EMPLOYMENT TRIBUNALS

Claimants	**Respondent**
	v
Mr S Mohamed	The Government of the State of Kuwait

Heard at: **London Central Employment Tribunal**

On: **20-23 November 2023**
(23 November in Chambers)

Before: **EJ Webster**
Mr P Alleyne
Ms S Plummer

Appearances
For the Claimants: **Mr G Adams (Counsel)**
For the Respondent: **Mr M Sethi KC (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claims for direct discrimination on grounds of disability and age are partly upheld.

2. The Claimant's claims for indirect discrimination on grounds of disability and age are partly upheld.

3. The Claimant's claims for harassment related to disability and age are partly upheld.

4. The Claimant's claim for discrimination arising out of disability (S15 Equality Act 2010) is upheld.

5. The Claimant's claim for associative direct disability discrimination is not upheld.

REASONS

6. By a claim form dated 28 September 2020 the Claimant bought claims against the Kuwait Health Office ('KHO') and the Respondent for direct age and disability discrimination, harassment related to age and disability, direct associative discrimination and indirect age and disability discrimination all of which the Respondent disputed.

7. Following a preliminary hearing on 13 January 2023, EJ Brown dismissed the claim against the KHO, on the ground that the Respondent was the only proper respondent and dismissed on state immunity grounds all complaints against the Respondent other than those claiming personal injury damages for disability and age discrimination and harassment. EJ Brown's reasons dated 24 January 2023 should be read with these.

The Hearing

8. The issues had been agreed between the parties and are set out below. There were no amendments to that list.

9. At the outset of the hearing Mr Sethi raised that an Unless Order had been made by EJ Goodman on 15 November 2023 that, he said, had not been complied with and therefore the Claims stood as struck out pursuant to Rule 38(1). The Tribunal found that the Claimant had materially complied with the Order and that the Claims were not struck out. Oral reasons were given at the time and are not repeated here.

10. The Tribunal was provided with a witness statement for the Claimant and Dr Wafaa El Sankary on behalf of the Respondent. Both gave oral evidence. Dr Wafaa made reference to her statement prepared for the state immunity case and we were provided with a copy of that and together they stood as her evidence in chief.

11. The bundle numbered 231 pages. We were not provided with the ordered chronology or cast list by the parties. No explanation for that was given. We were provided with a speaking note and a bundle of authorities by Mr Adams on the second day which amounted to a note on the law and two first instance decisions.

12. The matter had been listed for 7 days though that was clearly unnecessary given that there were only 2 witnesses. The parties had not thought to notify the Tribunal of the reduction in time needed.

13. The matter had also been listed for a two day remedy hearing in March. That hearing will remain in the list given that we have upheld part of the Claimant's claims.

List of Issues

The Issues had been agreed by the parties in advance of the hearing an did not need amendment.

14. Disability

a. Did the Claimant's Prostate cancer amount to a disability within the meaning of s6 of the Equality Act 2010?

15. Indirect Age and Disability Discrimination

(Acts which have been pleaded at POC [24] to [27] under the heading Discrimination on grounds of age and disability – Indirect Discrimination Section 19 of the Equality Act 2010")

5.1 POC [25]: Did the Respondent rely on a provision, criterion or practice (PCP) by imposing a compulsory retirement age?
(i) If so, did this PCP also apply to persons who did not share the claimant's age?
(ii) Is so, did the PCP put, or would put others who share the claimant's age at a particular disadvantage compared to others who do not share the same age?
(iii) If so, was the claimant put to that disadvantage?
(iv) If so, can the respondent show that the PCP is a proportionate means of achieving a legitimate aim?

5.2 POC [27]: Did the Respondent's request for all staff including the Claimant to return to work or have their pays deducted amount to a PCP?
(i) If so, did this PCP also apply to persons who did not share the claimant's age and disability?
(ii) If so, did the PCP put, or would put, others who share the Claimant's age and disability at a particular disadvantage compared to others who did not share the same age and disability?
(iii) If so, was the claimant put to that disadvantage?
(iv) If so, can the respondent show that the PCP is a proportionate means of achieving a legitimate aim?

16. Discrimination arising from disability
Pleaded at POC [26]

a. Did the Respondent dismiss the Claimant because of something arising from the Claimant's disability?
b. If so, what was the something arising from the Claimant's disability?
c. Did the dismissal pursue a legitimate aim?
d. If so, was the dismissal a proportionate means of achieving that aim?

