant time, because it would require him to do more demanding work, including climbing ladders and fast paced cleaning work in A&E, which he was unable to do because of his physical condition?

21. If so, would the step identified by the claimant, namely confining his work to cleaning theatres, have alleviated the identified disadvantage?

22. If so, would it have been reasonable for the respondent to have taken those steps at any relevant time and did they fail to do so?

Remedy

23. In the event the Tribunal finds in favour of the claimant the amount of the awards for injury to feelings and loss of earnings.

Findings in Fact

24. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

25. The respondent is an NHS Health Board providing services for Edinburgh and the Lothians.

26. The claimant has continuous service with the respondent from April 2002. His employment transferred to the respondent, from a Facilities Contractor, on 1 April 2017. His employment is continuing.

27. The claimant is engaged by the respondent as a Domestic Assistant, working at the Royal Infirmary of Edinburgh. As a Domestic Assistant his duties involve cleaning the hospital.

28. The claimant works 34.5 hours per week, over 3 nightshifts from 7pm to 6.30am, Friday to Sunday.

29. The claimant's supervisor was previously JM. In 2010, she provided him with a lift key, as he indicated that he had difficulty climbing stairs due to his knee pain. The claimant used the lift, rather than the stairs, from that point onwards. Thereafter, she also ensured that the claimant was assisted by colleagues, when he required to take medication which could make him feel dizzy

30. Until the summer of 2019, the claimant normally worked in A&E. At that stage he requested to be moved out of A&E, for a period of at least 6 months, as his wife was about to undertake chemotherapy and this would help to limit contact with infections, which they had been advised was necessary. The claimant's request was granted and he moved to cleaning theatres on Saturdays and Sundays. On Fridays he was assigned to any other work which was required, but not in A&E. That arrangement remained in place well beyond the 6 month

period and was still in place in 2022, despite the fact that this was no longer required.

31. As a result of not being able to climb ladders, due to his knee pain, the claimant was not required to undertake the high level cleaning duties in operating theatres. JM arranged for others to do that.

32. In May/June 2020, JM was promoted to Domestic Manager and LM became the claimant's supervisor.

33. The claimant was absent from work for 5 months, due to shoulder pain, in 2021. He had cortisol injections in each shoulder in October 2021, which eased the pain for a few months. He returned to work, on a phased basis, in November 2021. He was able to undertake his normal duties on his return.

34. At the start of July 2022, the respondent identified that another Domestic Assistant was required to work in A&E. as there had been a change in the way that the work was undertaken in A&E. A separate team had previously undertaken cleaning duties in cubicles where it was identified that the patient had an infection, such as Covid, but that work was now undertaken by the sole Domestic Assistant on duty in A&E. The work was proving too much for one person, and when they were on a break there was no one providing cover, which was not acceptable. The claimant was identified as the only person who could undertake this role between 7-10pm at weekends. The nightshift started at 10pm, so a member of that team would be able to take over from then, allowing the claimant to then move to cleaning the operating theatres.

35. On 9 July 2022, at the start of his shift, the claimant went to see LM to discuss his duties for that shift. It was normal practice for him to do so. LM indicated to him that she had been asked by SH to ask the claimant to work in A&E until 10pm. The claimant immediately refused. He became angry and shouted that he would not and, if he was told to do so, he would go home. LM asked the claimant to calm down and discuss matters. The claimant's shouting was heard by JM and others from outside the room. JM came into the room and shut the door, so others would not hear. She asked the claimant to sit down, stating that

they could talk about it and try to fix it. The claimant refused, continued to shout, stating that he was very angry, that he *'wasn't fucking going to A&E'* and that he was being treated like a slave, being asked to do extra work. He shouted at JM to *'open the fucking door'* so he could leave. JM did so and he left. The claimant was extremely annoyed and angry throughout the exchange.

36. The claimant was particularly annoyed as he understood that he required to undertake three hours of work in A&E and then clean the same number of theatres, in a shorter period of time. This was not however the case. He would not have been expected to clean the same number of theatres, simply to clean as many as he could in the remaining time. Those that remained to be cleaned would then be cleaned by the dayshift. The claimant also thought that he would be doing someone else's work and they would have nothing to do. Again, this was not the case. There was too much work in A&E for one person. He was being asked to assist with that work.