17. **Direct Age and Disability Discrimination**
(Acts which have been pleaded under POC [28] to [36] the heading "Discrimination on grounds of age and disability – Direct Discrimination section 13 of the Equality Act 2010)"

a. Did the Respondent subject the Claimant to the following treatment:

i. Because of age and disability, failed to pay the Claimant one month's pay for May 2020 /POC [29]
ii. Because of age and disability, failed to pay the Claimant 2 months of notice pay /POC [29]
iii. Because of age and disability, failed to pay the Claimant 2 months of holiday pay /POC [29]
iv. Because of age and disability, failed to pay the Claimant 5 days of absence from his work which the Claimant alleges was linked to his age and disability /POC [29]
v. Because of age and disability, dismissed the Claimant/POC [30]
vi. Because of age and disability, required the Claimant to return to work or face a deduction of wages /POC [31]
vii. Promoted Dr Sanaa Shawky instead of the Claimant in 2017 /POC [33]
viii. Promoted Dr Wafaa El Sankary instead of the Claimant in mid-2018 /POC [33].

b. Did the treatment of which the Claimant complained amount to a detriment?
c. If so, did the Respondent treat the Claimant less favourably than it would have treated others who did not have his age and disability? (The Claimant relies on a hypothetical comparator who has not been identified).
d. In the case of age, was the Respondent's treatment of the Claimant objectively justified?

18. Direct Associative Disability Discrimination

Pleaded at POC [32]

a. At the material time did the Claimant's wife and/or child suffer a disability within s.6 of the Equality Act 2010?
b. If so, did the Respondent require the respondent to return to work because of his association with his wife and/or child?

19. Harassment related to Age and Disability

(Acts which have been pleaded at POC [37] under the heading "Harassment on ground of age and disability under section 26 of the Equality Act 2010")

On various occasions in May 2020, did the Respondent engage in the following unwanted conduct:

a. Send a text message on 4 May 2020 and a letter on 18 May 2020 requiring the Claimant to return to work or face deductions /POC [37a]
b. Send the Claimant a letter of dismissal on 20 May 2020 stating the reason for his termination was due to his reaching retirement age and health /POC [37b] and [37c]
c. Rely on Kuwait local regulations/articles to dismiss the Claimant on the grounds of reaching the retirement age /POC [37d]
d. If so, was the conduct related to the Claimant's age and disability?

e. If so, did such conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

20. Personal Injury

Pleaded at POC [38]

a. Did the conduct set out in points 2-5 above cause the Claimant to suffer personal injury, specifically depression?
b. Was the type of injury suffered by the Claimant a reasonably foreseeable consequence of each alleged act of discrimination and/or harassment?
c. What compensation is the Claimant entitled to for personal injury?

21. Remedy

a. If the Claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy.

The Law

Jurisdiction

22. The time limit that applies to discrimination claims is that set out in Section 123 of the Equality Act 2010. A claim must be presented within 3 months of the act complained of or within such further period as is just and equitable. The test for extension under Section123(2)(b) allows for the Tribunal to extend time where it is just and equitable to do so. That discretion is the exception rather than the rule: *Robertson v. Bexley Community Centre* [2003] IRLR 434, at para 25. Although the discretion is wide, the burden is on a claimant to displace the statutory time limits, lest her claim be shut out irrespective of its validity: *Chief Constable of Lincolnshire Police v. Caston* [2010] IRLR 327. In *Abertawe Bro Morgannwg University Local Health Board v. Morgan (Unreported)* (UKEAT/0305/13/LA), Langstaff P held at para 52 that a litigant could hardly hope to satisfy the burden unless she provides an answer to two questions: The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was.

23. In *British Coal Corporation v. Keeble* [1997] IRLR 336, the EAT considered Limitation Act 1980, s.33 to provide a useful checklist for a Tribunal's consideration of whether to exercise its discretion to extend time. That checklist sets out the following factors:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

24. The courts have subsequently clarified that this is merely a useful checklist rather than a statutory requirement: *Southwark London Borough Council v. Alfolabi* [2003] IRLR 220.

25. The tribunal should consider whether to exercise its discretion to extend time separately in respect of each claim rather than doing so on a global basis: *Morgan* .

Burden of Proof – s123 Equality Act 2010

26. S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

27. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

28. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

29. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

30. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of

discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

Direct discrimination: Equality Act 2010 s13

31. 13 EqA "(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."

32. S13(2) EqA states

33. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

34. The claimant has relied upon a hypothetical comparator. We have born in mind the guidance set out by HHJ Mummery in In *Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA*, According to Lord Justice Mummery: '*In this case the issue of less favourable treatment of the claimant, as compared with the treatment of the hypothetical comparator, adds little to the process of determining the direct discrimination issue. I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground*.' Thus, it seems that, although considering the treatment of a comparator will often be the most straightforward way of determining whether direct disability discrimination has occurred, the issue may sometimes take a back seat to a common-sense appreciation of the facts.

35. We have therefore considered what is referred to as the 'because of' or 'reason why' test to the claimant's assertions. We have considered, the subjective motivations — whether conscious or subconscious — of the respondents in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on. As set out in *Nagarajan v London Regional Transport 1999 ICR 877, HL* we have considered the relevant mental processes of the respondents and the context in which they made their decisions. As Lord Nicholls put it in '*Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances*.'

36. We have reminded ourselves that it does not matter if the motive is benign or malign. This is set out in the EHRC Employment Code (see para 3.14). In other words, it will be no defence for an employer faced with a claim under S.13(1) to show that it had a 'good reason' for discriminating.

37. We have also reminded ourselves that the protected characteristic need not be the main reason for the treatment provided it is the 'effective cause'. (*O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT*).

Discrimination arising out of disability (s15 Equality Act 2010)

38. Section 15 EQA 2010 provides as follows:

(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."

39. We have had regard to the advice set out in Pnaiser as follows:

40. In *Pnaiser v NHS England* [2016] IRLR 170 the EAT gave the following guidance:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. 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.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

Harassment: Equality Act 2010 s26

41. (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.

…..

(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.

(5)The relevant protected characteristics are

disability;

42. The EHRC code, which we look to for guidance, sets out what is meant by 'related to' in paragraphs 7.9-7.11. It states that related to has a broad meaning and that the conduct under consideration need not be because of the protected characteristic.

43. The Claimant must establish first that the conduct is unwanted and then whether, taking into account all of the circumstances of the case it is reasonable for the conduct to have the stated effect. This is an objective test with a subjective factor of hearing in mind the perception of the claimant.

44. The gravity of the conduct is a key part of the objective assessment. Some complaints will fall short of the standard required. Elias LJ in Land Registry v Grant [2011] ICR 1390 CA (para 47):

… even if in fact the [act complained of] 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 an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

45. S19 Equality Act 2010 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

46. A Claimant must establish that the PCP has placed those sharing his or her characteristic at a 'particular' disadvantage. Therefore a Tribunal must concentrate particularly on people who share the protected characteristic in question and consider whether they are at a disadvantage because of the PCP — see *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia 2015 IRLR 746, ECJ*.

The Facts

47. We have had regard to all the documents we were taken to within the bundle and both witness statements. If we do not reference evidence that was provided to us in our judgment that does not mean we have not considered simply that it was not relevant to our conclusions.

48. The KHO forms part of the Kuwaiti diplomatic mission in London. The leaders of that department are diplomats and therefore covered by diplomatic immunity and did not give evidence to the Tribunal as they do not recognise its authority. We were told that no disrespect was intended which we accept, nevertheless, that does not detract from the fact that as a result of them not giving evidence,

we did not hear from the decision makers and therefore did not have evidence from the respondent regarding many of the issues we had to decide.

49. Dr El Sankary was sent to give evidence though it is not entirely clear why as she was not one of the decision makers regarding the termination of the Claimant's employment nor how he was managed in the lead up to his dismissal despite being, ostensibly, his line manager. Dr El Sankary did answer questions, but she also made it clear that she resented being asked questions where decisions had been made by others and frequently could not answer them or chose not to do so.

50. Many of the documents we had were translated from Arabic though we often had the Arabic originals in the bundle too. We had a certificate of translation in the bundle. The Claimant did not challenge the translation of any of the documents so we assume that we were reading an accurate translation of the documents.

The Claimant's role

51. The Claimant was employed by the Kuwait Health Office from 2009. He was originally employed as an in house doctor but from 2018 he became a medical auditor. The auditors' role primarily involves checking and approving medical expenses incurred by Kuwaiti nationals in the UK or coming to the UK for treatment.

52. We were informed that although most of the medical documentation and reports are held digitally in their system, the invoices remain as hard copies and are passed from one department to another before being physically posted in a diplomatic pouch back to Kuwait. Dr El Sankary stated that most of the information on the face of an invoice was uploaded onto the system by another department before being passed to the medical auditing team. The medical auditors would then check the amounts being invoiced against the amount that had been pre-approved and ensure that the treatment being charged for was relevant to the conditions being treated. That entailed detailed consideration of previous correspondence and the medical notes and reports for the patients. Any errors or amounts that needed checking would be resolved by the medical auditors before it was passed to the accounts team for payment.

53. The Claimant asserted that the invoices could easily have been scanned. Dr El Sankary said that the administration had said that this was not possible and it was asserted that this was because they contained confidential information regarding the Respondent and its citizens and could not be compromised by either sending the hard copy invoices to someone's home address or by scanning the invoice onto the system.

54. We find that we were given no evidence to suggest that anything on the physical invoice was more confidential than the medical and treatment information digitally stored on the system already. There was no confidentiality reason for that document not to be scanned. We accept that protocol meant that it had to be physically printed and that it generally travelled through departments in physical format but that was as a matter of custom and practice as opposed to

any proven necessity particularly at a time of crisis such as the Covid 19 pandemic.

The Claimant's health

55. The Claimant has prostate cancer and that was not in dispute. This is the condition he relies upon as being a disability. He also stated that he had hypertension and osteoporosis, The hypertension was not disputed by the Respondent as an existing condition – its status as a disability was not a matter before us. The Claimant's osteoporosis was not evidenced before us and not referenced in the one medical letter we had that is relevant to these proceedings. Nevertheless we had no reason to doubt the Claimant's veracity regarding the fact that he has this condition.