37. LM's evidence, which the Tribunal accepted, was that if the claimant had discussed matters with her on 9 July 2022, she would have been able to reassure him that he would be working with another Domestic Assistant in A&E, they would be able to support the claimant with any tasks he could not undertake and he could undertake work at his own pace: there was no requirement to work at a faster pace in A&E. She would have reassured him that, when the other Domestic Assistant was on a break (it was envisaged that one 15 minute break would be taken by the other Domestic Assistant in the three hour period the claimant worked with her), LM could be contacted via her radio to provide assistance. She would also have reassured him that he would not be required to clean the same number of theatres as he previously did, as he had a considerably shorter period of time to focus on that. LM and JM did not however have the opportunity to have these conversations with the claimant.

38. The claimant commenced a period of absence due to stress at work from 9 July 2022. He remained absent from work at the time he submitted his ET1. NB was initially responsible for managing his absence.

39. On 1 August 2022, the claimant submitted a grievance complaining about how he had been treated, over a number of years by JM. He stated that he had been *'bullied and harassed'* by her. In context, this was an allegation of unfair treatment, rather than an allegation of harassment under the Equality Act 2010. He raised numerous issues, such as JM taking holidays from him, reducing his hours and the incident on 9 July 2022. In relation to that incident he stated that believed that the respondent was acting in breach of their Health & Safety Policy as he was *'64 years old and cannot do the work in A&E and then directly after clean the theatres. I often have 6 theatres sometimes up to 8 to clean by myself. I manage to clean them but I cannot do extra work over and above'.* He stated *'I previously worked in A&E for years. I was younger then and just worked there, no theatres or extra work. [JM] came into the office and told me to go to A&E and then theatres. I told her no, I am not able to do that and I was going home as I could not do that.'* He stated '*I can never work with [JM].*' He mentioned that he had back and hip pain and was taking medication for this. He did not however state that he could not work in A&E due to this, or that JM's actions towards him were because of or related to that.

40. The claimant attended a grievance meeting on 13 September 2022. The meeting was conducted by CK, who had been appointed to investigate the grievance. At the meeting the claimant indicated that he couldn't work with JM, unless she didn't talk to him.

41. The claimant raised a further grievance on 5 October 2022, reiterating the issues set in his grievance of 1 August 2022, as set out in paragraph 39 above.

42. NB referred the claimant to occupational health in September 2022 and the claimant attended for an occupational health assessment on 29 September 2022. A report, dated 30 September 2022, was then provided to the respondent. The report stated, in relation to '*Context/Details'* that:

'Mr Smith reports that it [was] perceived work place concerns that were the trigger to this absence. Mr Smith reported that he has been managing his role as a domestic working within the theatre area. He has reported some muscular skeletal symptoms affecting his back, shoulders and knees, along with some

age-related symptoms, which may make working within a fast-paced working area more challenging, management may wish to take this into consideration when allocating areas of work, if operationally feasible. Mr Smith symptoms affecting his knees are likely to make climbing ladders difficult. The barrier to Mr Smith returning to work appears to be his work concerns rather than a specific medical reason at this time. A meeting to discuss any concerns is likely to be beneficial, if progress can be made.'

43. In the section related to *'Details of work adjustments or modifications which could facilitate their rehabilitation/return to work'* it was stated:

As Mr Smith has identified some work related concerns triggering this current absence, I would encourage him to undertake an individual stress risk assessment and agree an action plan with his manager in line with the guidance in the Dealing Positively with Stress at Work Policy. Using the HSE management standards indicator tool…may support the self-assessment process and associated discussions. As he has reported physical symptoms, I have signposted him and given the contact details for OH physiotherapy for advice. I would recommend due to the physical symptoms with his knees, that Mr Smith does not undertake climbing of ladders. This is likely to be a long term adjustment. Mr. Smith is best suited to be aware of his capabilities and limitations and he also has a responsibility ensuring you are aware of duties which could be challenging. He appears aware of the need to self-risk assess any manual handling task and ask for assistance if required. He informed me that he is up to date with any appropriate manual handling training.'

44. OH Physiotherapy Service produced a report to the respondent dated 4 October 2022. They stated as follows

'Albert has been absent from work recently with a non-musculoskeletal health problem. He reports that he has a long standing knee, back and shoulder problem. Prior to absence he reports he was managing his full duties within theatres. These problems may be exacerbated by working in a fast-paced environment and his knee problem may also be exacerbated by climbing ladders to change curtains. As outlined in [the OH] response, management

may wish to take this into consideration when allocating areas of work. In relation to these musculoskeletal problems it is recommended that Albert is fit to return to work, where possible avoiding faster paced environment like A&E and avoiding the climbing of ladders.'

45. Whilst the outcome of the OH advice was that the claimant's musculoskeletal problems were not preventing a return to work, the claimant remained unfit to work thereafter, as a result of stress at work. He lodged his ET1 on 24 November 2022.

46. NB, who was initially appointed to manage the claimant's absence, did not give evidence to the Tribunal. CK indicated that she understood that NB had not arranged a meeting with the claimant to discuss his ongoing absence and the reasons for this, as he had indicated in his grievance, and at the meeting on 13 September 2022, that he could not work with JM, and the indication from OH that that his workplace concerns (which the respondent understood from the grievance to be related to JM), rather than specific medical issues, were the barrier to him returning to work at that time. The respondent wished to investigate that relationship breakdown, and take any appropriate action, before arranging any meeting under the respondent's absence management procedures and/or discussing any potential return to work.

Matters Arising on Conclusion of Evidence

47. A break was taken from 1pm on 13 September 2023, following conclusion of the evidence, to 10am the following day. This was due to the fact that Mr Stevenson indicated that he had not anticipated the evidence concluding at that stage, that he was not in a position to proceed with submissions that afternoon and the claimant would be prejudiced if he was required to do so.

48. At 3.30pm on 13 September 2023, Mr Stevenson sent an email to the Tribunal and the respondent, indicating that the claimant wished to amend his claim to include a complaint of victimisation, and provided the terms of the proposed amendment as follows:

The respondent victimised the claimant in terms of s27(2)(d) EqA by being denied a meeting to discuss and implement the recommendations of their Occupational Health Advisers following receipt of their reports in October 2022 in consequence of his lodging a formal grievance relating to his inability to carry out domestic duties in the ERI A&E department by reason of his disability.

49. Mr Stevenson was invited to address the Tribunal in relation to that application prior to making his submission on 14 September 2023. In summary he stated:

    a. He appreciated that the application came late in the day, but it arose from CK's evidence and he would not be acting in his client's best interests if he did not seek to advance this; and

    b. He considered it to be a purely legal point, stating that further evidence would not be required.

50. Mr Davies, for the respondent, objected to the application. He stated that it should not be allowed for a number reasons, which are summarised as follows:

    a. The respondent had no fair notice of the complaint. Had the respondent had fair notice of the complaint he would have asked different/additional questions of the claimant and witnesses;

    b. The proposed amendment lacks specification;

    c. It was not accepted that further evidence would not be required. If the amendment was allowed he would, at least, wish to recall CK; and

    d. The prospects of the complaint are very poor. The respondent's position is that nothing in the grievance amounted to a protected act. General assertions of 'bullying and harassment' are not sufficient. Health issues are mentioned in the grievance for context only, not as a reason for treatment.

51. It was agreed that the application would be considered by the Tribunal and addressed in this judgment. The Tribunal's conclusions are set out at paragraphs 84-86 below.

Claimant's Submission

52. In summary, Mr Stevenson's submitted that:

a. The instruction given to the claimant on 9 July 2022 had the proscribed effect on the claimant.

b. In relation to the s15 complaint, the claimant was incapable of doing the work required in A&E. In particular he could not climb ladders to change curtains. While the respondent now states help would have been made available, the claimant was unaware of that. The tests set out in ***Pnaiser v NHS England*** are satisfied and the respondent cannot demonstrate that there was a legitimate aim for the claimant in particular being required to work in A&E.

c. Normal practice was to meet with an employee on receipt of an OH report. It was unfavourable treatment not to do so and that was due to the respondent's false belief that the claimant could do the work, with assistance. He further stated that, in the alternative, it could be argued that this unfavourable treatment was due to the respondent considering the claimant's grievance, in which he stated that he was unable to work in A&E due to his disability. Mr Stevenson accepted however that this was not the 'something arising in consequence of disability' which he had confirmed was the claimant's position at the outset of the final hearing.

d. The respondent failed to make reasonable adjustments, they ought to have allowed him to continue to work in theatres.

Respondent's Submission

53. Mr Davies, lodged a 13 page written submission in advance of the hearing, which was taken as read and not supplemented. In response to the claimant's submission he submitted that the alternative 'something arising from disability'

submitted by Mr Stevenson was entirely different to that stated at the outset of the hearing. Evidence was led with reference to the 'something arising from disability' being that confirmed at the commencement of the hearing. It would be extremely prejudicial to the respondent to allow the claimant to change their position after the conclusion of the evidence.