56. On 13 March 2020 the Claimant messaged Mr Naif whose exact title we were not informed of but we understand carried out the HR functions for KHO and who we understand has diplomatic immunity. The message informed the Respondent that the Claimant would not be attending work due to flu like symptoms. This was just before the country went into national lockdown on 23 March 2020 and from its own knowledge the Tribunal is aware that at this time those suffering from such symptoms were advised to stay at home.

57. It is not clear when the Claimant recovered from the flu but he was booked on annual leave from 24 March and due to return on 27 April 2020. Mr Sethi appeared to suggest during his cross examination that the Claimant had not recovered from those flu like symptoms by the time the Claimant's attendance became an issue in May 2020. We do not agree. There is no evidence to suggest that the Claimant was unwell with flu at that time.

58. By Whatsapp message dated 30 March 2020 the Claimant informed Mr Naif that he was 75, and has prostate cancer along with diabetes and hypertension. He says that he has to shield in accordance with the government guidance but his leave will end on 24 April.

59. There was no substantive written response to that message from Mr Naif. The next correspondence is dated 23 April when the Claimant informed Mr Naif that he would return to the office on 27 April 2020. We had no explanation as to why he sent this and the Claimant has not told us why he sent it nor why he did not in fact go into work on 27 April as indicated.

60. However it is not in dispute that he did not attend work on 27 April and we had no evidence to suggest how he informed Mr Naif or anyone else at the Respondent that he was not going to attend work as previously indicated. The next message we had was a request from Mr Naif on 30 April asking the Claimant to return to work on 4 May 2020. We presume from that message, that the Claimant and Mr Naif must have spoken in the intervening week as otherwise we presume that a message would have been sent on 27 or 28 April by Mr Naif asking where he was and/or ordering him to attend work. We had no evidence as to what was discussed regarding that week.

61. The Claimant did not return to work on 4 May 2020. Again, there was no message explaining that nor did we hear any evidence from the Claimant as to why he did not attend work on that day or inform the Respondent. He says that he will have called Dr Naif but he may not have managed to speak to him. Either way the explanation provided to the Tribunal was sparse. The Claimant simply relies upon his message dated 30 March and his GP letter dated 29 April (which we discuss below) as being the reason he did not attend work.

62. On 5 May Mr Naif messaged the claimant to say that he had not received any medical report indicating why the claimant was not able to attend work and indicating that he considered the absence unauthorised and would deduct wages accordingly. The fact that he considered the unauthorised absence to only start on 4 May suggests again that the previous week's absence had been discussed between them and was not considered 'unauthorised'.

63. From the sequence of messages on 5 May that ensued we consider that the Claimant and Mr Naif must have spoken on the phone and the Claimant must have sent Mr Naif the GP letter dated 29 April 2020 (p185) to Mr Naif as Mr Naif then comments on it as follows:

    "To Dr Samir
    This report proves you are ill and that you worked past your pension age. Evidently, you stand in need of your pension retirement."

64. The Claimant responds and says that he is well enough to work, he just cannot leave his home due to the risk to him and subsequently to his wife and daughter who had health conditions. The Claimant also states that he has only had 3 days of sickness absence before despite his cancer and his age.

65. Although we had no evidence that conversations took place between Mr Naif and the Claimant, we are sure that they did. This is evidenced by messages referring to phone calls and also because information that must have been conveyed between them is referenced but not explained thus meaning that a conversation probably took place.

66. Absent evidence from Mr Naif or any helpful explanatory evidence from the Claimant as to the sequence of events between 27 April and 20 May, we have pieced together the following chronology which on balance of probabilities is what we find occurred:

    (i) 27 April 2020 – Claimant and Mr Naif speak and they agree that the Claimant will not attend work that week though we believe it is unlikely that it was agreed that this would be paid. We consider that the Claimant will have told Mr Naif that he does not consider it possible for him to come to the office because of his health and that of his family. We consider that Mr Naif will have asked for a medical letter demonstrating that the Claimant was too unwell to attend work
    (ii) 4 May – Claimant did not attend work

(iii) 5 May – Mr Naif messaged the Claimant saying that he had not received the medical evidence regarding the Claimant's health
(iv) 5 May – the Claimant and Mr Naif speak
(v) 5 May – the Claimant sends Mr Naif the GP letter dated 29 April
(vi) 5 May – Mr Naif indicates that the letter says the Claimant is too unwell and past the pension age and should retire
(vii) 5 May – the Claimant responds explaining that he is not too unwell but due to the pandemic he needs to work from home and that he did not know about the retirement age
(viii) Another conversation or conversations took place from 5 May to 18 May. We do not know what was discussed but we consider it more likely than not that there must have been some discussion regarding what work the Claimant could do from home and Mr Naif or others within the Respondent dismissed those suggestions. We reach this conclusion based on Dr El Sankary's evidence that there were rumours that the Claimant had asked whether he could answer the calls on the hotline from home.

67. On 18 May after, 15 days had elapsed between 4 May and 18 May Mr Naif, in effect, gave the Claimant one more chance to demonstrate that he was too unwell to work. In that message he said as follows:

"*Dr Samir*

Please provide us promptly with a medical justification letter for the period 4th May 2020 to this day 18th May 2020. This period shall be deducted from your salary, while also the regulation on the 15 days of unauthorised absence shall apply to you.
Please contact us promptly."

68. The Claimant indicated to us and in the messages that we have seen that he was not too unwell and presumably stuck to that line of argument during their phone conversations. He was adamant that he could work provided he could work from home. It is clear that Mr Naif does not accept the GP letter dated 29 April as sufficient reason not to attend the offices and tells the Claimant that at some point during this period. His message on 18 May is therefore a last chance to 'correct' that situation by producing medical evidence that he was too unwell. The Claimant does not do so believing that the shielding letter from his GP is sufficient. The respondent did not agree.

69. We heard evidence Dr El Sankary that the auditors department had several people with chronic health conditions some of whom were also elderly and that allowing the Claimant to work from home and shield would probably have led to the entire department shielding or wanting to work from home.

70. On 20 May the Claimant was sent a termination letter (p200) which says as follows:
"Since you reached the retirement age some time ago, and in view of your health condition, I hope that Allah the Great and the Strong will grant you good health in the period of your upcoming retirement.

I shall instruct the financial department take the necessary steps to terminate your employment with effect from the end of Sunday 03/05/2020."

71. Dr El Sankary accepted in cross examination that there was no reference in this letter to the claimant taking 15 days of unauthorised absence. Further she accepted that it gave reasons related to retirement and the claimant's health and that this was probably the reason behind the dismissal because that is what the letter says.

Documents

72. The Respondent asserted that the Claimant's employment was subject to two contractual documents;
    (i) The Regulations on Local Employees and Workers 1999 (the 'Regulations'); and
    (ii) His written contract of employment.

73. The Claimant said that he had never seen the Regulations before and was not aware of them. We think that is unlikely given that they set out, in considerable detail, his terms and conditions and the rules surrounding entitlement to them whereas his contract is short and contains little practical information concerning, for example, holiday pay or sickness absence entitlement. Further, his contract of employment makes specific reference to the Regulations at Clause 5.

74. The relevant Regulation clauses were:

Article 33(2) which states as follows:

The term of service of a local employee shall be terminated for one of the following reasons:

(II) Absence without permission or following a permitted leave for 15 days consecutively or for 30 days intermittently within twelve months. In the latter case, such absence constitutes an act of resignation. In response to this latter case, the mission may either accept such resignation, thereby applying the resignation-related provisions herein, or accepts that employee's return to work, because of the excuses he or she provides. The absent employee shall always be subject to deduction from his or her salary against the periods of absenteeism and shall be deprived of all the privileges. related to such periods, including the end—of service benefits, besides health insurance premiums regarding such periods, in cases to which the insurance related provisions herein apply;

(IV) Inappropriate health;

(VI) Termination of the employment contract without giving reasons, on condition the 'Ministry's approval is sought first, with the employee being given a warning period not less than two months before the" date of termination unless the employment contract provides for another period;

(VII) Reaching the age of sixty-five, unless the Ministry deems it necessary to keep him or her in Work for reasons of public. interest. The service of any employee shall always expire at seventy.

75. Clause 4 of the Contract of employment indicates that it is permitted for either party to terminate the contract without reason provided they give 1 month's notice.

Covid 19 protections

76. We accept Dr El Sankary's evidence that the workplace put in place various social distancing measures and a rota system for the department which said that the medical auditors would take it in turns to come in one or two days per week so that only one of them was in the office at any time. The Claimant appeared to question during his evidence whether they were in place and Dr El Sankary was challenged during cross examination on whether other staff or patients would have come in to the office. However we accept Dr Sankary's evidence that these measures were put in place given that the majority of the staff were doctors and no doubt understood the risks they were being subjected to at that time and the need to minimise them if possible.

77. Dr El Sankary's evidence was that they were all scared, that she too had underlying health problems that mean that she was vulnerable and that all of them would have wanted to work from home but because the administration had said that they had to physically attend work so she did; not because she did not view it as risky, but because she had to choose between taking that risk and getting paid. She chose the latter.

Conclusions

Indirect discrimination on grounds of age and disability

78. The Claimant relies upon the policy that there was a compulsory retirement age in place at the Respondent of 70. The Regulations state that normal retirement age is 65 and compulsory retirement age is 70. On the face of it it therefore appears that such a policy existed at the Respondent. However, we had no evidence to suggest that it was applied more generally. The Claimant gave us evidence that he knew of at least one other person who worked beyond the age of 70. He also stated that he had not known about the policy and it appears that the Respondent did not keep track of the Claimant's age as it appears to have come as a surprise that he was over 70 given Mr Naif's messages following him reading the GP letter.