Relevant Law

Discrimination arising from disability

54. Section 15 EqA states:

"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

55. Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it was highlighted that 'arising in consequence of' could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

56. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

'the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an

(identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

Failure to make reasonable adjustments

57. Section 20 EqA states:

"Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A."

58. Section 20 EqA sets out three requirements, the first of which is relevant to this case. The first requirement is a *"requirement, where a provision, criterion or practice of A's puts 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 it is reasonable to have to take to avoid the disadvantage."*

59. Section 21 EqA provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

60. *'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'* (The Equality and Human Rights Commission: Code of Practice on Employment (2011) (the **EHRC Code**), paragraph 6.10).

61. The Court of Appeal in ***Ishola v Transport for London*** [2020] IRLR 368 considered the term 'provision, criterion or practice', noting that it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. In context, all three words carried the connotation of a state of affairs indicating how similar cases were generally treated or how a similar case would be treated. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done.

62. A substantial disadvantage is one that is more than minor or trivial (paragraph 6.15 of the EHRC Code). The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular PCP 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 (paragraph 6.16 of the EHRC Code).

Harassment

63. Section 26(1) EqA states:

'(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 an intimidating, hostile, degrading, humiliating or offensive environment for B.'

64. Section 26(4) EqA states:

'(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.'

65. There are accordingly 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) which relates to a relevant protected characteristic and (iii) that has the proscribed purpose or effect.

66. The Equality and Human Rights Commission: Code of Practice on Employment (2011) explains, at paragraphs 7.9-7.11, that 'related to' has a broad meaning. It occurs where there is a connection with the protected characteristic. Conduct does not have to be 'because of' the protected characteristic.

Burden of proof

67. Section 136 EqA provides:

***'**If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'*

68. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, as explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of discrimination, harassment or victimisation by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the

complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

69. In ***Madarassy***, it was held that the burden of proof does not shift to the respondent simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal 'could conclude' that on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Discussion & Decision

Harassment

70. The Tribunal considered the allegation of harassment. The Tribunal understood that it required to consider whether there was unwanted conduct, whether it related to disability and, if so, whether the conduct had the proscribed purpose or effect. There is no requirement to identify an actual or hypothetical comparator in complaints of harassment, but the burden is initially on the claimant show evidence from which the Tribunal could reasonably conclude that the unwanted conduct complained of was 'related to' disability and it had the proscribed purpose or effect. A prima facie case in respect of all three aspects must be demonstrated to shift the burden of proof to the respondent.

71. The Tribunal firstly considered whether the claimant had established the conduct complained of, namely belittling him at a meeting on 9 July 2022 and

requiring him to do work he was incapable of. The Tribunal accepted that, if this was established, it would be unwanted.

72. The Tribunal concluded that it was not established that the claimant was belittled at the meeting on 9 July 2022. There was no evidence of this whatsoever. He was simply asked to work in A&E. From that point onwards he was extremely annoyed and angry and refused to engage in any discussion.

73. The Tribunal also concluded that it was not established that he was required to do work he was incapable of. He was asked to undertake cleaning work in A&E. He was not incapable of doing that. His role was to clean the hospital and he was able to undertake his role in all other departments. His primary concern was that he was being asked to undertake extra work and he would not be able to do this and then clean the same number of theatres. He was not however being asked to do this. Whilst he may have experienced difficulty undertaking a very small proportion of the duties required in A&E, which were not required elsewhere, such as climbing step ladders to change curtains, he would not have been required to do those tasks. He was working as part of a team of two. The other person could undertake those tasks, and for the 15 minutes that person was on a break, LM would have been available to provide assistance, if required.

74. While the OH Physiotherapist did state in their report dated 4 October 2022 (nearly 3 months after the claimant was asked to work in A&E) that the claimant was 'fit to return to work, where possible avoiding faster paced environment like A&E', the report did not state that the claimant was unable to work in A&E, simply that faster paced environments, like A&E, should be avoided *where possible*. In any event the Tribunal did not accept the claimant's evidence that A&E was a faster paced environment for a Domestic Assistant. The Tribunal preferred instead LM's evidence, that Domestic Assistants could only work at the pace they could work, whether in A&E or elsewhere. They could not work faster in different environments/departments.

75. Given these findings, the Tribunal concluded that the conduct complained of, namely that he was required to do work he was incapable of, was not

established. The complaint under s26 EqA in relation to this accordingly does not succeed and is dismissed.