79. However, if we are wrong and such a policy was in place by virtue of the written documents we have seen, we do not find that this policy or practice was applied to the Claimant as he did not get dismissed until he was 74. He was not told he should retire at 65 or at 70 and therefore he cannot rely upon that PCP as placing him at disadvantage.

80. The second PCP relied upon is that the Respondent requested all staff, including the Claimant, to return to work or have their pay deducted. The Respondent did not dispute the existence of this policy. They said however that it was a proportionate means of achieving a legitimate aim because the medical auditors were carrying out mission critical work and the invoices could only be worked on in hard copy and there was no alternative work that the Claimant could carry out from home. Significant Covid safety measures were put in place in the work place such that the individuals would be on their own in the office, the Claimant could drive to work and a rota was in place only requiring staff to come in one or two days per week

81. The appropriate pool of comparison is the pool of employees who were required to come into work by the Respondent (London Underground Ltd v Edwards (No. 2) [1998] IRLR 364 and, in respect of the age claim, were younger than 70 and in respect of the disability claim, did not have prostate cancer.

82. Taking the age element of the claim first. We accept that this PCP put anyone over the age of 70 at a disadvantage when compared to someone under 70 because everyone over 70 was advised by the UK government that they were more at risk and told to stay at home if at all possible. People over 70 were established to generally be at a higher risk of severe illness and death than younger people. Therefore more people over 70 would not be able to comply with the PCP imposed by the Respondent to physically come into the office. The Claimant fell into this category and was personally disadvantaged by the policy as he was told that he had to come in or he would not be paid – and he was not paid during May 2020 when he did not come in.

83. Taking the disability aspect of the claim. The pool for comparison is all people who do not have prostate cancer which will include some people with underlying health conditions who also need to shield but others who do not. The group of people who all have prostate cancer are at a greater disadvantage because they must all shield. We accept that the Claimant was placed at this particular disadvantage. Mr Sethi suggested that the Claimant had been non symptomatic with his prostate cancer for many years, something which the Claimant did not appear to dispute nor has he evidenced to us. Nevertheless, his diagnosis was not in doubt and his GP's letter dated 29 April clearly advises that he ought to shield at least in part because of that condition. We therefore consider that the PCP of requiring people to come into the office placed people with prostate cancer at a disadvantage and the claimant was placed at that disadvantage.

84. We do not accept that the Respondent has demonstrated to us that this was a proportionate means of achieving a legitimate aim. There was alternative work for the Claimant to carry out that could be done from home such as manning the hotline – particularly if they were only expected to work 1 or 2 days per week. Other staff were doing some work from home even if it was not work on the invoices. More importantly we do not agree that it was proportionate to maintain that the only way of working with the invoices was to keep them as hard copy throughout their processing. None of the evidence we heard from Dr El Sankary or the documents provided demonstrated that the information on the invoices was any more confidential than the clearly confidential medical

notes and reports that were kept on the system. To maintain that this document was somehow more confidential than the medical information, particularly when the majority of the information on the invoice was also uploaded to the system but in a different format, means that we do not think that it was proportionate to refuse to scan the invoices thus allowing them to be worked on remotely during the Covid pandemic. We have not had the evidence to suggest that it was proportionate to require the Claimant to attend work when alternative arrangements could have been made.

S15 Equality Act 2010 - Discrimination arising from disability

85. The Claimant's claim in respect of this was not clearly expressed by Mr Adams in submissions but it appears to the Tribunal that the Claimant was saying that the 'something arising' from his disability was the fact that he was told that he needed to shield during the relevant period due to the Covid 19 pandemic.

86. We accept that this was the case. The Claimant's GP letter clearly states that he ought to shield and the government's recommendations at the time were that those with health conditions ought to shield.

87. We do not accept the Respondent's suggestions put in submissions that it was the Claimant's flu and his wife and child's conditions alone that necessitated his absence. Clearly his own health was a key part of his decision and to this end he produced the GP letter dated 29 April and he explained why his health precluded him from attending work in messages and phone calls to the Respondent at that time. Most of this correspondence was focused on his own health not that of his wife and child. Further we had no evidence that his flu continued and was the cause of his absence at this point.

88. Shielding was also in accordance with the UK government guidelines at the relevant time which stated that those over 70 and with an underlying health condition.

89. The dismissal occurred for a reason arising out of his need to shield because he would not return to work in the office to work.

90. We accept that processing invoices and continuing the work of a medical auditor could amount to legitimate aims. They said the work was mission critical due to the fact that the department was assisting Kuwaiti nationals stranded in the UK during the pandemic many of whom had critical health needs. De El Sankary gave evidence to that effect that was not challenged by the Claimant's representative.

91. However we do not accept that dismissing the Claimant after 15 days of not attending the office was a proportionate means of achieving a legitimate aim. They failed to consider and or explore in any way the following possible measures:

(i) Scanning the invoices which did not hold any more confidential information than that which was already on the system
(ii) Posting the invoices to the Claimant's home address
(iii) Allowing the Claimant to undertake alternative work such as the helpline

92. It is clear that some members of staff worked from home. It is clear that there was work that could be done from home even within their department and it is clear that the invoices did not need to remain hard copies in these situations. This was an exceptional moment and the business as usual approach by the Respondent resulted in no account being taken of the Claimant's health requirements whatsoever.

93. In addition, we have not been given any evidence as to why 15 days' absence, whilst possibly provided for as a cut off point for dismissal in the Regulations, was a proportionate time after which they could dismiss someone for absence. We have for example received no evidence that the Respondents could not cope with one individual not being present for more than 15 days or that it affected the delivery of their stated aim to such an extent that it was not proportionate to wait longer than 15 days.

94. We also observe that we have no evidence from Mr Naif who made the decision to dismiss the Claimant. The Claimant has established facts from which a Tribunal could conclude in the absence of any other explanation, that the Respondent contravened the provisions protecting the Claimant in the Equality Act. In respect of this claim, he was dismissed and the letter dismissing him is inherently related to his age and disability as it comments on both and says that they are the reasons for his dismissal. The Respondent has not provided any evidence concerning the Claimant's dismissal from those who made the decision. In our view the Respondent has not provided a non discriminatory reason as they have provided no evidence of their reasoning beyond what is on paper – which clearly states that the reason for dismissal wa the Claimant's age and health. They have not therefore put forward a valid defence under s136(3).

Direct discrimination

Payments

95. The Claimant claims is that he was not paid the following:
(i) 2 months' holiday pay
(ii) 2 months' notice pay
(iii) Pay during May 2020

96. We do not consider that the Claimant has established before us that he was entitled to the above payments. Mr Adams did not address us on which provision within the Claimant's contract allowed him to have 2 months' notice pay or 2 months' holiday. We have found after the proceedings concluded that there are some provisions for holiday pay and notice pay but none that tally with the figure of 2 months.

97. The Claimant adduced no evidence to suggest that he was not paid for these periods when others, dismissed in similar circumstances, would have been paid those amounts.

98. With regard to the payments in May. There are provisions within the Regulations that suggest that 1 week's sick pay might be paid but not that paid leave would be given when, as the Claimant has asserted, he was well enough to work. It is clear that the Claimant's contract states that if he is absent from work, then he is not entitled to payment and that was a situation endorsed by the letter asking everyone to come back to work or face deductions from their pay.

99. Even if we are wrong and the Claimant could establish a contractual entitlement to the being paid when he was absent in May, we find that any decision not to pay the Claimant occurred because he was absent and then dismissed. The motivation or reason why was his absence from the workplace, not the Claimant's age or disability.

Promotion

100. The Claimant has provided not evidence that Dr Shawky or Dr El Sankary were promoted ahead of him due to his age or disability. His witness statement does not cover these specific incidents at all. We therefore accept Dr El Sankary's evidence that the Claimant did not want the additional responsibility given that there was no pay rise. He raised no concerns or complaints about the matter at the time and, bar these proceedings, has given us no evidence whatsoever that that indicates that he either wanted to be promoted to head of the department nor that he was upset when he was not promoted.

101. In any event these claims are considerably out of time. They are separate, one off incidents and not part of a continuing act. No submissions or evidence was provided to us addressing why a claim regarding these incidents had not been submitted earlier nor why it might be just and equitable to extend time. The Claimant has raised no grievances or concerns regarding the situation in the interim.

Dismissal

102. The reason given for the Claimant's dismissal, in his dismissal letter, was that he was past retirement age and his health. The existence of this letter and the messages from Mr Naif saying the same thing, shift the burden of proof to the respondent to give a non discriminatory reason for the dismissal.

103. The respondent has not provided us with any evidence that demonstrates that the reasons in the letter were not the real reasons for the Claimant's dismissal. stated that there is anything to suggest that on the face of it the dismissal letter was not an accurate reflection of the reasons that they dismissed him for. Dr El Sankary accepted in evidence that these were the reasons given and they were therefore likely to be the reasons for the dismissal.

104. We reiterate our analysis above regarding the burden of proof in s 136. have no evidence from Mr Naif who made the decision to dismiss the Claimant. The Claimant has established facts from which a Tribunal could conclude in the absence of any other explanation, that the Respondent contravened the provisions protecting the Claimant in the Equality Act. In respect of this claim, he was dismissed and the letter dismissing expressly references his age and disability as it comments on both and says that they are the reasons for his dismissal. The Respondent has not provided any evidence concerning the Claimant's dismissal from those who made the decision. In our view the Respondent has not provided a non discriminatory reason as they have provided no evidence of their reasoning beyond what is on paper – which clearly states that the reason for dismissal wa sthe Claimant's age and health. They have not therefore put forward a valid defence under s136(3).