Reasonable Adjustments

76. In relation to complaints of failure to make reasonable adjustments, the onus is on the claimant to show that the duty arises, i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not disabled, and to identify some steps which could have alleviated that disadvantage. If the Tribunal is satisfied of this, the burden then shifts to the employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified and/or that it would not have been reasonable to make that adjustment.

77. The Tribunal firstly considered whether the respondent had a PCP of requiring cleaners to carry out cleaning work in all areas of the hospital, without adjustment to duties. The Tribunal concluded that it had not been demonstrated that the respondent had such a PCP. No evidence was led by the claimant in relation to how other individuals were, or would be, treated in relation to the allocation of their duties and whether these were, or would be, adjusted or not. The only evidence led by the claimant was in relation to how he was treated. That evidence demonstrated that the respondent had adjusted his duties and taken steps to assist the claimant on a number of occasions, including:

a. Providing him a lift key in 2010, when he indicated that he had difficulty climbing stairs;
b. Ensuring that the claimant was assisted by colleagues when he required to take medication which could make him feel dizzy;
c. Moving him from A&E in 2019, when he indicated that he wished to reduce the risk of passing infection to his wife; and

d. Arranging for others to undertake the high level cleaning duties in operating theatres, as a result of the claimant not being able to climb ladders to do so.

78. If the claimant had discussed matters with LM on 9 July 2022, she would have reassured the claimant that he would be working with another Domestic Assistant in A&E. They would be able to support the claimant with any tasks he could not undertake and he could undertake work at his own pace: there was no requirement to work at a faster pace in A&E. If the other Domestic Assistant was on a break (it was envisaged that one 15 minute break would be taken by the other Domestic Assistant in the three hour period the claimant worked with her), LM could be contacted via her radio to provide assistance. The Tribunal concluded that these points also undermined the claimant's assertion that the respondent had a PCP of requiring cleaners to carry out cleaning work in all areas of the hospital, without adjustment to duties.

79. Given that the PCP relied upon was not established, the complaint of failure to make reasonable adjustments does not succeed and is dismissed.

Discrimination Arising from Disability

80. To shift the burden of proof to the respondent in relation claim under s15 EqA, a claimant requires to show:

a. That he or she has been subjected to unfavourable treatment;
b. A link between the disability and the 'something' that is said to be the ground for the unfavourable treatment; and
c. Some evidence from which it could be inferred that the 'something' was a reason or cause for the treatment (noting that it need not be the main or sole reason, but must have at least a significant (more than minor or trivial) influence it).

81. The Tribunal considered the guidance ***Pnaiser***. The first question is whether the claimant was treated unfavourably. In relation to the first question, the

Tribunal noted that no question of comparison arises. The EHRC Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain.

82. The Tribunal considered each asserted act of discrimination arising from disability with reference to the guidance in ***Pnaiser*** and reached the following conclusions:

a. **Being instructed to carry out work in A&E.** The Tribunal concluded that this was not unfavourable treatment. Being asked to work in A&E was not something a reasonable worker would complain about in circumstances where the worker is aware that reasonable adjustments have been accommodated in the past and there is no reasonable basis for him to assume that this would not be the case in relation to work undertaken in the A&E. The claimant's principal concern was that, in addition to the 'extra' work to be undertaken in A&E, he would require to clean the same number of theatres as he had previously. That was not however the case. A reasonable worker would not complain about that without ascertaining the true position. The claimant has accordingly not established that he was subjected to unfavourable treatment.

Even if the Tribunal had not reached that conclusion however they would have found that there was no evidence from which it could be inferred that the 'something' arising from disability, namely an inability to do the work, was established (see paragraphs 80-82 above) or that it was a reason or cause for the instruction. The sole reason or cause for the instruction was that the respondent had identified that, due to a change in operations, the Domestic Assistant work which required to be undertaken in A&E was proving too much for one person, and when they were on a break there was no one providing cover, which was not acceptable. The claimant was the only person who was available between 7-10pm on weekends to provide additional support.

For these reasons, this element of the claimant's complaint of discrimination arising from disability does not succeed and is dismissed.

b. **Failing to follow occupational health advice in October 2022.** The terms of the report from occupational health and the report from OH Physiotherapy are set out in paragraphs 42-44 above. In the period from these reports to the claimant lodging his ET1 on 24 November 2022, the claimant remained certified as unfit to work due to 'stress at work'. In these circumstances, the only potential 'advice' for the respondent, which they failed to follow at that time was that *'a meeting to discuss any concerns is likely to be beneficial, if progress can be made.'* The other 'advice' related to the position when the claimant was in a position to return and was not certified as unfit to work due to stress at work. The Tribunal accepted that the respondent did not arrange to meet with the claimant following receipt of the report, and that this amounted to unfavourable treatment: it was something about which a reasonable person would or could complain.