105. However, mindful of the observations in Hewage, we have considered the reason why given the submissions and discussions regarding Regulation 33(2) and the 15 days absence. We do not accept that the 15 days unauthorised absence was the only reason for his dismissal even if it was part of the mechanism that enabled the dismissal. It is clear even on the Respondent's evidence that the Claimant's age and disability played a part in the decision. In *Gould v St John's Downshire Hill 2021 ICR 1, EAT*, Mr Justice Linden, states 'The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious.'

106. We do not accept the explanation of 15 days absence was the sole reason for the Claimant's dismissal. It is abundantly clear that the Claimant's age and his disability significantly influenced the decision to dismiss the Claimant as they are directly referenced in the dismissal letter and Mr Naif had already suggested in earlier messages that the Claimant ought to retire because of his health and age. They are both significant reasons why the Claimant was dismissed; the 15 days' absence was just the trigger for enacting the dismissal for those reasons.

107. S.13(2) EqA provides: 'If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim. The Respondent made no 'in the alternative' argument before us or in the ET3 that the dismissal for age was a proportionate means of achieving a legitimate aim under the direct discrimination legislation. They simply asserted that it was not the reason for the dismissal. We therefore consider that they have not intended to make any such representations.

108. We therefore uphold the Claimant's claim that his dismissal was directly discriminatory on grounds of age and disability.

109. The final claim for direct discrimination was regarding the requirement for the Claimant to return to work or not be paid. We do not uphold this claim. This requirement was sent to everyone within the medical auditing team. We accept Dr El Sankary's evidence in that regard. The reason why that letter or message was sent was that the Respondent wanted everyone to return to the work place. It was not sent because of the Claimant's age or disability. We had no evidence to suggest that this was the case and we do not consider that the Claimant has shifted the burden of proof to demonstrate that the reason why was his health or age.

Associative discrimination

110. This claim does not work and is misconceived. The Claimant has not established that he was dismissed because his wife and daughter had health conditions. Whilst their health may have played a part in his decision not to attend the offices; the reason the Respondent dismissed the Claimant was because he would not attend the offices due to his health and age.

Harassment

111. The Claimant relies upon 2 emails dated 4 May and 18 May 2020. There was no message sent on 4 May. Mr Sethi said in submissions that there was no such message and therefore any claim must fail. Mr Adams did not address this point at all in his submissions. The Claimant's evidence does not clarify which message he relies upon. Several were sent on 5 May and so we cannot simply assume that this was a typographical error particularly in circumstances when the Claimant was represented by Counsel and had ample opportunity to rectify the situation. We therefore consider that the claim regarding a 4 May message must fail.

112. Nevertheless, the message sent on 18 May must be read in context and that context includes all the messages that were sent on 5 May. The details of the messages are set out above.

113. The Claimant is being told both on 18 May and in the lead up to that message that if he does not attend work he will have his pay cut and he will be dismissed. This is in the context of Mr Naif understanding that the Claimant considered that to attend work would place his life at risk given the recommendations of his GP and the UK government. In that context, we consider that this message was unwanted. It is related to the Claimant's health and age as Mr Naif is aware that the Claimant is shielding precisely because of his health and age and he makes reference to both medical reports and the pension age in the UK being 67.

114. We are conscious of the fact that the style and language of the messages exchanged between the Claimant and Mr Naif are culturally very different from those a Tribunal in this country would normally see. It has therefore been more difficult for us to glean from the words alone what the intended tone or perceived tone of those messages might be. The Claimant did not provide us with evidence as to how that message made him feel specifically nor how he interpreted what was said. His evidence about how he has been

made to feel by the Respondent referred to the situation overall as opposed to the acts relied upon for the harassment claim.

115. Given that situation, and having been taken to the Regulations during the proceedings, we find that the intended tone of the 18 May message was factual as opposed to threatening. Mr Naif is setting out the facts of the Claimant's situation and the factual repercussions in terms of pay should the Claimant remain away from the work place in these circumstances. We do not consider that his intention was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant though we have no doubt that he was trying to convey to the Claimant that he ought to come back to work.

116. On balance we find it reasonable that the Claimant perceived this message as creating an intimidating, hostile, degrading, humiliating or offensive environment in circumstances where he was being told that he had to choose between putting his health at potentially grave risk or losing his job. In May 2020 thousands of people globally were dying, the NHS was struggling to cope with the numbers who were seriously ill and there was no news of a vaccine at that time. Those that were becoming seriously ill or dying were, in the UK, predominantly those with underlying health conditions or those over 70. The Claimant had both. We therefore consider that in all the circumstances of the case it was reasonable for the Claimant to interpret such ultimatums as intimidating and hostile.

117. With regard to the Claimant's claim that his dismissal was an act of harassment, we note that S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. Neither party addressed us on this point. Nevertheless by operation of s212(1) we do not uphold the Claimant's claim that his dismissal was an act of harassment as we have already upheld that his dismissal was a detriment for the purposes of his direct discrimination claim.

Employment Judge Webster

Date: 24 November 2023

JUDGMENT and SUMMARY SENT to the PARTIES ON

24/11/2023

FOR THE TRIBUNAL OFFICE