The Tribunal concluded however that there was no evidence from which it could be inferred that the 'something' that was said to be the ground for the unfavourable treatment, (namely what the respondent believed the claimant was capable of, standing their knowledge and belief of his physical limitations) was a reason or cause for the treatment. The respondent did not arrange a meeting with the claimant as he had indicated in his grievance, and at the meeting on 13 September 2022, that he could not work with JM, and the indication from OH was that his workplace concerns (which the respondent understood to be related to JM), rather than specific medical issues, were the barrier to him returning to work at that time. The respondent wished to investigate that relationship breakdown, and take any appropriate action, before arranging any meeting under the respondent's absence management procedures and/or discussing any potential return to work. The fact that they did not arrange a meeting was entirely unrelated to the claimant's physical condition, including what the respondent believed the claimant

was capable of, standing their knowledge and belief of his physical limitations. For these reasons, this element of the claimant's complaint of discrimination arising from disability does not succeed and is dismissed.

83. For the avoidance of doubt, the Tribunal did not feel it was appropriate for the claimant to change the 'something arising from disability' relied upon during submissions, as the claimant's representative sought to do. Particularly when time had been taken to discuss this at the outset of the hearing and the claimant's representative had clearly confirmed what the something arising from disability which was relied upon. Even if this had been permitted however, it would not have changed the outcome of the case, as the Tribunal did not accept that the claimant stated in his grievance that he was not able to work in A&E because of his disability. The 'something arising from disability' would accordingly not have been established.

Application to Amend

84. Having reflected on the submissions made by the parties, the Tribunal concluded that the application to amend the claim form, to include a complaint of victimisation, should be not allowed.

85. In reaching this decision, the Tribunal considered the injustice and/or hardship of allowing or refusing the amendment, taking into account, in particular, the factors noted below:

a. *Nature of the amendment*. The amendment seeks to add new legal claim. While this is related to the existing factual matrix, given that it is a new legal claim, it would require different areas of enquiry to the existing claims.

b. *Applicability of time limits*. Claims of victimisation should be brought within 3 months of the date of the act to which the complaint relates, or such other period as the Tribunal considers just and equitable. A failure to do something is treated as occurring when it was decided upon. In this case, it is clear a decision was taken immediately following the receipt of the OH reports, namely at the start of October 2022. The claimant's formal

application to amend was made on 14 September 2023. The application to amend was accordingly brought outwith the 3 month period, as extended by early conciliation. The claimant was not represented when he completed the ET1. He has however been represented since January 2023. Since then, there have been two case management preliminary hearings and the claimant has lodged further particulars of his claim on three separate occasions. The complaint of victimisation was not mentioned in the case management discussions or the further particulars lodged. It was open to the claimant or his representative to seek clarification from the respondent in relation to the reason why they did not meet with the claimant immediately following receipt of the occupational health reports, but this was not done. In these circumstances, and taking into account the timing and manner of the application, the Tribunal concluded that it would not be just and equitable for time to be extended.

c. *Timing and manner of application*. The application was made after the conclusion of the evidence at the final hearing, when witnesses were no longer present, immediately prior to submissions.

86. Both parties can point to injustice/hardship if the application is allowed/refused. The Tribunal concluded that the hardship and injustice to the respondent however outweighed that of the claimant. While the claimant is not able to pursue that complaint, given the terms of the grievances (as set out in paragraphs 39 & 41 above) it appeared to the Tribunal that the complaint had poor prospects of success. The Tribunal felt that it was unlikely that the claimant would be able to establish that the grievances contained statements amounting to a protected act for the purposes of s27(2)(d) EqA. From the respondent's perspective however they would be significantly prejudiced if the application to amend were allowed. They had no fair notice of the complaint before or during evidence. Had they had fair notice of this, the Tribunal accepted that their representative would have asked different questions of the claimant and the respondent's witnesses. They may even have called NB as a witness, given that she was initially responsible for the management of the claimant's absence. For these reasons, the Tribunal concluded that the application should be refused.

Employment Judge: **Sangster**
Date of Judgment: **20 September 2023**
Entered in register: **25 September 2023**
and copied to parties